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IN PURSUANCE OF APARTHEID
A question for the International Court of Justice?**

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International Court of Justice?**

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The Denationalization of Black* South Africans in Pursuance of Apartheid

A Question for the International Court of Justice?

Introduction

Apartheid or separate development, as the South African Government now prefers to call its policies, is synonymous with racial discrimination. For more than three decades South Africa has been the moral outcast of the international community on account of its institutionalization of racial discrimination in a world committed to racial equality. But things are changing in South Africa. Discrimination on grounds of race is giving way to discrimination on grounds of nationality as millions of black South Africans are deprived of their South African nationality by legislative fiat and allocated, in its place, the nationality of some unrecognized mini-State carved out of the body of South Africa. In many ways the new discrimination is worse than the old. The new aliens are confined to their new States, often in pitiful poverty in squalid resettlement camps in barren wastelands; they are deported as aliens from the country whose nationality they previously held; they are hounded by the South African police as unlawful immigrants; and, as aliens, they have lost all claims to participate in the political life of South Africa — even if they qualify to reside within the borders of South Africa itself. International law does not oblige a State to admit aliens to share in its economic wealth; international law allows States to deport unwanted aliens; international law permits law enforcement agencies to monitor the movement of aliens within its territory; and international law accepts that aliens have no right to participate in the political life of a foreign State. In short, the new degradation to which blacks in South Africa are subjected is perpetrated in the name of international law, behind the figleaf of nationality.

South Africa's courts are closed to the argument that the new policy of nationality-based discrimination is contrary to contemporary international law, for South Africa has no Bill of Rights and no court may question the validity of an Act of Parliament on the ground that it violates international law. Only the International Court of Justice may make this judgment. And, as South Africa does not accept the

* The word "black" is used in this paper to include Africans only.

compulsory jurisdiction of the International Court, an advisory opinion of that Court is the only form in which this judgment may be made. Individual victims of the denationalization laws may not approach the International Court for an advisory opinion on the lawfulness of these measures; nor may individual States make such a request. But in terms of Article 96(1) the Charter of the United Nations and Article 65(1) of the Statute of the International Court of Justice an advisory opinion on any question of international law may be sought by the General Assembly or the Security Council of the United Nations. The purpose of the present paper is to enquire whether this is an appropriate course.

What follows is an examination of this question. It is written in the belief that international law has a humanitarian role to play in the world and in South Africa; that it can contribute both to peace between nations and to peace within a nation.

EUPHORIA AND REALITY IN SOUTH AFRICA

Important things are happening in South Africa. Parliament, endorsed by a referendum among white voters, has adopted a Constitution that makes provision for coloured and Indian participation in the mainstream of the political process. Agreements have been entered into with Mozambique, Swaziland and Angola that effectively curb the military activities of SWAPO and the ANC. Legal job reservation has been repealed, black trade unions recognized, university segregation relaxed and special permits allow blacks to mingle with whites in the expensive hotels and restaurants. A mood of euphoria prevails among white South Africans that seems rapidly to be spreading to many Western nations. And the realities of South African political life are often overlooked.

But what should not be ignored is that apartheid or separate development remains largely unchanged — in fact if not in fiction. The old laws of white domination, enacted in a previous era of National Party rule, remain firmly ensconced on the statute book and are vigorously enforced by officials unmoved by the heady rhetoric of change that covers the surface of white South African politics. The pass laws, the resettlement laws, the Group Areas Act, the Reservation of Separate Amenities Act, the Internal Security Act and a host of other racist and repressive laws that constitute the core of apartheid are still with us. Moreover the new Constitution makes no provision for black participation, with the result that 75% of the South African population is compelled to satisfy its political aspirations in impoverished homeland States.

Unfortunately euphoria is promoted and reality obscured by a new fiction in the body politic. This is the fiction that all black South Africans are aliens or potential aliens in terms of South Africa's denationalization laws. These laws and the question whether they may be adjudicated upon, will form the subject of the present study.

But before this is done, it is necessary to consider previous attempts and efforts to promote peace in Southern Africa by means of the International Court of Justice in order to place the question posed in historical context.

APARTHEID - A DOMESTIC ISSUE?

