correspondence

"JUSTICE AND THE INTERNATIONAL COURT"

In a letter to the editor, Charles Burton Marshall wrote that, "Like many comments critical of the judgment of the International Court of Justice in the South West Africa case, worldview's *editorial [July-August] seems to me to confuse law in the sense of procedural rectitude applied in litigation and law as policy enacted into legislation." Mr. Marshall elaborated his own views in a letter to the Honorable E. Rose Adair. What follows is the text of that letter as it was introduced into the O'Hara subcommittee hearing record.*

Another, and differing, opinion is suggested by Ernest A. Gross, recently chief counsel to Liberia and Ethiopia in the case before the International Court. His article, "The South Africa Case: What Happened," appears in Foreign Affairs, *October* 1966.

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Dear Mr. Adair:

This letter follows on our conversation about the judgment of the International Court of Justice concluding the long and complex litigation in the South West Africa case, the outcome of which seemed to come as a surprise to a great many, including, according to his own acknowledgement, the Secretary of State.

I am astonished by the evidence of astonishment. Prompted by professional curiosity and free of conscious preconceptions, I had examined the labyrinthine issues as developed in a dozen printed volumes of varying bulk and a mass of transcribed oral argument put forth by the litigants. Whatever facet I examined closely, the weight of the argument seemed to me clearly on the respondent's—that is, South Africa's—side. Accordingly, I rather expected South Africa to prevail finally.

Foresight in such a matter, however, requires taking count of judges as well as taking account of legal points. On this basis, the respondent seemed to me definitely the favorite and the petitioning side, Ethiopia and Liberia, a palpable long shot. Let me explain.

The potential participants in the decision included fifteen regular members of the Court and two *ad hoc* judges named by the respective sides—seventeen in all. One regular judge stood aside, presumably in appropriate regard for the fact of having once been designated *ad hoc* judge for the petitioners before election as a regular judge. Another was removed by illness and a third by death. Thus the residual number nearing the decisive stage was fourteen. That even number presented a possibility of a tie, in which event, under the law as laid down in the Court's statute, it would fall to the presiding judge to resolve the issue by casting a second vote.

Of the residual fourteen at this stage, four judges were participating in the case for the first time, whereas ten had participated at a preliminary, though substantive, stage four years ago, when the Court had divided eight to seven on whether the petitioners had standing as such and whether their petition presented a justiciable issue. Six of the seven then dissenting were among the ten. Their number included the presiding judge, authorized to break a tie. Only four of the eight prevailing in the preliminary stage remained.

If all six previous dissentients abided by their earlier views, the addition of only one from among the four judges newly participating would produce the tie that would in effect constitute a shifted majority. By the same token, all four of the new participants must align with the four remnant from the earlier majority to produce again a majority for the petitioners.

Superficially considered, the prospect presented a 15-to-1 probability in favor of South Africa. One must, however, look deeper than the superficial data. What was the probability of a shift among the six previous dissenters? To judge by the unequivocalness of the positions articulated on the record, the solid legal analysis reflected in them, and their continuing central bearing on the case, such a probability seemed negligible. What was the probability that one, just one, of the new participants would align himself with them? Getting down to a particular, why assume that Judge Gros of France would not reflect views akin to those ably articulated in 1962 by his predecessor also of France, Judge Basdevant? I could think of no reason so to assume. Thus, under closer analysis, the 15-to-1 odds seemed conservative indeed.

I come back to the Secretary of State's acknowledged surprise. Surely no one would criticize so overpressed an official for not having delved for himself into such details. In such matters he must rely on advices from below. What interests me here, then, is the quality of bureaucratically generated information.

