

## SYMPOSIUM ON THE MARSHALL ISLANDS CASE

### PUBLIC INTERESTS IN THE INTERNATIONAL COURT OF JUSTICE—A COMPARISON BETWEEN *NUCLEAR ARMS RACE* (2016) AND *SOUTH WEST AFRICA* (1966)

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In the present essay I compare the 2016 judgment of the International Court of Justice (ICJ) in *Nuclear Arms Race* (Marshall Islands v. United Kingdom)<sup>1</sup> with the Court's 1966 judgment in *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa).<sup>2</sup> A series of similarities between the two judgments are obvious: They are two of the three cases in the history of the Court in which the judges were equally split and the President had to cast his [tie-breaking vote](#).<sup>3</sup> The critique of the judgments has been exceptionally strong, in 2016 as in 1966. The core of the critique, then as now, has practically been the same—the Court retreats into an excessive formalism that protects great powers.

The contentious proceedings in both *Nuclear Arms Race* and *South West Africa* were part of a much larger struggle. The applicants took pride in the fact that they did not act out of self-interest alone but were driven by a much larger desire—the struggle against racism in 1966 and against nuclear weapons in 2016. Both times the applicants turned to the ICJ when political processes had failed to deliver. And both times the Court let them down. While the Court's 1966 judgment in *South West Africa* remains "[the most controversial judgment in its history](#),"<sup>4</sup> its 2016 judgment does come close.

The point of comparing *Nuclear Arms Race* with *South West Africa* is not to say that we have been there before and that nothing has changed. Above all the [comparison](#) raises questions as it renders the present more familiar and more peculiar.<sup>5</sup> The Court's judgment in 1966 was the first, and the one in 2016 the latest, in a series of cases that may be read as instances of public interest litigation—judicial action in support of causes that have not found effective recognition in the political process. When comparing the two judgments, I will focus on the classic

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<sup>1</sup> [Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament](#) (Marsh. Is. v. UK), Preliminary Objections (Oct. 5, 2016) [hereinafter *Nuclear Arms Race*]. The Court delivered three very similar judgments in the cases against the India, Pakistan, and the United Kingdom. Vice-President Yusuf found that a dispute existed with the United Kingdom, but not with India or Pakistan. Only in the case with the United Kingdom were the votes equally split. When I speak of the 2016 judgment, I speak of that judgment.

<sup>2</sup> [South West Africa](#) (Eth. v. S. Afr.; Liber. v. S. Afr.) 1966 ICJ REP. 6 (July 18) [hereinafter *South West Africa*].

<sup>3</sup> Other instances are [Legality of the Threat or Use of Nuclear Weapons](#), Advisory Opinion, 1996 ICJ REP. 226 (July 8) [hereinafter *Nuclear Weapons*]; [Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles From the Nicaraguan Coast](#) (Nicar. v. Colom.), Preliminary Objections (Mar. 17, 2016).

<sup>4</sup> JOHN DUGARD, [THE SOUTHWEST AFRICA/NAMIBIA DISPUTE](#) 292 (1973).

<sup>5</sup> Jürgen Kocka, [Comparison and Beyond](#), 42 HIST. & THEORY 39 (2003).

question at the core of such public interest litigation: What are the characteristics of public interest litigation in these cases? To what extent can applicants litigate in the public interest? What does that ultimately say about the relationship between judicial and political processes, about social and legal attitudes to politics?

*Litigating in the Public Interest—Then and Now*

The judicial proceedings leading to the Court's 1966 judgment were a key part in the struggle against apartheid—the cause célèbre for newly independent and nonaligned states from the 1950s onward. The applicants, Ethiopia and Liberia, [acted in consultation](#) with African states and with their financial assistance.<sup>6</sup> With limited resources they hired a small team of mostly U.S. lawyers around [Ernest Gross](#), a former U.S. representative at the United Nations. On the first day of the oral pleadings, Gross [took pride](#) in the fact that “the Applicants have not sought judicial recourse in order to secure a narrow material or selfish interest peculiar to themselves.” “Their legal interest,” he clarified, “encompasses nothing less than observance by the Respondent of the totality of its legal obligations under the ‘sacred trust’ of the Mandate.”<sup>7</sup> In his 1966 dissenting opinion [Judge Jessup](#) goes at great length to argue that, while there is indeed “no generally established *actio popularis* in international law, . . . international law has accepted and established situations in which States are given a right of action without any showing of individual prejudice or individual substantive interest as distinguished from the general interest.”<sup>8</sup>

