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# *Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the South West Africa Cases*

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## **Abstract**

This paper revisits the controversy of Judge Sir Muhammad Zafrulla Khan's recusal from the *South West Africa* cases using new information from the National Archives in Australia, India, South Africa, and the United Kingdom, including an unpublished manuscript written by the Australian judge and the Court's President Sir Percy Spender. Sir Percy's manuscript, which addresses the "recusal" controversy and the 1966 Decision, raises uncomfortable questions about the politics of international law within the Court in the 1960s. In many ways, Judge Zafrulla's struggle with Sir Percy at the ICJ can be analogized to the struggle of non-European peoples to self-determination. The internal "legal" struggle within the Court paralleled the larger "political" struggle outside the Court. Zafrulla would win the struggle, however, when as President of the Court during the 1971 Advisory Opinion on *Namibia* he would contribute to decolonization, a possibility he foresaw when he was forced to recuse himself.

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\* LL.B Hons (Brunel), LL.M (Leiden), PhD (SOAS), Postdoctoral Fellow, National University of Singapore. A draft of this paper was presented to a panel on the history of international law chaired by Professor Antony Anghie at the 4th Biennial Asian Society of International Law Conference hosted by the Indian Society of International Law in New Delhi on 15 November 2013. An earlier draft of the paper was presented to the Law Faculty of the National University of Singapore at the Faculty's Research Seminar Series on 30 October 2013. The presentation was chaired by Simon Chesterman, the Dean of the Law School. The paper has been culled from a book manuscript and is based on research undertaken in the National Archives UK in Kew, the British Newspaper Library in Colindale, London, the library of the Palais de Nations in Geneva, the National Archives of India, and by correspondence with the National Archives of the Republic of South Africa. The manuscript also benefits from a draft manuscript that Judge Sir Percy Spender wrote of his recollections of the recusal controversy in 1965 just prior to the International Court of Justice's decision in the second phase of the *South West Africa* cases, but which he never published. I would like to thank Professor David Lowe, Director of the Alfred Deakin Research Institute at the Deakin University of Australia, for sharing Sir Percy's manuscript with me, which is available with the rest of Sir Percy's papers at the National Library of Australia in Canberra. I would like to also thank Antony Anghie, Zabeth Botha, Anthony Carty, Rohit De, John Dugard, Stephen Girvin, Jacques Obserson, Qudsi Rasheed, Arthur Rovine, Kirsten Sellars, Prabhakar Singh, Michiel Spanjaart, Arun Kumar Thiruvengadam, Sara Wharton, and two anonymous reviewers, for their help, suggestions, and feedback.

*It was as though the gods were against us.*<sup>1</sup>

Arthur W. Rovine, one of the Counsels for Ethiopia and Liberia in the *South West Africa* cases.

The *South West Africa* cases were the most explosive and politically controversial cases in the history of the International Court of Justice (ICJ).<sup>2</sup> The cases spanned an extraordinarily important moment in world history, that of decolonization, which began in the late 1940s, and plateaued in the early 1970s, resulting in the trebling of the United Nations' membership. Decolonization coincided with the height of the Cold War confrontation and the civil rights struggles in the United States and elsewhere. All these factors played a role in making these cases particularly contentious, which was aggravated by the controversy concerning the use of the casting vote in the second phase of the cases by the President of the Court, Judge Sir Percy Spender. This enabled him to reverse the decision taken by the Court in the first phase of the cases, which had given Ethiopia and Liberia jurisdiction to pursue their claim in the second phase of the cases, alleging that South Africa was breaching its obligations towards the inhabitants of South West Africa through the implementation of its apartheid policy. The cases tested the patience and expertise of the Court, filling several volumes of reports, and led to personal confrontations within the Court and in various forums beyond The Hague—in the United Nations Headquarters in New York City and on the battlefields of Southern Africa.