Apartheid, so Pretoria argues and has argued for over three decades, is a domestic issue, and as such it is shielded from international scrutiny by Article 2 (7) of the United Nations Charter, which provides that

“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . .”

The validity of this view has been hotly contested by nations and by lawyers who have argued that this provision does not provide immunity to a State that violates human rights, as enshrined in the Charter and contemporary international law. Some States, whose own record in the field of human rights leaves much to be desired, have preferred to base their attacks on apartheid on less secure grounds. Apartheid, they argue is *sui generis*, a special case of man’s inhumanity to man by reason of the institutionalization of racial discrimination, and this suffices to remove it from the protection of Article 2 (7).

When this dispute first arose in 1946 over the discriminatory treatment of South Africans of Indian origin, the South African Government, then headed by General JC Smuts, itself requested that advice be sought from the International Court of Justice. But South Africa was unable to muster sufficient political support in the General Assembly for its request for an advisory opinion¹. Disheartened General Smuts told the South African Senate that in requesting an advisory opinion

“ . . .we claimed a right which any man has, to appeal to a court of law. There has been a great deal of talk . . . of fundamental rights. What is the most fundamental right of all of a free man and a free nation? It is the right to appeal to law, to a court of law”².

In retrospect, the refusal to request an advisory opinion on South Africa’s racial policies was a tactical error on the part of the international community as it enabled the South African Government to adopt an “uncooperative and somewhat truculent attitude”³ towards the United Nations. But it was understandable. Apartheid, as

1. GAOR, 1st Session, 2nd Part, Plenary mtgs, p 1061.
2. Senate Debates 1946-47, cols 4135-7 (30 January 1947).
3. DR Gilmour “The United Nations and Apartheid — Certain Procedural Aspects of the Problem” (1969) 16 *Netherlands International Law Review* 12 at 16.

an institutionalized form of racism, was yet to come. Nations of the world were uncertain of the full consequences for themselves of the new world order with its uneasy balance between State sovereignty and the promotion of human rights. And the International Court of Justice was itself too fragile and untried an institution to be burdened with so highly politicized a subject as the parameters of a State's exclusive domestic jurisdiction. So it is not surprising that the General Assembly chose to interpret its Charter itself and to build up a body of law that denied to South Africa the right to shelter behind Article 2 (7) when its racial policies were in issue⁴.

NAMIBIA AND THE INTERNATIONAL COURT OF JUSTICE

The attitude of the United Nations towards the role of the International Court in the dispute over Namibia contrasts sharply with its approach to the question of apartheid. On three occasions — in 1950, 1955 and 1956 — the General Assembly sought advisory opinions from the Court⁵; in 1960⁶ it gave its blessing to legal proceedings initiated by Ethiopia and Liberia against South Africa over South West Africa⁷; and in 1970⁸ the Security Council requested an advisory opinion, for the first and only time in its history, on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*⁹.

Here the United Nations has laid a sound legal foundation for its action at every stage and it is this recourse to the World Court that has ensured a greater consensus among States - particularly Western nations — on this issue. Indeed there can be no doubt that the Court's ruling in 1971 that "the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory" is the basis for Security Council Resolution 435(1978) and the present United Nations action aimed at the withdrawal of South Africa from Namibia. Moreover, although the South African Government still on occasions formally reaffirms its

4. Rosalyn Higgins *The Development of International Law through the Political Organs of the United Nations* (1963) 66-67.
5. *International Status of South West Africa* 1950 ICJ Reports 128; *Voting Procedure Case* 1955 ICJ Reports 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa* 1956 ICJ Reports 23.
6. Resolution 1565 (XV).
7. *South West Africa Cases, Preliminary Objections* 1962 ICJ Reports 319; *South West Africa, Second Phase* 1966 ICJ Reports 6. See further John Dugard *The South West Africa/Namibia Dispute* (1973).
8. Resolution 284(1970).
9. 1971 ICJ Reports 16.

rejection of the 1971 *Namibia Opinion*, it seems clear that it accepts the futility of arguing against a judicial finding that has been approved by the entire international community. Hence its acceptance of the principle of independence for Namibia — despite its heel-dragging over the implementation of this goal.

