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Charles

THE RIGHT SIDE OF HISTORY
SA AT THE ICJ, AGAIN

by **Professor Christopher Gevers**

Sixty years ago Dr. Martin Luther King Jr insisted that "the arc of the moral universe is long, but it bends towards justice". For Palestinians, like black South Africans and 'South West Africans' before them, that arc seems especially long.

Sixty years before King immortalised these words, Germany's General von Trotha issued the extermination order that began the first genocide of the 20th century, committed against the Nama and Herero peoples of South West Africa, which served as a model for those to come.

It took almost three decades for King's promise to materialise, formally at least, when the peoples of South Africa and South West Africa obtained freedom from apartheid and colonialism in the 1990s. Their fates had been entwined in the aftermath of World War I, when white-settler South Africa was granted a so-called 'civilisational' mandate over South West Africa by the League of Nations, whose people were declared "not yet able to stand by themselves under the strenuous conditions of the modern world".[1]

The people of Palestine await their freedom, freedom deferred — initially at first — by the same 'civilisational' arrogation of their fate, this time to the British, who had already promised their land to European Zionists as "a national home for the Jewish people".[2]

Since then, Palestinian's right to self-determination has effectively been denied by the most powerful states in the international community (notwithstanding the fact that an overwhelming majority of its members have recognised the State of Palestine). All the while, Palestinian land has been further diminished by Israeli annexation and settler expansion, and they have been subject to the grotesque and quotidian violence that accompanies prolonged occupation, apartheid and in recent months a vengeful bombardment and siege, one that has scorched the earth of Gaza.

For much of its history, International Law has been on the wrong side of this moral arc. Shortly after King gave his speech, the International Court of Justice (ICJ, or World Court) dismissed a case collectively brought against apartheid South Africa by newly independent African states, which resulted in them all but giving up on International Law and the World Court.

The details of what became known as the 1966 *South West Africa* decision are well-known to international lawyers, who would sooner rather forget them. In short, after a preliminary decision in 1962 confirming Liberia and Ethiopia's standing to bring the case, and a full hearing on the merits, in 1966 a reconfigured bench decided – by the casting vote of the Australian Judge President – to take the extraordinary step of

revisiting *and reversing* its decision on standing: finding that Liberia and Ethiopia had "no legal right or interest" in the matter.

It was later revealed that the reconfiguration of the bench in 1966 was engineered by fraud and collusion on the part of the old guard of white judges – led by those of Australia and the United Kingdom.[3]

The impact of the 1966 decision on the Court was immediate, and profound. In response to what they labelled a "scandalous and wicked" [4] judgment, African states threatened to abandon the Court altogether. As one African diplomat told the UN General Assembly it at the time: [5]

> The Court, conceived at a time when colonial law was a part of international morality, no longer corresponds to the needs of an era when the concepts of liberation of peoples have become fundamental principles of International Law

The impact of the 1966 decision for International Law *in South Africa* are less well-known. The apartheid state was ebullient at what it framed as a "victory" at the ICJ. So too were the white settlers of South West Africa invested in the continuation of apartheid, and to show their appreciation they started a fund for International Law – named after South Africa's lead counsel in the case, Professor Verloren van Themaat – which they handed over to Unisa. [6]

Professor Booysen, who would later administer the fund, credited white South West Africans generosity to their "faith in the objectivity of the law as a result of the 1966 decision of the [ICJ]", and the belief "that public international law would be capable of protecting them against the inevitable black Africanisation tide rolling relentlessly southwards".[7]

That Verloren van Themaat Fund for International Law established by right-wing settlers would pay for the establishment of South Africa's first *two* International Law journals in the late 1960s, early 1970s, namely:

- the *Comparative and International Law Journal of South Africa* and
- the *South African Yearbook of International Law*.