The Marshall Islands have suffered immensely from nuclear weapons. But upon filing its application with the Court in 2014, [Tony de Brum](#), Foreign Minister and co-agent for the Marshall Islands, explained that “[n]ot only are the Marshall Islands fighting for what they believe to be good for the Marshall Islands. We are fighting for what we believe is the only solution in terms of peace and prosperity in the world.”<sup>9</sup> The proceedings in *Nuclear Arms Race* go back to the initiative of two NGOs, the [International Association of Lawyers Against Nuclear Arms \(IALANA\)](#)<sup>10</sup> and the [Nuclear Age Peace Foundation](#).<sup>11</sup> The Amsterdam-based lawyer and Vice-President of IALANA, Phon van den Biesen, acted as co-agent next to Tony de Brum. The initial legal team included mostly lawyers linked with IALANA and with its UN office, the [Lawyers Committee on Nuclear Policy](#).<sup>12</sup> IALANA provided financial assistance while the lawyers on the team worked pro bono.

*Nuclear Arms Race* and *South West Africa* testify to the [shifting difficulties](#) of public interest litigation before the ICJ.<sup>13</sup> The Court's 1966 Judgment denied the applicants' standing on the ground that they had no “legal right or interest in the subject matter of the case.”<sup>14</sup> As may be well remembered, the Court thereby turned around from its 1962 Judgment on Preliminary Objections, to the great surprise and dismay of almost all observers. Its

<sup>6</sup> Anthony D'Amato, [Legal and Political Strategies of the South West Africa Litigation](#), 4 LAW TRANSITION Q. 8, 17 (1967); also see Ernest A. Gross, [The South West Africa Case: What Happened?](#), 45 FOREIGN AFF. 36, 40 (1966).

<sup>7</sup> South West Africa, [Verbatim Record](#), C.R. 65/2 at p. 8; quoted in D'Amato, [supra note 6](#), at 23.

<sup>8</sup> South West Africa, [Dissenting Opinion of Judge Jessup](#), 1966 ICJ REP. 325, 387–389 (July 18).

<sup>9</sup> See his speech at [The Marshall Island's Nuclear Zero Cases in the International Court of Justice](#), THE LAWYERS COMMITTEE ON NUCLEAR POLICY INC., at minute 6.02.

<sup>10</sup> [INTERNATIONAL ASSOCIATION OF LAWYERS AGAINST NUCLEAR ARMS](#).

<sup>11</sup> [NUCLEAR AGE PEACE FOUNDATION](#).

<sup>12</sup> [LAWYERS COMMITTEE ON NUCLEAR POLICY](#).

<sup>13</sup> Such a reading of *South West Africa* was also offered by Cecily Rose in her contribution to the symposium [A Court for the World? Trust in the ICJ 50 years after South West Africa](#), The Hague (Nov. 30, 2016). On the difficulties, see already André Nollkaemper, [International Adjudication of Global Public Goods: The Intersection of Substance and Procedure](#), 23 EUR. J. INT'L L. 769 (2012).

<sup>14</sup> [South West Africa](#), [supra note 2](#), at paras. 14, 31.

composition had changed slightly in the intervening years. Apart from the regular elections of 1963, Judge Badawi (Egypt) had died in 1965 and Judge Bustamante (Peru) was absent due to illness.<sup>15</sup> The Court's new President, Sir Percy Spender (Australia), and Judge Sir Gerald Fitzmaurice (United Kingdom), seized the opportunity to turn their [joint dissent](#) of 1962 into the new majority in 1966.<sup>16</sup> Together [they persuaded](#) Judge Sir Muhammad Zafrulla Khan (Pakistan) not to sit in the case (even though Judge Zafrulla neither recused himself, nor was a formal decision ever taken on the issue).<sup>17</sup> The remaining judges were evenly split and President Spender [cast his vote](#) to deny the applicants' standing after all.<sup>18</sup>

The 1962 Judgment had held that the applicants, like all former Member States of the League of Nations, have an interest in the effective performance of the "sacred trust" that the League had placed into the hands of South Africa as a mandate power in South West Africa.<sup>19</sup> The Court's 1966 judgment was the exact opposite and only allowed states to vindicate their "specific rights" connected to their individual interests.<sup>20</sup> Ethiopia and Liberia could not bring a case against South Africa's conduct as a mandate power for South West Africa, let alone against apartheid *per se*.