On a half dozen or so occasions within a span of a few weeks preceding the decision, the South West Africa case came up in conversation with one person or another well up in the State Department. Invariably I was told something to the effect that it looked bad for South Africa or was asked how else conceivably could the Court rule? When I pressed for details to support that outlook, I was told something to the effect that such was the overwhelming consensus among those close to the matter. In a context like that, consensus is very likely to be synonymous with gossip. Solid information is all too likely to be a shaky, wishful guess, built up to apparent authority by being circulated through departmental channels as through an induction coil. Such was probably the case here. Very often in a bureaucracy the least reliable index to what is what is what comes from the office most concerned.

In testifying on May 17 before the subcommittee on Africa, I purposely refrained from venturing a prediction of the outcome, regarding it as insolent for an outsider to anticipate in public regarding such matters. I did utter a caution against an idea, urged by earlier witnesses, calling for the United States ostentatiously to get poised to set in motion plans based on a guessed-at outcome, which seemed so unlikely to materialize. Such conduct could only put the Government in a posture of attempting to prejudice an issue *sub judice*, a foolish posture at best.

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Fortunately, our magistrates avoided that gaucherie. Behind the scenes, an amusing thing occurred, however, and some of my State Department friends later shared the laugh with me. On the Friday preceding the decision, the State Department did send to the government at Pretoria a formal note, declaring the United States' devout concern for the rule of law in international relations and serving solemn notice of an intent to spare no effort to enforce the forthcoming decision. What is comical about this painstaking flaunting of unexceptional precepts is the reflection of misguided anticipation. Obviously, initiative still outruns urbanity in our diplomacy. There is a need to ponder Talleyrand's sagacity—"above all, not too much zeal."

The South African authorities probably could not imagine a great power's resorting to such a step without conclusive advance knowledge of the outcome. Accordingly, the note's arrival may well have shaken momentarily their confidence—which my wife and I found so secure and emphatic when we privately discussed the case with some of them last April—of a judgment favorable to South Africa. Whatever the misgivings temporarily incurred, it must be regarded by them now as clearly to the good, from South Africa's standpoint, to have in hand an unequivocal expression from the U.S. Government pledging to honor the decision and calling it good, sight unseen.

Indeed, the decision is good, and I say this from an American standpoint. It serves to dissipate some of the obfuscation surrounding the broader South African question. It removes a main promise relied on by those who have hoped and striven to inveigle the United States obliquely into an improvident interposition in South Africa's internal affairs. It diminishes substantially the chance of involving the United States in needless conflict at a time when—Heaven knows!—it is already experiencing its portion of travail elsewhere. I say that the decision reduces the probability of yet another outbreak of international violence—notwithstanding that some who had looked expectantly to the International Court for a decision that they could invoke as a warrant for precipitating violence now assert, in the wake of the decision issued, that the outcome leaves them no alternative to violence.

Such talk coming from spokesmen for some of the other African states is discountable as rhetoric. The South African Republic should be able to cope with anything its piqued northward neighbors might try, as those neighbors are amply aware. To any importunities to fetch chestnuts from the fire for them, our Government is now in position explicitly to say: the chestnuts are not ours. Our high policymakers no longer need to feel pressed and reproached by invocations of a shadowy legal obligation in such matters. The outcome, as *The Washington Post* properly observed in the sole fairly cogent editorial I saw on the matter, puts the South Africa question squarely in the political field where, if anywhere, it belongs. Our policy-makers would not be in position to invoke any exculpatory abstractions concerning fealty to the rule of law if they should hereafter precipitate us into a blunder in that connection. It is scarcely imaginable now—indeed it never was—that our magistrates would indulge in such imprudence The sooner this is quietly made clear across Africa, the better for everybody. I stress *quietly*. The thing to do is to simmer down—to quit talking so much about matters that we are so little likely to do much of anything about, unless we take leave of our gumption.

A few observations are due concerning the quality of the Court's decision and the pertinent opinions. The opinion delivered by the presiding judge, Sir Percy Spender, strikes me as a superb judicial

exercise, equal in quality to the erudite and essentially right opinion in which he and Sir Gerald Fitzmaurice as dissenters combined at the preliminary stage in 1962. It is good to see such wisdom elevated from a losing to a prevailing position.