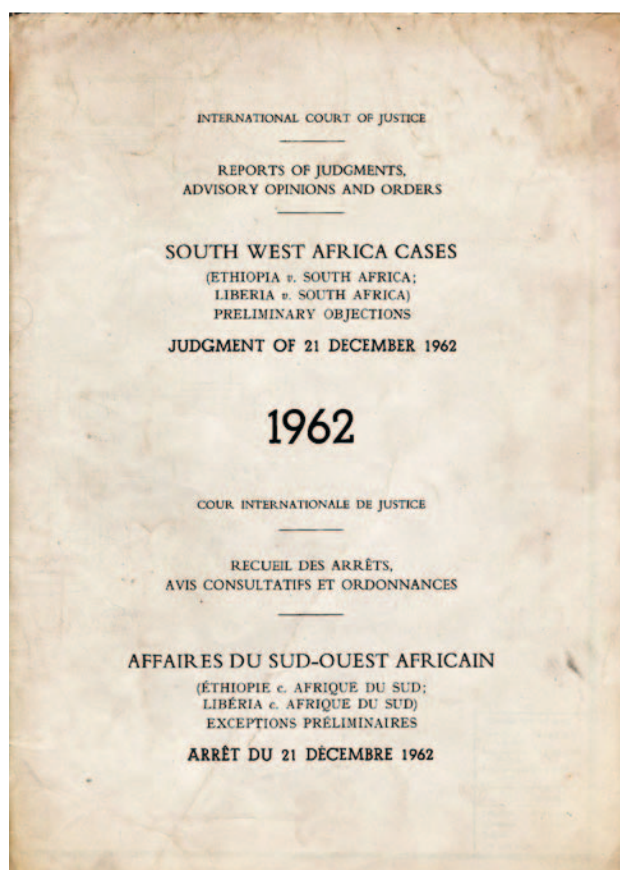
Notably, these International Law journals' other sponsors included corporate allies and fronts of the apartheid government – including subsidiaries of multinational sanction-busting companies – and the Attorney's Fidelity Fund.

I tell that story not *only* because it needs to be told, *and wrestled with*, by South Africa's international legal academy, but also to underscore the significance of South Africa's second trip to The Hague, and to be sober about the enormity of the task going forward.

More specifically, I want to draw four lessons from both the 1966 decision and its aftermath, in the key of Amilcar Cabral's famous aphorism:

> "Tell no lies. Expose lies whenever they are told.
> Mask no difficulties, mistakes, failures.
> Claim no easy victories."

I want to use each of these directives to say four things about the significance the ICJ case: for South Africa, for International Law, and for a just international order.



INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS

SOUTH WEST AFRICA CASES
(ETHIOPIA v. SOUTH AFRICA; LIBERIA v. SOUTH AFRICA)
PRELIMINARY OBJECTIONS

JUDGMENT OF 21 DECEMBER 1962

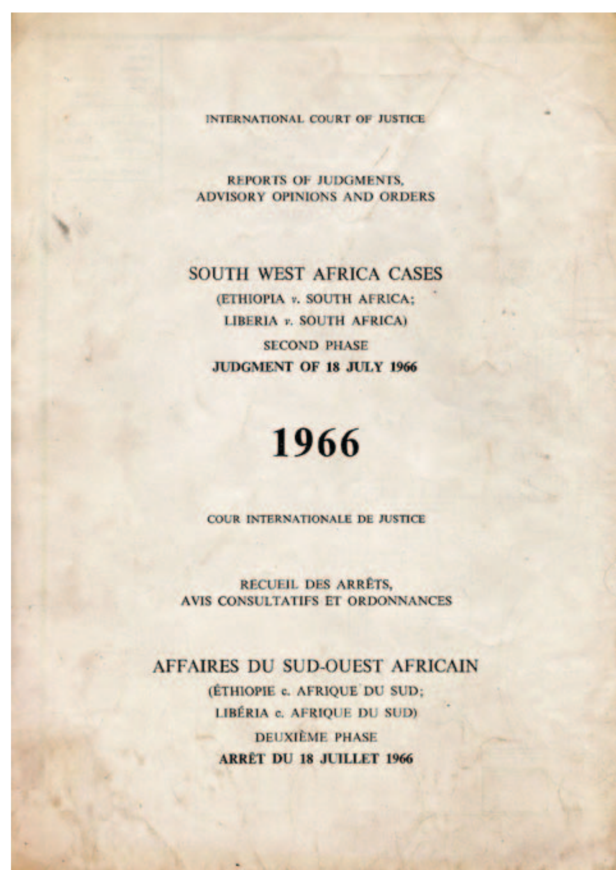
1962

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRES DU SUD-OUEST AFRICAIN
(ÉTHIOPIE c. AFRIQUE DU SUD; LIBÉRIA c. AFRIQUE DU SUD)
EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 21 DÉCEMBRE 1962



INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS

SOUTH WEST AFRICA CASES
(ETHIOPIA v. SOUTH AFRICA; LIBERIA v. SOUTH AFRICA)
SECOND PHASE

JUDGMENT OF 18 JULY 1966

1966

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRES DU SUD-OUEST AFRICAIN
(ÉTHIOPIE c. AFRIQUE DU SUD; LIBÉRIA c. AFRIQUE DU SUD)
DEUXIÈME PHASE

ARRÊT DU 18 JUILLET 1966

FIRST, TELL NO LIES…ABOUT INTERNATIONAL LAW

The 1966 decision reminds us that International Law was the engine and freight of colonialism, and remains 'colonial' in many respects. In fact, Israel's invocation of the language of 'barbarism' and 'civilisation' is not mere rhetoric, it is an attempt to re-colonise International Law: to invoke its underlying racial grammar, in order to demonise Palestinians and their allies as unworthy of International Law's recognition and protection, even when they go to the World Court.