The Court has struck different tones since then. In [Barcelona Traction](#) (1970) it embraced the notion of *erga omnes* obligations in direct response to the fiasco of 1966 (and without any relevance for the case at hand).<sup>21</sup> [East Timor](#) (1995) [showed limits](#) as to what the *erga omnes* nature of obligations can do to establish the Court's jurisdiction.<sup>22</sup> But in 2012 the Court was at least confident enough to establish Belgium's standing in the [case against Senegal](#) by exclusively relying on the *erga omnes* nature of the obligation to prosecute or extradite torture suspects.<sup>23</sup> [Judge Crawford](#) could then rightly conclude in his dissenting opinion in *Nuclear Arms Race* that "[i]t is now established—contrary to the inferences commonly drawn from the Merits phase of *South West Africa*—that States can be parties to disputes about obligations in the performance of which they have no specific material interests."<sup>24</sup>

But with its 2016 Judgment in *Nuclear Arms Race* the Court has introduced a new hurdle according to which the respondent must have been "aware or could not have been unaware" of the existence of the legal dispute.<sup>25</sup> This threshold again works to limit access to the Court, especially for weaker states and for applicants who pursue public interests. Whatever sense the requirement of "objective awareness" might make in the settlement of concrete bilateral disputes, it creates new obstacles when applicants turn to the Court in order to supplement or remedy political processes.

<sup>15</sup> Judge Ammoun (Lebanon) replaced Judge Badawi but, as is common practice, he did not join the ongoing proceedings.

<sup>16</sup> See *South West Africa*, [Joint Dissenting Opinion of Judge Sir Percy Spender and Sir Gerald Fitzmaurice](#), 1962 ICJ REP. 465 (Dec. 21).

<sup>17</sup> See Victor Kattan, [Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the South West Africa Cases](#), 5 ASIAN J. INT'L L. 310 (2015).

<sup>18</sup> [Statute of the International Court of Justice](#) art. 55 ("in the event of an equality of votes, the President . . . shall have a casting vote.").

<sup>19</sup> [South West Africa](#), Preliminary Objections, 1962 ICJ REP. 319, 342 (Dec. 21).

<sup>20</sup> [South West Africa](#), *supra* note 2, at 29.

<sup>21</sup> [Case Concerning the Barcelona Traction, Light and Power Company, Limited](#) (Belg. v. Spain), 1970 ICJ REP. 3, para 33 (Feb. 5, 1970).

<sup>22</sup> [East Timor](#) (Port. v. Austl.), 1995 ICJ REP. 90 (June 30); also see [Dissenting Opinion of Judge Weeramantry](#), 139 esp. at 172–4. For a comparison with *South West Africa*, see John Dugard, *1966 and All That: The South West Africa Judgment Revised in the East Timor Case*, 8 AFRICAN J. INT'L & COMP L 549 (1996).

<sup>23</sup> [Questions relating to the Obligation to Prosecute and Extradite](#) (Belg. v. Sen.), 2012 ICJ REP. 422 (July 20).

<sup>24</sup> *Nuclear Arms Race*, [Dissenting Opinion of Judge Crawford](#) para 22.

<sup>25</sup> [Nuclear Arms Race](#), *supra* note 1, at para 41.

*Attitudes to Politics and the Role of the Court*

The possibilities and limits for applicants to institute judicial proceedings in the [public interests](#) reveal social and legal attitudes to politics.<sup>26</sup> One would generally expect that the higher the hurdles for public interest litigation, the greater should be the trust in the political process. But in both 1966 and 2016 the ICJ raised the hurdles high for judicial action while there was no reason to trust that the political process would deliver. In fact, in both instances the proceeding's main aim was precisely to lend the political process a helping hand in pursuing the public interests.

Throughout the 1950s and 1960s newly independent and nonaligned states concentrated their struggle against apartheid on the United Nations General Assembly (UNGA). It became increasingly obvious that the UNGA Resolutions lacked the necessary bite. The Security Council was held back by the United States and United Kingdom, both of whom continued to cater to [strong business interests](#) in South Africa.<sup>27</sup> According to Gross, “[i]f any realistic prospect had existed that members of the United Nations would repress, rather than merely condemn, South Africa’s violations of its clear and present duties under the Mandate, the hazards, burdens and, above all, the time involved in litigation would have been avoided.”<sup>28</sup>

The applicants in *South West Africa* did not expect a binding judgment to work miracles on South Africa, let alone spell the immediate end of apartheid. They hoped that the judgment would tip the United States and the United Kingdom towards changing their policies in the Security Council.<sup>29</sup>

The stymied political process was also the applicant’s obvious target in *Nuclear Arms Race*. Time and again had UNGA Resolutions unanimously found that all states have an obligation “to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>30</sup> The Court’s unanimous *Nuclear Weapons* Advisory Opinion affirmed this obligation in 1996.<sup>31</sup> In beautiful harmony has the UNGA since then adopted a yearly [resolution](#) that restates the Court’s Opinion.<sup>32</sup> But neither the Resolutions nor the Court’s Opinion have left a trace on the ground. UNGA Resolutions could not hinder the buildup of the apartheid regime in the 1950s and 60s, nor can they hide the fact that no negotiations on nuclear disarmament have taken place since the 1970s.