In such a legal controversy, it is necessary for the petitioning side to construct a chain of reasoning long enough to reach from the initial premise to the conclusion sought. If one link fails, the chain fails as determinatively as if every link should give way. A respondent needs to demolish only one link in the essential chain in order to prevail. Courts are wisely reluctant to carry the adjudicative function to excess. It is standard judicial practice to resolve only such issues as are necessary to dispose of a case, the maxim being that when it is not necessary to decide it is necessary not to decide. The petitioners' first link crumbled under judicial analysis. So the Court has left the matter there.

A headline I saw in *The New York Times* called the basis of decision a technicality. The dictionary's relevant definition is: "something which is technical; especially, a point of law, detail of procedure, rule, etc., of significance only to a technician." The term is often used in controverted matters disparagingly; one side's point of substance is a technicality to the opposing side. When a chain of legal reasoning snaps, the losing side is wont to say that only one link went--and it but a technicality. Like other disciplines, however, law is a fabric woven of technicalities. In a legal context, to call something technically defective is to call it legally defective. To say that the petition was rejected on a technicality is just a way of saying that it lacked acceptability as a proposition in law, but by the use of that word the pejorative implication is shifted from the petition to the decision.

I noted that word in the headline with amusement at another instance of editorializing in a news account. Then a high spokesman in our foreign policy--why name him?--used the same term in the same connection. Noting it that time, I disapproved heartily. If that overpressed official should ever find occasion to familiarize himself with the opinion, his misimpression will be corrected. The basis of decision was a matter of substantive law. The presiding judge's opinion makes the point amply clear. The applicants were found to have no legal right or interest in the subject matter of their claims. A technicality? Maybe so. It would depend on the inflection used. If one means a *mere* technicality, then no. Such a basis for a judicial finding is about as substantive as one can get.

A related notion widely repeated by persons unfamiliar with the relevant opinions, having to rely therefore on news media for their evaluations, echoes Judge Jessup's highly publicized declaration, in dissent, labeling "the judgment which the Court has just rendered . . . completely unfounded in law." Obviously, if he considered the judgment otherwise than as he describes it, he would concur instead of dissenting. Boiled down to its essence, the quoted assertion conveys only the fact of Judge Jessup's disagreement with the prevailing side. He registers his view in the style customary in judicial polemics. Like anyone else, a judge dislikes being among the losers. In the immediate moment of disappointment he is likely to display pique by choosing dramatic language. Moreover, a dissenting judge casts himself as advocate for an overruled cause, and advocacy requires a combative approach. In Judge Jessup's instance, disappointment is heavy indeed. He feels deprived of an opportunity to go all the way with the petitioners. Notwithstanding the presiding judge's appeal for colleagues to focus their appended essays on the determining element in the case and to avoid laboring the might-have-beens, Judge Jessup's essay examines approvingly all the links in the snapped chain. His considerable skills in advocacy are displayed to the full. (In a concurring opinion South Africa's *ad hoc* judge, J. T. van Wyk, labors similarly to show how he thinks each of those links might have been sundered in its turn if the Court had to go on to deal with them. His and Judge Jessup's extensive essays in advocacy have at least the value of rounding out the record by exploring all the controverted ramifications.)

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As a related point, it is not correct--though I have noted several misguided allegations to the contrary --that the element on which the decision turns was properly disposed of once and for all in the 1962 stage of the proceedings. The idea is palpably false. To utter it is like saying, on meeting an acquaintance after a considerable interval, "But I thought you were dead! Aren't you? I couldn't have been wrong!" Nor is it correct that the Court, besides resurrecting the element on which the decision focused, heard no fresh argument on it. The element remained an inherent issue throughout, and it was argued by counsel as searchingly if not as lengthily, in the latter stages as in the preliminary phase. What has happened essentially is a shift in determining numbers. It is not so much a case of the Court's changing its mind. Different minds have changed the Court. The old dissenters have become the new prevailers, acceding thus to the right to call

themselves the Court. As one of them puts it, "The Court is not bound to perpetuate faulty reasoning, and nothing contained in the 1962 Judgment could constitute a decision on any issue which is a part of the merits of the claim."