This is not a throwback to language of another time, it is an effort to reset (and reassert) International Law's colonial and racial grammar in the present.

SECOND, EXPOSE LIES [ABOUT INTERNATIONAL LAW] WHENEVER THEY ARE TOLD

Since 1994 International Law has been feted by our courts, the profession and South African academics; since December it has been rightly celebrated by the public at large. However, the risk of uncritically placing international law on the side of post-apartheid South Africa, is that we flatten out International Law's complex relationship with apartheid, shoring up the common and 'comforting myth'[8] International Law opposed apartheid.

This is *at best* a half-truth: *International human rights law eventually opposed* apartheid; *the majority of the General Assembly* opposed apartheid. But International Law and institutions *as a whole* simply did not. Like colonialism, International Law laid the foundations for the establishment of apartheid in 1948, and apartheid lasted as long as it did because of, not in spite of, International Law and institutions – including the Security Council and, for a time, the International Court of Justice.

In this respect the 1966 decision also reminds us that South Africans did not get good at international law overnight, or even in 1994: the uncomfortable truth is that apartheid South Africa was very well-versed in the language of International Law.

THIRD, MASK NO DIFFICULTIES, MISTAKES, FAILURES

In the case against apartheid South Africa in the 1960s there were difficulties, mistakes and failures – and we need to acknowledge and learn from these. The details are often side-lined by the scandal of how the World Court came to rule against African states in 1966 – namely by collusion and fraud amongst the British and Australian judges to engineer a majority and reverse its own earlier decision on standing.

We don't know what would have happened if a decision had been made on the merits, but the assumption is often made that – in the absence of extrajudicial shenanigans – Liberia and Ethiopia would have won and the ICJ would have ruled that apartheid violated International Law. Truth be told, that outcome was far from certain. In fact, only *two* of the seven dissenting judgments explicitly stated that apartheid violated international law.

The first mistake in 1966 was the decision by Liberia and Ethiopia to hire a long-time servant of the US State Department as their lead counsel, a mistake that has been easily remedied this time around.

The other cracks that emerged in the case against apartheid in the 1960s are more difficult to avoid: they had to do with the legal tactics of apartheid South Africa – which have already been mirrored by Israel in the recent proceedings:

- The first was to dismiss the case as a cynical and political abuse of the court.
- The second was to take technical points, such as whether there was a dispute or "unispute".9
- The third was to produce alternative sets of facts about the conditions in South West Africa, one that contested the UN's narrative and, more importantly, the accounts of those directly affected: then the South West Africans, today the Palestinians.

South Africa has done well to counter these tactics – and the court came down on the side of the UN and South Africa's well-documented account of the situation in Gaza.

However, the most fateful mistake of African states in 1966 was to place all their faith in the justice of International Law – its ability to jump its colonial shadow. In short, the lawyers for Liberia and Ethiopia ended up relying solely on the claim that apartheid *by its very nature* violated International Law.

It is not certain by any means that they would have been successful, but even if they had it would have been on *the hardest* of all the available arguments.

In the current proceeding South Africa – for reasons of jurisdiction – has no choice but to make the hardest possible argument: that Israel is not only wantonly destroying the lives, homes and livelihoods of Palestinians but *is doing so with the intention to destroy them as a group*.

There is no other route to the ICJ other than through the eye of this particular needle. It would have been far easier to prove that Israel is committing severe human rights violations or war crimes or crimes against humanity – but to seize the court South Africa must rely on the Genocide Convention's compulsory jurisdiction clause.

Here too the spectre of 1966 looms large: as it was because of the ICJ's betrayal of African states in 1966 that there is no equivalent clause granting the ICJ jurisdiction over disputes under the International Covenant on Civil and Political Rights (which was being drafted at the time the judgment was handed down). Had one been included, South Africa's case before the ICJ would have been far simpler today.

However, there are other, more hopeful arcs from 1966 to the present. I want to end by highlighting two:

The first is the basis for South Africa's claim: namely that Israel's genocide against Palestinians in Gaza does not only effect their rights alone, but implicates the rights and obligations of South Africa (and other states) as the prohibition on Genocide is a *jus cogens* norm that generates obligations *erga omnes partes* (to use the latin terms).

Simply put, Israel's obligation not to commit genocide is one it owes "to all the other States, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action".