The Marshall Islands thus turned to the Court in support of the political process. When the 2016 judgment made clear that no help was forthcoming from the judiciary, the Marshall Islands again fell back on what was there before: [Shortly after the judgment](#) the UNGA adopted a [resolution](#) to convene in 2017 a “United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination.”<sup>33</sup>

<sup>26</sup> See generally, David Feldman, *Public Interest Litigation and Constitutional Theory in Comparative Perspective*, 55 MODERN L. REV. 44, 44 (1992) (“the scope of citizens to use judicial processes to advance public, political ends gives a discernible indication of social and legal attitudes to politics, the rights and responsibilities of citizenship, and the relationship between electors, legislatures, executives, courts and the disfranchised”).

<sup>27</sup> Ryan M Irwin, *Apartheid on Trial: South West Africa and the International Court of Justice 1960–66*, 32 INT’L HIST. REV. 619, 624 (2010); Gross, [supra note 6](#), at 41–42. Also see National Policy Paper—South Africa, Part One, Department of State, S/P Files: Lot 72 D.

<sup>28</sup> Gross, [supra note 6](#), at 41.

<sup>29</sup> D’Amato, [supra note 6](#), at 31–33.

<sup>30</sup> The wealth of resolutions is referenced in the applicant’s memorial in [Nuclear Arms Race](#), para 201.

<sup>31</sup> See [Nuclear Weapons](#), [supra note 3](#).

<sup>32</sup> See [GA Res. 51/45](#) (Dec. 10, 2006) (115–22–32).

<sup>33</sup> First Committee, [Taking forward multilateral nuclear disarmament negotiations](#), UN Doc. A/C.1/71/L.41 (Oct. 14, 2016). See Dan Joyner, [U.N. General Assembly Decides to Convene a Nuclear Weapons Ban Conference](#), ARMS CONTROL LAW (Oct. 31, 2016).

African states [did the same](#) in 1966. Immediately after the judicial process failed to deliver the desired outcome, they again acted through the [UNGA](#) to terminate South Africa's mandate for South West Africa and to place the territory under UN trusteeship.<sup>34</sup> But it was entirely clear to everyone that South Africa would not comply.<sup>35</sup>

Judges in both 1966 and 2016 were divided over the question of what the Court should do when laudable causes do not find effective recognition in political processes. According to the majority it is tough luck if politics fails to deliver. The laudable causes, in any event, were not theirs. In 1966, the majority was white. In 2016, it included all the judges from countries possessing nuclear weapons. [According to the minority](#), however, it is precisely the role of the Court to step in and advance the general interest where the political process fails.<sup>36</sup> This follows from its [understanding](#) as the World Court and the UN's "principal judicial organ".<sup>37</sup> If it does not live up to that role, it will dwindle into [irrelevance](#).<sup>38</sup>

After 1966, newly independent and nonaligned states turned their back to the Court. With the exception of the joint proceedings in *North Sea Continental Shelf* (Germany v. Denmark; Germany v. The Netherlands), no single case was filed before the Court from 1962 until 1971. To recall the flavor of the reactions to the 1966 judgment: According to a Liberian newspaper, the judgment was a "travesty of human rights. . . . [T]he Court by its infamous decision spits in the face of its applicant by saying 'you had no right to come here'. What an insult!"<sup>39</sup> And the Sydney Morning Herald wrote that "[t]his judgment will convince many that the ICJ is indeed a 'white man's court'."<sup>40</sup> In response to a 1970 UN questionnaire to "Review the Role of the International Court of Justice," the representative of Ghana to the UNGA replied that the Court would be in a much better position if it did not "reflect outmoded conservative thought reminiscent of imperialism."<sup>41</sup>