DENATIONALIZATION AND THE INTERNATIONAL COURT OF JUSTICE

Clearly the United Nations cannot go back in time and request the International Court of Justice for an advisory opinion on the question whether apartheid is a domestic issue within the meaning of Article 2 (7) of the UN Charter. It is now too well established that the policy of apartheid, as manifested in a host of discriminatory laws, is a matter of international concern — as demonstrated by a multitude of General Assembly and Security Council resolutions.

But there is now a new issue, of some legal complexity and of considerable political importance, that plagues South Africa and seems appropriate for judicial opinion — and this is the policy of denationalization on grounds of race.

(a) The policy of denationalization

Apartheid, in its early form, was simply a policy of racial domination. However, in response to international pressure, it became more sophisticated as successive political leaders sought to adjust it to the new demands for self-determination and human rights. Unwilling to share power with blacks, the National Party devised a policy which would in *law and form* rid South Africa of all black Africans and compel them to exercise their civil and political rights in new States carved out of the body of South Africa. This policy, sometimes described as Grand Apartheid, remains the cornerstone of the present Government's policy. But it is so grandiose in design and so rooted in fiction and fantasy that many refuse to take it seriously — except those denationalized blacks whose lives have been changed by its harsh realities.

The part played by denationalization in the policy of apartheid has been fully described by the present writer elsewhere¹⁰ and is here only briefly summarized.

The South African Government stands accused of denying full civil and political rights to its black nationals on grounds of race. To rebut this charge, and hence secure relief from international pressure, it has two options. It can either extend equal political rights to its black nationals or it can ensure that there are no blacks with South African

10. John Dugard "South Africa's 'Independent' Homelands: An Exercise in Denationalization" (1980) 10 *Denver Journal of International Law and Policy* 11; "Denationalization: Apartheid's Ultimate Plan" (1983) *Africa Report* (July/August) 43.

nationality able to claim such rights. It has chosen the latter course and invoked the international-law concepts of statehood and nationality to further this goal.

Under the Bantu Homelands Citizenship Act (now the National States Citizenship Act) of 1970 every black person with South African nationality became a "citizen" of the ethnic homeland with which he was connected by birth, language or cultural affiliation. Thus every black person became a "citizen" of one of the ten ethnic homelands that at that time were constitutionally still part of South Africa, namely Transkei, Bophuthatswana, Ciskei, Lebowa, Venda, Gazankulu, QwaQwa, KwaZulu, KwaNdebele and KaNgwane. The next step would be to grant independence to these ethnic units and to decree that the "citizens" of each unit would lose their South African nationality, irrespective of where they lived, and become nationals of the new "State". In this way South Africa could no longer be accused of discriminating against its own nationals. When it discriminated against the new aliens by refusing them full civil and political rights it could now justify its action under traditional international law which permits such discrimination on grounds of nationality.

That this was to be the solution to South Africa's "racial problem" was made clear by Dr CP Mulder, in his capacity as Minister of Bantu Administration and Development. In 1978 Dr Mulder stated in Parliament

"If our policy is taken to its logical conclusion as far as the black people are concerned, there will not be one black man with South African citizenship . . . Every black man in South Africa will eventually be accommodated in some independent new State in this honourable way and there will no longer be a moral obligation on this Parliament to accommodate these people politically."¹¹

Since 1976, when Transkei was granted independence, fantasy has been translated into fact. Four homelands — Transkei, Bophuthatswana, Venda and Ciskei — have been granted independence and eight of South Africa's twenty million blacks have been deprived of their South African nationality by the South African statutes conferring "independence" on these "States". These statutes carefully refrain from using race as a criterion for denationalization. Instead language and cultural affiliation feature as the criteria. In practice, however, only blacks connected with these States are deprived of their South African nationality.

As aliens, as nationals of newly independent States, these eight million ex-South Africans experience many of the disadvantages of alien status. They do not qualify for South African passports and they may be deported to their State of nationality. Indeed since 1981 over

11. *House of Assembly Debates*, vol 72, col 579 (7 February 1978).

4,000 Transkeian nationals have been deported from the Western Cape to Transkei. Still worse, as aliens, they cannot claim to participate in the political life of South Africa, but must remain content with a vote in some distant homeland, which they may never have visited.

But this is not all. Under international law a State may not only deport aliens: it may also refuse them admission. This philosophy now permeates political thinking in South Africa. Denationalized black South Africans living in the poverty-ridden homelands are refused admission to the industrial centres of South Africa; and those denationalized South Africans without special permission to remain in South Africa are deported to their National States. Resettlement camps and rural poverty are therefore the products of the policy of denationalization.