This was the same justification underpinning African states' case in 1966: that apartheid South Africa's obligations in respect of South West Africa could be enforced by other states, and African states *in particular*. This radical approach to the

enforcement of fundamental norms of International Law is also the heritage of 1966.

The second arc from 1966 to the present passes through 1973. In the wake of the ICJ's decision, African states turned to the General Assembly to combat apartheid but did not abandon International Law altogether. Rather, they sort to reimagine and remake International Law in order to ensure it would be on the right side of history, and the wrong side of apartheid.

The centrepiece of their efforts was the Apartheid Convention: which not only declared apartheid a crime against humanity – and provided for both universal jurisdiction for its prosecution, and a jurisdiction clause for the ICJ to adjudicate violations thereof – but drew a link between colonialism, apartheid and genocide. By doing so, African states rejected the claims that either the genocide was unique to the Holocaust, or the apartheid was unique to South Africa.

In doing so, the Apartheid Convention adopted a *structural account* of the crime of apartheid – as a system of political, economic, social and cultural *domination*, as opposed to a series of individual rights violations – and, by implication, extended this account to Genocide Convention as well.

It was precisely *this* historical and theoretical understanding of the situation in Gaza that South Africa invoked at the outset of proceedings in The Hague, namely that:

> "[T]he ongoing Nakba of the Palestinian people through Israel's colonization since 1948, ….has systematically and forcibly dispossessed, displaced, and fragmented the Palestinian people, deliberately den[ied] them their internationally recognized, inalienable right to self-determination… [and imposed an] institutionalized regime of discriminatory laws, policies, and practices designed and maintained to establish domination [by] subjecting the Palestinian people to apartheid, on both sides of the Green Line …"

As such, South Africa's Agent continued:

> "[T]he genocidal acts and omissions by [Israel] "inevitably form part of a continuum", of illegal acts perpetrated against the Palestinian people since 1948."

Notably, in December 1966 the UN delegate from Guinea noted – with hindsight – that *the real mistake* in bringing apartheid South Africa before the ICJ for violating the rights of the peoples of South West Africa was that it "distort[ed] the true nature of the problem of South West Africa's future, which…*was a colonial problem*".

In this respect, what concerns me most about last month's historic Provisional Measures order are not the words that were missing at the end (i.e. "immediate suspension of military operations"), but those that were present at the beginning, namely:

> "The Court begins by recalling the *immediate context* in which the present case came before it… 7 October 2023."

The success of South Africa's case going forward will, in my opinion, hinge on its ability to direct and hold the court's attention to the broader context of colonialism and apartheid that are the conditions of possibility for the ongoing genocide in Gaza. There are no easy victories here, International Law *and human rights law* have historically been hostile to recognising and redressing structural harms like colonialism and apartheid, or even acknowledging the struggles of the majority of the world's people against them, and the legal tactics, traditions and epistemologies these have generated.

However, the consequences of doing so will be profound: not only for immediate case and the question of Palestinian freedom, but for question of freedom everywhere – including in South Africa.

In this sense, taken together, the 1966 moment and the recent return to The Hague, remind us of the possibility *and also the fragility* of not only a different, more just international order, but of another International Law. A

Notes

1 Article 22, *Covenant of the League of Nations* (1919).
2 "The Balfour Declaration" (1917), available at https://www.un.org/unispal/document/auto-insert-193242/
3 In the end the Australian Judge President had a casting vote on a deadlocked court, but only because he pressurized the Pakistani Judge (who almost certainly would have voted for Liberia and Ethiopia) to sit the case out by fraudulently claiming that a "substantial majority" of his fellow Judges thought he should do so because of his past involvement in the South West Africa matter. Historical documents suggest it was only the Australian and British judges who held this view. See further Victor Kattan, 'Decolonizing the International Court of Justice: The Experience of Judge Sire Muhammad Zafrulla Khan in *the South West Africa* Cases', (2015) 5 *Asian Journal of International Law* 301-355.
4 UNGA 1432 (1966) para. 113 (Dahomey).
5 UNGA 1447 (1966), para. 130.
6 Hercules Booysen, *An Academic Life Over Continents: Reflections of an Afrikaner on the Changes which Engulfed South Africa During the Second Half of the Twentieth Century* (2007), 129.
7 Ibid.
8 Chinua Achebe, "An Image of Africa: Racism in Conrad's 'Heart of Darkness", (1977) *Massachusetts Review* 18.
9 In the Oral Hearing Israel's Counsel unsuccessfully argued: "This is not a dispute, it is a 'unispute' – a one-sided clapping of hands." ICJ, *Public sitting held on Friday 12 January 2024, at 10 a.m., at the Peace Palace, in the case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa *v.* Israel), para .19