### *Targets for Critique—Don't Aim at Formalism*

A progressive role for the Court to step in where political processes fail would suggest modes of interpretation that are guided by the law's object, its purpose, and by the principle of effectiveness. Unsurprisingly then a common critique from dissenting judges and scholars has been the Court's excessive formalism. [Judge Tanaka \(Japan\)](#) lamented the 1966 Judgment's "strict juristic formalism"<sup>42</sup> and, before he joined the court, [Taslim O. Elias](#), bemoaned the "legalistic, restrictive and narrow" mode of reasoning.<sup>43</sup> Half a century later, [Judge Bennouna \(Morocco\)](#) wrote a dissent in *Nuclear Arms Race* that could have been directed at *South West Africa* just as well: "[H]ow can [the Court] shelter behind purely formalistic considerations which both legal professionals and

<sup>34</sup> [GA Res. 2145 \(XXI\)](#) (Oct. 27, 1966). See further, TASLIM O. ELIAS, [THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS](#) 348 (1983).

<sup>35</sup> D'Amato, [supra note 6](#), at 43.

<sup>36</sup> See especially South West Africa, [Dissenting Opinion of Judge Jessup](#), 1966 ICJ Rep. 325 (July 18); Nuclear Arms Race, [Dissenting Opinion of Judge Cançado Trindade](#).

<sup>37</sup> [UN Charter](#) art. 92; [Statute of the International Court of Justice](#) art. 1. On the conceptions of the ICJ, see ARMIN VON BOGDANDY & INGO VENZKE, [IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION](#) 36–63 (2014).

<sup>38</sup> Nuclear Arms Race, [Dissenting Opinion of Judge Robinson](#) para. 70 ("the Court has written the Foreword in a book on its irrelevance").

<sup>39</sup> Letter from Dutch embassy in Monrovia to The Hague, July 22, 1966, NL-HaNa, Dutch Ministry of Foreign Affairs, Inv. Nr. 24849.

<sup>40</sup> SYDNEY MORNING HERALD (July 20, 1966), Dutch Ministry of Foreign Affairs, Inv. Nr. 24849.

<sup>41</sup> Quoted in Helmut Steinberger, *The International Court of Justice*, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 193–283, 226–7 (1974).

<sup>42</sup> South West Africa, [Dissenting Opinion of Judge Tanaka](#), 1966 ICJ REP. 250, 276.

<sup>43</sup> TASLIM OLAWALE ELIAS, [AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW](#) 75 (Richard Akinjide ed., 1972).

ordinary citizens would find difficult to understand, rather than contributing, as it should do, to peace through international law, which is the *raison d'être* of the Court [?]"<sup>44</sup>

The same holds true for [Judge Cançado Trindade \(Brazil\)](#) and for [Judge ad hoc Bedjaoui \(Algeria\)](#), who believes that “today the most unsettling danger remains an excess of formalism.”<sup>45</sup> In their opinion it leads to a jurisprudence deprived of all relevance for the future and for humanity.<sup>46</sup>

As disheartening as the Court’s formalism may have been in 2016 as in 1966, it is not a strong reason behind anything and therefore not much of a danger either. Judge Bedjaoui knows this when he deplores how the majority’s reasoning easily reveals that its drafters had made up their mind in advance.<sup>47</sup> Formalism, as other modes of reasoning, follows choices that have already been made. Judge Jessup wrote as much in his 1966 dissent: Methods of interpretation are “a cloak for a conclusion reached in other ways and not a guide to a correct conclusion.”<sup>48</sup>

In *Nuclear Arms Race* Judge Bennouna put the revealing spotlight on Judge Abraham (France), the Court’s tie-breaking President.<sup>49</sup> In *Georgia v. Russian Federation* (2011) [Judge Abraham](#) had favored the Court’s earlier jurisprudence on determining the existence of a dispute—a jurisprudence which he praised as “strictly realistic and practical ... free of all hints of formalism.”<sup>50</sup> In contrast to the narrow majority of the judges at the time he had wished to uphold the Court’s jurisdiction. In 2016, he was at pains to explain why in his opinion there is no dispute in *Nuclear Arms Race*. He retreats into formalist reasoning, claiming that his hands are tied by the Court’s clear jurisprudence over the five intervening years.<sup>51</sup>

The mode of reasoning does not make the difference, judges and their preferences do. In the wake of the 1966 judgment newly independent and nonaligned states thus focused on the composition of the Court. By 1969, African states had won two seats (at the expense of Latin America and Asia) and only two of the judges voting with the majority in 1966 were still on the bench. The Court changed under the impact of decolonization, as did international law more generally.<sup>52</sup> Change always seems to be just around the corner. With regard to the ICJ, however, it is unlikely that the 2016 judgment will be part of developments of a similar magnitude as those of the 1960s and 70s.