(b) The response of the United Nations

The United Nations has called upon States not to recognize Transkei¹², Bophuthatswana¹³, Venda¹⁴ or Ciskei¹⁵, and in so doing it has castigated the denationalization of blacks. For instance the General Assembly resolution denouncing the independence of Ciskei describes the policy of creating independent homelands and denationalization as “an international crime”¹⁶, while a Security Council resolution issued at the same time condemned it, *inter alia*, on the ground that “it seeks to create a class of foreign people in their own country”.¹⁷

The political organs of the United Nations have responded in political terms to the homelands policy by denouncing it as a manifestation of apartheid to be subjected to the sanction of collective non-recognition. In the process two important legal questions have been glossed over, which remain unresolved — at least as far as Pretoria is concerned. The first is the question whether separate development and the creation of independent black States constitutes a legitimate exercise in self-determination; and the second is whether the denationalization of blacks in the course of the independence-conferring process violates international law. In the absence of a judicial decision on these two matters the South African

12. General Assembly Resolution 31/6A of 26 October 1976.

13. General Assembly Resolution 32/105 N of 14 December 1977.

14. Security Council Document S/13549 of 21 September 1979 ((1979) 16 *UN Monthly Chronicle* no 6, p 32). General Assembly Resolution 34/93G of 12 December 1979.

15. General Assembly Resolution 36/172A of 17 December 1981. See too the Security Council Resolution of 15 December 1981 ((1982) 19 *UN Monthly Chronicle* no 2, p 42).

16. Resolution 36/172A of 17 December 1981. See too, Resolution 37/69A of 9 December 1982.

17. See the statement of 15 December 1981 reported in (1982)19 *UN Monthly Chronicle* no 2, p 42.

Government will continue to argue that its policies accord fully with international law and wait patiently for the recognition of its "independent homelands" as its military and economic might becomes more fully appreciated by black African States in the region.

(c) The possibility of an advisory opinion on denationalization

As indicated above, two legal questions remain unresolved as far as Pretoria is concerned: the validity of separate development as a form of self determination; and the lawfulness of denationalization. The first question is completely unsuitable for submission to the International Court of Justice for an advisory opinion, but there appears to be considerable merit in referring the question of denationalization to the World Court.

The concept of self-determination in the modern world is an unruly horse. It has been dealt with exhaustively in the literature of the international law, in UN reports¹⁸ and in two opinions of the International Court of Justice.¹⁹ Despite this, it remains a concept of uncertain content and uneasy application. Probably it is not the type of question on which the International Court of Justice could pronounce in broad principle — as opposed to an *ad hoc* determination in a specific case. To aggravate matters the political organs of the United Nations have already repeatedly determined that in their judgment, separate development fails to comply with UN expectations in respect of self-determination. In these circumstances the International Court might understandably decline to render an opinion²⁰ on the ground that the question falls for political determination by the General Assembly, in the course of interpreting its own Charter, and that such a determination has already been made. Moreover, even if the Court were prepared to pronounce on the matter, an opinion endorsing a succession of General Assembly resolutions would be dismissed by the South African Government as an instance of judicial rubber-stamping of a political decision. For these, and other reasons, there would be no point in referring so broad a legal question, of substantial political content, to the

18. See, in particular, *The Right to Self-Determination* (prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities) E/CN.4/sub.2/405/Rev/. New York 1980.
19. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Reports 16; *Western Sahara Case* 1975 ICJ Reports 12.
20. Article 65 of the Statute of the International Court of Justice provides that "the Court may give an advisory opinion". It is therefore entitled to refuse to give an opinion in appropriate circumstances. See the *Eastern Carelia Case* PCIJ Reports, Series B, No 5 (1923).

International Court for an advisory opinion.

Denationalization, however, falls into an entirely different category. Here we have a disputed question of law, not covered by the Charter of the United Nations, which, although narrow in scope, goes to the root of the policy of apartheid or separate development.

(d) The question of law

That the question of denationalization in the South African context constitutes a dispute of law cannot be doubted.