This paper revisits the controversy of these cases by examining the legacy and the role of Judge Sir Muhammad Zafrulla Khan (1893–1985), the first Asian President of the Court, and a fascinating figure who played an important but overlooked role in decolonization. As this paper explains, Zafrulla was placed under extraordinary pressure by Sir Percy to refrain from participating in the cases, which enabled Sir Percy to cast a second vote in the second phase of the cases, thus ensuring a favourable outcome for South Africa. As is well known, Sir Percy's casting vote had ominous consequences for the reputation of the Court and has been regarded as an aberration. In the words of Dame Rosalyn Higgins, the former British judge at the ICJ: "The 1966 Judgment is, by common consent, to be regarded as an aberration. The true voice of the Court is to be found in the Advisory Opinions of 1950, 1955, 1956, and 1971."<sup>3</sup> What Higgins did not mention was that Zafrulla was a judge of

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1. Email correspondence between Arthur W. Rovine and the author dated 27 November 2013.
  2. See *International Status of South-West Africa*, Advisory Opinion, [1950] I.C.J. Rep. 128; *South-West Africa—Voting Procedure*, Advisory Opinion of 7 June 1955, [1955] I.C.J. Rep. 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion of 1 June 1956, [1956] I.C.J. Rep. 23; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, [1962] I.C.J. Rep. 319; *South West Africa, Second Phase*, Judgment, [1966] I.C.J. Rep. 6; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Rep. 16.
  3. Rosalyn HIGGINS, "The International Court of Justice and Africa" in Rosalyn HIGGINS, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford: Oxford University Press, 2009), 1056 at 1071.

the Court when the 1955 Opinion was given and he participated in the drafting of the 1956 and 1971 Opinions. Had Zafrulla been elected to the ICJ in 1946, as he almost was, he would also have been on the Court when it gave its 1950 Opinion as well—although as the judge for India rather than Pakistan. There is a complex and fascinating story behind these cases—and especially the 1966 Decision, which should not only be regarded as an “aberration” but as manifestly unsound, if not unsafe. The question is: What happened between 1956 and 1971?

In the process of relating Zafrulla’s story in the *South West Africa* cases, this paper raises several issues of critical importance concerning these cases, as well as the complex legacy of colonialism more generally, with regard to several important aspects of international law. These include: the reasons that motivate objections to a candidate on the ground of bias; the relevance of opinions expressed during prior national representation when evaluating the suitability for election to international judicial office; the extent to which the secrecy of judicial deliberations, or case-related private exchanges, among judges ought to be respected; the ICJ’s relationship to the other principal organs of the United Nations (UN); and the legal relevance or weight that ought to be ascribed to normative resolutions of the UN General Assembly and Security Council.

Whilst much has been written on Zafrulla’s purported recusal in the legal literature<sup>4</sup> in the context of the *South West Africa* cases,<sup>5</sup> the story of this decade’s long saga and courtroom drama remains incomplete. As Judge Jennings observed, the recusal controversy was “officially never explained”.<sup>6</sup> In the 1960s, Zafrulla’s purported recusal from the second phase of the *South West Africa* cases was only addressed indirectly, despite the fact that Zafrulla’s purported recusal had a direct and detrimental impact on the outcome of that case. One reason why the story of Zafrulla’s purported recusal has not been addressed in much detail is because it took place behind closed doors. But with archival material released by the National Archives in the UK, Australia, India, and South Africa in the last two decades, along with a draft manuscript that Sir Percy Spender—who was President of the Court during the second phase of the *South West Africa* cases—wrote giving his version of