### *Conclusions: So Close!*

Thinking of historical events as accidents diffuses critique and responsibilities. Before joining the Court, [Rosalyn Higgins](#) wrote of the 1966 judgment as an aberration.<sup>53</sup> This is also how dissenting [Judge Robinson](#) thinks

<sup>44</sup> *Nuclear Arms Race*, [Dissenting Opinion of Judge Bennouna](#) 2.

<sup>45</sup> *Nuclear Arms Race*, [Dissenting Opinion of Judge ad hoc Bedjaoui](#) para. 22 (“mais pour ‘heure le danger le plus inquiétant reste l’excès de formalisme,” author’s translation). As the Court’s President between 1994 and 1997, Bedjaoui notably read out the Court’s Advisory Opinion in [Nuclear Weapons](#), *supra* note 3. For his view on *South West Africa* also see Mohammed Bedjaoui, [Expediency in the Decisions of the International Court of Justice](#), 71 *BRI. Y.B. INT’L L.* 1, 16–17 (2000).

<sup>46</sup> *Nuclear Arms Race*, [Dissenting Opinion of Cançado Trindade](#) esp. para 11; *Nuclear Arms Race*, [Dissenting Opinion of Judge ad hoc Bedjaoui](#).

<sup>47</sup> *Nuclear Arms Race*, [Dissenting Opinion of Judge ad hoc Bedjaoui](#) para. 81.

<sup>48</sup> *South West Africa*, [Dissenting Opinion of Judge Jessup](#), 1966 *ICJ REP.* 325, 355 (July 18).

<sup>49</sup> *Nuclear Arms Race*, [Dissenting Opinion of Judge Bennouna](#) 3.

<sup>50</sup> *Georgia v. Russia*, [Separate Opinion of Judge Abraham](#), 2012 *ICJ REP.* 223, para. 14 (Apr. 1).

<sup>51</sup> *Nuclear Arms Race*, [Declaration of President Abraham](#) para. 9.

<sup>52</sup> See *THE BATTLE FOR INTERNATIONAL LAW IN THE DECOLONIZATION ERA* (Jochen von Bernstorff & Philipp Dann eds., forthcoming 2017).

<sup>53</sup> Rosalyn Higgins, [The International Court of Justice and Africa](#), in *THEMES AND THEORIES* 1056, 1071 (2009).

of the 2016 judgment.<sup>54</sup> But both judgments were carried by half of the judges. They can hardly be understood as slips of the pen. For newly independent and nonaligned states, the 1966 judgment was a confirmation of their view that the Court was a white man's Court for a white man's international legal order. [Many observers](#) will likewise see the 2016 judgment as symptomatic of the fact that [great powers may do as they please](#) while the weak suffer as they must.<sup>55</sup> Both judgments turn their onlookers into hard-nosed realists, at least for a moment.

The next moment one might again see that the judgments were so very close. What difference would it have made if the Court had decided otherwise in 1966 or 2016? According to John Dugard, the Court's 1966 judgment delayed the end of apartheid by some ten to fifteen years.<sup>56</sup> Of course, as atomic physicist Niels Bohr once said, predictions are difficult, especially about the future. Had the Court accepted its jurisdiction in *Nuclear Arms Race*, a number of countries stood ready to intervene on the side of the applicant under Article 63 ICJ Statute. As in *South West Africa*, nobody expected a favorable judgment in *Nuclear Arms Race* to do wonders. But perhaps it could have worked to shift balances of opinions and votes on issues such as the renewal of the Trident nuclear weapon programs in the United Kingdom. The 1966 and 2016 judgments should be remembered not as aberrations but for what they are: Simultaneous testimonies to the influence of power over justice and of the possibility that it could have been the other way around.

<sup>54</sup> *Nuclear Arms Race*, [Dissenting Opinion of Judge Robinson](#) para. 68.

<sup>55</sup> THUCYDIDES, [THE HISTORY OF THE PELOPONNESIAN WAR](#) Book 5, Chapter 89 (431 B.C.). For a commentary in this vein also see Nico Krisch, [Capitulation in The Hague: The Marshall Islands Case](#), *EJIL: TALK!* (Oct. 10, 2016).

<sup>56</sup> Comment made at the symposium [A Court for the World? Trust in the ICJ 50 years after South West Africa](#), The Hague (Nov. 30, 2016).