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Symposium: A Court for the World? Trust in the ICJ 50 years after South West Africa

On 30 November 2016, the T.M.C. Asser Instituut, in cooperation with the Amsterdam Center for International Law (ACIL) of the University of Amsterdam (UvA) hosted a symposium: 'A court for the World? Trust in the ICJ 50 years after South West Africa'. Held as part of the Asser-ICJ Series, this event comprised two panels, each followed by a Q&A session, and concluded with a lecture by H.E. Abdulqawi Ahmed Yusuf, Vice-President of the International Court of Justice (ICJ).

Opening remarks by Prof. Dr Janne Nijman, Director of the T.M.C. Asser Instituut, emphasised the role of international institutions in cultivating trust. Acknowledging the distrust generated towards the ICJ as a result of its 1966 decision on the merits of the *South West Africa* cases (hereinafter, the '1966 judgement'), she observed that international law's legacy of colonialism was still felt today in the field of international criminal law. Considering the ICJ's 1971 Advisory Opinion on the *Legal Consequences of the presence of South Africa in Namibia* (hereinafter, the '1971 Advisory Opinion') she invited the panellists to reflect on how, and to what extent, trust in the ICJ as a world court had been restored.

Panel I. The South West Africa Cases: Text and Subtext
Chair: Dr Cristina Hoss, Iran-US States Claims Tribunal

Dr John Dugard, from Leiden University and the University of Pretoria, focused his intervention on the analysis of the litigation strategies of both parties to the 1966 judgement. He pointed at three reasons why the Applicants' theory, which claimed that the apartheid regime imposed on South West Africa was contrary to the mandate conferred to South Africa by the League of Nations, failed to be recognised by the ICJ, namely: the strategy of the applicant states; the strategy of the respondent states; and the composition of the bench. Represented by US international lawyers with little trial experience and resources, Ethiopia and Liberia stood unprepared to challenge the sizeable amount of factual evidence presented by South Africa's imposing team of national lawyers and which aimed to demonstrate that apartheid was not a discriminatory regime. Furthermore, while the applicant states wrongly expected the judges to rule in favour of the international norm of non-discrimination, South Africa sensed the conservatism of the bench, who ended up ruling on a technicality rather than in substance. In Dr Dugard's view, the ICJ only rehabilitated from its failure to condemn the apartheid regime with its unanimous ruling in the *Nicaragua* case.

Dr Victor Kattan, from the National University of Singapore, considered the 1966 judgement in the context of the cold war, the emergence of the right to self-determination and the *Declaration on Decolonization* (UN General Assembly Resolution 1514). He underlined that, in addition to breaching the international norm of non-discrimination and contradicting the mandate, the South African

apartheid regime also violated the right of the people of South West Africa to self-determination. Noting an emerging alliance between the Soviet Union and newly decolonised states in the 1960s as well as the Soviet Union's earlier proposal to include the right to self-determination in the Universal Declaration on Human Rights, Dr Kattan submitted that an apparent association between self-determination and communism might have influenced the judges who presided over the *South West Africa* cases.

Approaching the topic from an institutional perspective, Dr Sara Kendall, from the University of Kent, drew parallels between the distrust generated towards the ICJ in the wake of the 1966 judgement and the apparent discontent towards the ICC today. She observed that persistent neo-colonial logics and feelings of institutional betrayal could forge a new process of alienation of the third world. Dr Kendal asserted that today's wave of withdrawals – or threats of withdrawals – from the Rome Statute of the ICC, is to be understood as a political reaction to institutional inaction, in the same way that states turned to the UNGA in 1966 to end the mandate on South West Africa. In that context, she submitted that crisis, understood in the sense of 'critique' rather than 'rejection', provided an opportunity for institutional reflection and dialogue with member states. She concluded by recalling that international institutions play a role that go beyond their mandate in dealing with general values such as ethics and the interest of justice.

Panel II. Who finds their way to the Court?
Chair: Dr Antoine Duval, T.M.C. Asser Instituut

H.E. Prof. Maria Teresa Infante Caffi, from the Embassy of the Republic of Chile and the University of Chile, provided insight into the historical developments which shaped the perspective of Latin American states on the role of the ICJ as a world court. She underlined that while the ICJ has enjoyed a rather positive reputation in Latin America and is known for bringing legal certitude, states are still reluctant to defer jurisdiction over sovereignty issues to a third party, as shown by the evolution of their positions with relation to the 1948 Pact of Bogota. Professor Infante observed that the legitimacy of the Court to play a supranational role, including over sovereign matters, is dependent on its capacity to reflect the aspiration of a plurality of states as a community, including its representativeness in terms of legal cultures and traditions and its application of the principle of jurisdictional equality among members of the court.

Following on Dr Dugard's intervention, Dr Cecily Rose, from Leiden University, returned to the issue of litigation strategies, but from a more sociological perspective, offering a broader analysis of the topic by focusing on strategies of councils appearing before the ICJ on behalf of developing states. In this context, she compared the 1966 judgement with the more recent *Marshall Island* cases, underlying how, in both cases, public interest litigation on part of the applicants, who were represented by foreign lawyers, was met by an 'over-formalistic' judgement decided on a very narrow margin. Dr Rose described the ICJ as a reactive institution who sits uncomfortably with public interest litigation, which prioritises interests of people rather than states.

Dr Ingo Venzke, from ACIL, considered the *South West Africa* cases in the context of what he called the 'battle for the ICJ', a situation triggered by an increasing number of new candidate members to the UN as a result of the second wave of decolonisation. He submitted that the 1966 judgement quashed any expectations that newly independent states may have had for a system of international law emancipated from the influence of western imperialism and for the ICJ to redress past wrongs and induce progressive change. Instead, the decision reinforced prevailing sceptical views towards international adjudication as amounting to the enforcement of rights previously imposed on colonised states, including a customary law that they had not taken a role in shaping. Highlighting the political consequences of the 1966 judgement, of which a dramatic decrease in the number of cases submitted to the Court, Dr Venzke asserted that the subsequent changes in the composition of the members of the Court, which he qualified as a 'quest for the bench', allowed the ICJ to regain ambivalence in the years that followed the infamous decision.

Evening Talk: 'Trust in International Courts and Tribunals by African States after South West Africa'

Bringing the discussion back to the issue of trust in the ICJ, H.E. Abdulqawi Ahmed Yusuf, Vice-President of the ICJ, submitted that distrust in the Court arose long before the *South West Africa* cases. He identified two main reasons that explain the general unwillingness on part of African states, in the early 1960s, to engage with international judicial settlement of disputes. First, the fact that African states felt misrepresented in the development of international law as applied by the Court. Secondly, the treatment of African states as mere objects rather than subject of international law by the previous Permanent Court of International Justice in the only five cases concerned with African interests, territory and resources which it had to deal with. Other less decisive factors identified by Judge Yusuf include the attachment of newly independent states to their sovereignty, and misrepresentation at the ICJ itself. Recognising the 1971 Advisory Opinion as an attempt to repair the damage caused by the 1966 judgement with an interpretation of international law that took into account the subsequent developments of international customary law, Judge Yusuf identified the Advisory Opinion in the *Western Sahara* case as an important source or renewed trust in the ICJ on part of African states. He also mentioned subsequent developments in international law, such as the codification of customary law, geographical representation, familiarisation and judicialisation of interstate relations in Africa itself, as demonstrated by the creation of an African Court of Justice, as critical rehabilitation factors.