Yet another criticism widely voiced pertains to the six-year interval between onset and upshot. Is it fair, the critics ask, to let petitioners protract false expectations so long—to withhold bad news until so late. (A teacher often hears similar plaints from students denied a degree after long endeavor.) The point is psychologically understandable. Those who launched the case felt so certain of a verdict that the outcome leaves them with a sense of being jilted. The right to attempt a suit is not a right to a favorable judgment, however. The long wait and final letdown would never have occurred if the petitioners had not launched a complex litigation on a dubious premise. No one compelled, or even enticed, them into a vain suit and false hopes. In all that interval the petitioners have been denied nothing rightfully theirs. The criticism reminds me of a magazine agent who once told me I had just wasted a half-hour of his time.

Another reproach is that the decision is political. That last is a tricky word, a catchall pertaining to aspects of public affairs involving highly controverted interests and conflicts of purpose between or among large groups, with no established, accepted frame of values by which to settle the matter at issue, to the general satisfaction, at hand. The word *political* pertains to the processes by which such matters arise, and such controversies are waged, managed, and perhaps finally brought to solution. In any proper sense of the word the South West Africa case is inherently political. The sponsors of the petition are politically actuated. What they have sought is a judicial writ to use as a political weapon. I am not calling this reprehensible. I am just saying it is so. So also is the respondent politically motivated. One cannot examine any facet of the case without finding matters which are inextricably political. When someone on the side whose interests did not prevail calls the decision political, one can only remark, "Look who's talking!" Obviously, also the Court's decision has a political effect. It alters the frame of the dispute about South West Africa and thus indirectly about South Africa as well, just as it would alter the frame of dispute if the decision were in the opposed direction. Those who would attack the Court's judgment as political only reflect their disappointment that the Court, in interpreting the law, did not fashion a decision to suit their political designs.

In this respect, the Court's judgment seems to me altogether salutary. It is beyond the Court's province to stay the current widespread urge to make everybody's business everybody's business over the great globe, but the effect of the Court's judgment is to put a damper on the fashion of parading that urge under a rule-of-law rubric. Not everyone who fancies a grievance has therefore a case. The Court exists to apply the rules scrupulously as valid cases come to it, but its mission is not to issue hunting licenses for dissatisfied governments to go stalking in other people's preserves. The Court is disposed to remain a Court, not to be tempted to set itself up as a legislature. Such are some of the points implicit in the South West Africa judgment. One can only hope that a determining number of governments, including our own, will come to recognize the eminent good sense of that position and to discern that the judgment preserves, rather than sacrificing, the Court's usefulness.

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As knowledge of the nature of the pleadings rejected by the Court widens, many persons now disposed to be critical about the judgment may well come to see its essential wisdom. I refer here particularly to the interpretation of pertinent matters put forth by the applicants after the respondent had succeeded in refuting the original premises of the application and the accompanying allegations regarding performance under the mandate. The interpretation thereupon resorted to by the applicants would have the Court assume powers of a legislative character not entertained in the instrument which created it. The Court, moreover, would be called upon to attribute to General Assembly resolutions a law-making import not warranted by the United Nations Charter. In the name of the rule of law, the Court was thus importuned to contrive new law to suit the applicants' ends. In determining number, the judges have declined to presume a prerogative not rightfully theirs or to read into the Charter an intent which the Charter does not in fact reflect. If the judges were compelled to go as far as to address themselves to that issue in resolving the case, they would have to choose between a judicial arrogation and an implicit extension of judicial approval to South Africa's policies. At such a juncture, the Court would indeed take on a political character. That juncture has been avoided, for the Court has found ample basis for resolving the case on an antecedent, though centrally important, aspect.