South African jurists, who deny the illegality of the denationalization measures²¹, do so on essentially two grounds. First, they contend that the statutes depriving all persons associated with the independent homelands of their South African nationality are not racially based. Secondly, they maintain that international law places no prohibition on the right of a State to deprive its own nationals of their nationality.

Denationalization has been legislatively effected in the tersest manner possible. The South African statutes conferring independence on Transkei²², Bophuthatswana²³, Venda²⁴ and Ciskei²⁵ all contain a common provision²⁶ declaring that "Every person falling in any of the categories of persons defined in Schedule B shall be a citizen of the Transkei, [Bophuthatswana, Venda or Ciskei as the case may be] and shall cease to be a South African citizen". Schedule B attached to all these statutes varies slightly in each case. In essence, the schedule lists the following categories of persons as nationals of the new State and hence as persons automatically deprived of their South African nationality:

- (a) Every person designated as a citizen of the homeland in terms of the National States Citizenship Act of 1970, that is, every black person linked by birth, language or cultural affiliation with the homeland.
- (b) Every person born in or outside the homeland if at least one parent was a citizen of the homeland in terms of the National States Citizenship Act.
- (c) Every person domiciled in the homeland for at least five years.
- (d) Every South African national who is not already a citizen of another homeland who speaks a language used by members of any tribe that forms part of the population of the homeland in question, including any dialect of such language.

21. WH Olivier "Statelessness and Transkeian Nationality" 1976 *South African Yearbook of International Law* 143; GN Barrie "A Legal View of Transkeian Recognition and so-called Statelessness" (1976)3 *Politikon* 31.

22. Status of Transkei Act 100 of 1976.

23. Status of Bophuthatswana Act 89 of 1977.

24. Status of Venda Act 107 of 1979.

25. Status of Ciskei Act 110 of 1981.

26. Section 6.

- (e) Every South African national who is not already a citizen of another homeland “who is related to any member of the population contemplated in paragraph (d) or has identified himself with any part of such population or is culturally or otherwise associated with any member of such population.”

These statutes carefully refrain from expressly depriving persons of South African nationality on grounds of race. Instead they prescribe language and cultural affiliation as the criteria for denationalization, in addition to birth, descent and domicile. This has led a South African jurist²⁷ to argue that whites, coloureds or Asians linked with a homeland by language or cultural affiliation are likewise denationalized. This is an interesting argument but it is not borne out by the facts of denationalization or by declared government policy. Certainly there is no known instance in which a white, coloured or Asian person connected with Transkei, Bophuthatswana, Venda or Ciskei has been compulsorily deprived of his South African nationality since the conferral of independence upon these States. In any event, this is a question of fact appropriate for judicial determination.²⁸

The main argument raised in support of the legality of these denationalization laws is that “there is no rule of international law which prohibits the Republic of South Africa from denationalizing some of its inhabitants”²⁹. Support for this proposition is found in general statements by jurists such as O’Connell³⁰, Brownlie³¹ and Weis³² and traditional international law.

In recent times, however, it has been authoritatively argued that “denationalization measures based on racial, ethnic, religious, or other related grounds are impermissible under contemporary international law”³³. Weis in his seminal study on *Nationality and Statelessness in International Law* (1979) concludes, after a study of State practice and judicial decisions on denationalization measures, that the right of a State to make rules governing the loss of nationality is in principle not restricted by international law³⁴, but he acknowledges the existence of a “possible exception” in the case of denationalization

27. Olivier, *supra* note 21 at 152-153.

28. In its Advisory Opinion on the *Western Sahara* the International Court of Justice emphasized that “a mixed question of law and fact is nonetheless a legal question” for the purpose of giving an advisory opinion: 1975 ICJ Reports 12 at paragraph 17.

29. Olivier, *supra* note 21 at 154, and at 147. See too, Barrie, *supra* note 21 at 34.

30. *International Law* (2nd ed), vol 2, at 683-4.

31. *Principles of Public International Law* (2nd ed) at 126.

32. *Nationality and Statelessness in International Law* (2nd ed) at 126.

33. McDougal, Lasswell and Lung-chu Chen *Human Rights and World Public Order. The Basic Policies of an International Law of Human Dignity* (1980) at 918.

34. At 126.

on grounds of race. On this subject he declares:

“Considering that the principle of non-discrimination may now be regarded as a rule of international law or as a general principle of law, prohibition of discriminatory denationalization may be regarded as a rule of present-day general international law. This *certainly* applies to discrimination on the ground of race which may be considered as contravening a peremptory norm of international law . . .”³⁵

In similar vein Brownlie declares that “If the deprivation is part and parcel of a breach of an international duty then the act of deprivation will be illegal”³⁶. As States are under a duty not to discriminate against their nationals on grounds of race under contemporary international law³⁷, it appears that large-scale denationalization measures will, on this reasoning, be contrary to international law.

The argument that customary international law prohibits deprivation of nationality on grounds of race is based on State practice, multilateral treaties, and judicial decisions. In particular it is founded on:

- (1) The widespread opposition to the 1941 Nazi decree which denationalized German Jews;³⁸
- (2) Article 15 of the Universal Declaration of Human Rights, which declares that “no one shall be arbitrarily deprived of his nationality”;
- (3) Article 9 of the Convention on the Reduction of Statelessness of 1961 which provides that a “Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds;” and
- (4) Article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, in which States undertake to guarantee the rights of everyone, without distinction as to race, equality before the law, “notably in enjoyment of the right to nationality”.

The arguments for and against a rule of customary international law prohibiting denationalization on grounds of race have been only briefly outlined. These arguments do, however, reveal the existence of a dispute over a question of law. Moreover this dispute is clearly not

35. At 125. Italics added.

36. “The Relations of Nationality in Public International Law” (1963) 39 *British Year Book of International Law* 284 at 339.

37. *Namibia Opinion* 1971 ICJ Reports 16 at 58; *Barcelona Traction Case* 1970 ICJ Reports 3 at 32.

38. Weis, *supra* note 32 at 119-121. In 1968 the Federal Constitutional Court of Germany held that the 1941 decree was null and void *ex tunc*. See Mann “The Present Validity of Nazi Nationality Laws” (1973)89 *Law Quarterly Review* 194 at 199-200.

one that is appropriate for determination by the political organs of the United Nations as it does not relate to an interpretation of the UN Charter but to the existence of a rule of customary international law.

POLITICAL FACTORS AND THE REQUEST FOR AN ADVISORY OPINION

The decision to request the International Court for an advisory opinion is a political one, to be taken by the General Assembly or the Security Council after a full consideration of the political advantages and disadvantages of such a course. Any resolution requesting such an opinion requires a two-thirds majority vote in the General Assembly³⁹ and nine affirmative votes, including the concurring votes of the permanent members, in the Security Council.⁴⁰

Two considerations weigh heavily against an approach for an advisory opinion. First, there is an undoubted reluctance on the part of both the General Assembly and the Security Council to allow the Court to decide on matters that they regard as falling within their competence. Secondly, there are still suspicions in certain quarters about the International Court as a result of the decision of the Court in 1966 in the *South West Africa Cases*⁴¹. On reflection, however, it appears that there is little substance in either of these objections.

It is true that the political organs of the United Nations have shown a preference for resolving legal disputes relating to their own powers and procedures by political means⁴². Disputed interpretations of the Charter have thus generally been settled by a political decision of the organ concerned. To a large extent this explains the unwillingness of the General Assembly to allow the International Court of Justice to pronounce on the scope of Article 2 (7) dealing with the question of domestic jurisdiction. These considerations are not, however, relevant to the question of the lawfulness of South Africa's denationalization measures, for in this case we are confronted with a dispute over the existence of a rule of customary international law not involving an interpretation of the Charter, or affecting the powers and procedures of the political organs of the United Nations. In these circumstances any purported resolution of the disputed question of

39. In 1946 the President of the General Assembly ruled that a two-thirds majority vote was required for a proposal that the question of South Africa's treatment of Indians be referred to the International Court of Justice for an advisory opinion. See Michla Pomerance *The Advisory Function of the International Court* (1973) 239 note 332.

40. Article 27(3).

41. *South West Africa Cases (Second Phase)* 1966 ICJ Reports 6. For a description of the legal and political response to this decision, see Dugard *The South West Africa/Namibia Dispute* (1973) 332-375.

42. Rosalyn Higgins *The Development of International Law through the Political Organs of the United Nations* (1963) 66-67.

law by the political organs of the United Nations will simply be dismissed by South Africa and other States as the expression of a political opinion on a matter of law.