This is not to say, in any invidious way, that the Court's resolution of the case is politically motivated.

In face of great pressures, the judges of the International Court of Justice in determining number have kept to the best tradition of jurisprudence, thereby reconfirming for the institution the esteem which I recall having heard Chairman O'Hara voice so succinctly at one of the hearings of the subcommittee on Africa. Indeed, a matter for which the prevailing judges deserve great credit is their resistance to becoming politicized in handling a case inescapably charged with politics. It is no detraction from the value and the conclusiveness of the decision that the outcome was determined by the presiding judge's breaking of a tie, though one of the dissenting judges faintly attempts to make a point on this score. The rules constraining the Court in thus resolving the case are as basic to its structure as is the judge's right to voice his dissent.

Thank you for inviting my attention to *The Congressional Record* reporting Chairman O'Hara's well chosen words occasioned by the judgment. They display a balance between specific immediate regret over the outcome and a general disposition to respect the institution and its processes, and the effect is consistent with the Chairman's remarks alluded to above. I am reminded, by contrast, of a TV interview in which someone speaking for the applicants characterized the Court's judgment as a "judicial abortion." Someone identified with a misconceived and miscarried case is likely thus to choose terms calculated to shift fault from the case itself to the outcome, much as a strongly motivated ball player often inveighs against the umpire on being called out in attempting to steal a base. The reactions voiced by the applicant governments themselves and some of the governments associated with them in supporting the venture to elicit a court decision for use in a political cause have been in similar vein. One is reminded of the way fans in Flatbush used to react when the old Dodgers dropped a ball game.

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I am prompted to a thought about style in being on the losing side in international litigation. A few years ago a friend of mine, who is a distinguished member of the bar and a statesman of high repute, represented a Southeast Asian government in a case before the International Court of Justice growing out of a dispute with a neighboring country over a certain parcel of land. His side won the judgment. The other side recriminated strenuously on the "we-wuz-robbed" theme. My friend was scornful of such conduct. He remarked to me his confidence that there would have been no such reaction if the decision had gone the other way. He told of having taken upon himself as counsel a duty to instruct his clients in the nature of judicial processes and the character of judicial resolution of controversies. A disputant tends to see only his own side of the case, thus to define justice in terms of his own interests. He is all too likely to regard a court as morally and legally bound to see the issues his way. A capacity to surprise litigants is inherent in the judicial process. My friend had impressed these points upon his clients. He had advised them about expecting the unexpected and had made clear to them how to comport themselves in event of an adverse ruling. "The rule of law, after all, is not merely an abstraction in the judges' custody," he remarked to me. "It is also, and even more importantly, an attitude of mind among adversaries and a mode of behavior in concrete situations."

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Dear Sir: In your very interesting issue for July-August there is an editorial "Justice and the International Court," which seems to me to make the case appear even worse than it actually is. What the Court did was to declare that Ethiopia and Liberia, which had brought the case to the Court, were not entitled to do so, and that they had no status as appellants. This of course was an extraordinary decision, since quite the opposite had been taken in 1962 and it means that the rights and wrongs of the case never came before the Court at all. The Court has therefore made no decision for or against the case but has declined to discuss it when brought before them by two individual countries.

It would, however, be perfectly in order for the U.N. itself to bring the case before the Court, the only difficulty being that as it could not be called a dispute they could only ask for an advisory opinion, and this of course has not got the force of law. However, it looks as though the African countries at the U.N. Assembly are going to ask for a good deal more than this, and we shall have to wait and see what happens. In the meantime I think it is very important to emphasize the fact that the World Court has not taken a decision about S. Africa and its mandate for S.W. Africa, merely because it would not accept Ethiopia and Liberia as having a right to bring cases to the Court, because they have no status as individual countries.

DAME KATHLEEN COURTNEY, D.B.E.