The ghost of the unfortunate 1966 decision of the International Court of Justice in the *South West Africa Cases* continues to haunt the political organs of the United Nations and Third World States; and there can be no doubt this accounts for the little use made of the advisory jurisdiction of the Court since 1966. But it is high time that this ghost was laid. Since 1966 the composition of the Court has changed completely and it is today more representative of world opinion. Moreover, the Court has more than compensated for its cautious and conservative past in decisions such as the 1971 *Namibia Opinion* and, perhaps, the preliminary order of 10 May 1984 holding that, pending the Court's final decision on the matter, the United States should desist from any action endangering access to or from Nicaraguan ports and from any activities that jeopardized the right to sovereignty and political independence of the Republic of Nicaragua.⁴³

The advantages attached to obtaining an advisory opinion far outweigh the disadvantages. Debates in the United Nations over South Africa and apartheid have grown sterile as State after State annually repeats and reiterates its abhorrence of apartheid. Resolutions of the political organs have become equally unproductive. Certainly they have little impact on domestic opinion in South Africa, which has become immune to the rhetoric and resolutions of the General Assembly and Security Council. What is called for now is a new strategy that focuses on recent developments in South Africa, rather than on past practices and policies. Denationalization is the foundation stone of the "new apartheid" which aims to substitute discrimination on grounds of nationality for discrimination on grounds of race. This shift in policy on the part of Pretoria should be squarely faced. But it cannot be properly contested without a solid juridical base that deprives the denationalization measures of their legitimacy. The political organs of the United Nations cannot do this. Only the International Court of Justice can provide the necessary legal foundation for such a response.

Of course, it is impossible to predict the outcome of a request for an advisory opinion with absolute certainty. There must remain some risk that the Court will repeat its conservatism of 1966 and uphold an argument on denationalization that takes no account of the new world legal order. But this is highly unlikely. Racial equality and the principle of non-discrimination have become so integral and central a part of contemporary international law that the risk of failing to persuade the Court that racially-based denationalization laws violate customary international law must be small.

43. *New York Times* 11 May 1984.

Would the South African Government accept an advisory opinion refuting its legal claims? The answer is probably “no” in the short term and “yes” in the long term — at least if regard is had to the precedent of the 1971 *Namibia Opinion*. The South African Government initially repudiated the 1971 Opinion in the most strident language⁴⁴, and indeed still argues that it is legally untenable. But as State after State, and particularly the Western States, gave their backing to the Opinion of the World Court, South Africa was obliged to change its strategy and to accept that independence for a unitary Namibia was the only politically viable goal. If the International Court were to rule against the South African Government on the question of denationalization there is no doubt that its immediate response would be to reject the opinion as politically biased and legally untenable. But, after this outburst of anger, there is a real possibility that Pretoria would relent and reconsider the course upon which it has embarked. This optimism, which many will dismiss as evidence of misplaced idealism and a naive confidence in the effectiveness of the judicial decision, is premised on two beliefs. First, respect for the judicial decision, be it national or international, still permeates public opinion in South Africa, and no Government can disregard this factor. The Government of Mr P.W. Botha is becoming increasingly dependent on the support of white, coloured and Indian conservative opinion, rather than upon the reactionary forces of Afrikanerdom that have guided previous National Party Governments, and it is precisely this constituency that would be most disturbed by a ruling of the International Court of Justice that Pretoria’s policies towards blacks were premised on an illegality. Secondly, South Africa’s western allies are committed to the promotion of the Rule of Law in the world order and could be expected to bring new influence to bear upon Pretoria, as evidenced by their response to the 1971 *Namibia Opinion*.

That judicial decisions play an important educational role in domestic societies has long been recognized. Thus the judgment of the Supreme Court of the United States in *Brown v Board of Education*⁴⁵ in 1954 provided the impetus for a revolution in attitudes towards race in the United States of America. Judgments and advisory opinions of the International Court of Justice should be similarly viewed. An advisory opinion from the International Court of Justice that the pivotal principle of modern apartheid violates international law could serve the same purpose as the *Brown* decision, both among people and among nations.

44. Dugard, *supra* note 41 at 490-491.

45. 347 US 483(1954).