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4. See John DUGARD, “The South West Africa Cases, Second Phase, 1966” (1966) 83 *South African Law Journal* 429 at 431; Rosalyn HIGGINS, “The International Court and South West Africa: The Implications of the Judgment” (1966) 42 *International Affairs* 573 at 586; William M. REISMAN, “Revision of the South West Africa Cases” (1966) 7 *The Virginia Journal of International Law* 1 at 55; Bin CHENG, “The 1966 South-West Africa Judgment of the World Court” (1967) 20 *Current Legal Problems* 181 at 196–9; Elizabeth S. LANDIS, “The South West Africa Cases: Remand to the United Nations” (1967) 52 *Cornell Law Quarterly* 627 at 653; Richard FALK, “The South West Africa Cases: An Appraisal” (1967) 21 *International Organization* 1 at 11, note 28; Edward GORDON *et al.*, “The Independence and Impartiality of International Judges” (1989) 83 *Proceedings of the Annual Meeting of the American Society of International Law* 508 at 510.
  5. The best analysis is provided in John DUGARD, *The South West Africa / Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations* (Berkeley, CA: University of California Press, 1973). But see also Solomon SLONIM, *South West Africa and the United Nations: An International Mandate in Dispute* (Baltimore, MD: Johns Hopkins University Press, 1973).
  6. See the entry for “Article 24” by Sir Robert JENNINGS in Andreas ZIMMERMAN, ed., *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006), at 422, note 27. See also the entry for “Article 24” by Philippe COUVREUR in the updated 2012 edn. at 459, note 26.

events, and that was never published, the events that led to this infamous legal moment in which Zafrulla was pressured to refrain from participating in cases can be revealed and resurrected.

This paper sketches Zafrulla's career at the ICJ up until the moment of his purported recusal in 1965, and then places his struggle with Sir Percy and Sir Gerald Fitzmaurice, who also sought to prevent Zafrulla from sitting in the *South West Africa* cases, in the context of the decolonization movement, and the collapse of British imperialism more generally, ending with the 1971 Advisory Opinion on *Namibia*.<sup>7</sup> In many ways, the 1971 Advisory Opinion on *Namibia* (as *South West Africa* was renamed in 1968) can be seen as a form of "poetic justice" in advancing the cause of dependent peoples to self-determination. As will be seen, the 1971 Opinion not only reflected "the true voice of the Court", as Judge Higgins argues, but the views of Zafrulla, who was the President of the Court, and who was the principal architect of that judgment, but who has not, until now, been credited with drafting it, probably because of the reputation he acquired as the "silent judge".

## I. THE SILENT JUDGE?

In many ways Zafrulla was an enigma. Despite spending nearly sixteen years on the ICJ, he did not write more than twenty pages in the shape of individual opinions or declarations.<sup>8</sup> To date, only one paper has been published about Zafrulla in a law journal in which the first Asian President of the Court was referred to as the "silent judge".<sup>9</sup> But Zafrulla's reputation as the silent judge seems inapposite because he was anything but quiet when he was British India's representative to the League of Nations in 1939 and when he was Pakistan's first Foreign Minister and its Permanent Representative to the UN. This became most apparent from the speeches that he gave at the League of Nations when he condemned the USSR's invasion of Finland and in the United Nations when he criticized the UN Partition Plan for Palestine and India's policies in Kashmir.<sup>10</sup> These speeches made Zafrulla famous and he became an icon in the Arab world after he gave his speech on Palestine, which made him popular with the Arab masses, although notably not in his native Pakistan where he was attacked because of his membership of the Ahmadiyya Muslim community, a sect that is persecuted in Pakistan because of their purported refusal to believe in the finality of the Prophet Muhammad.<sup>11</sup> And yet as Mehr Chand Mahajan, a former Chief Justice

7. See *Legal Consequences for States*, *supra* note 2.

8. See Ijaz HUSSAIN, "Sir Zafrulla Khan—The Silent Judge" (1985) 23 *Archiv Des Völkerrechts* 478 at 482.

9. *Ibid.*

10. Regarding Zafrulla's speech on Finland, see speech by Sir Muhammad Zafrulla Khan (India) in the Text of the Debates of the Twentieth Session of the Assembly of the League of Nations, No. 3, Geneva, Friday, 15 December 1939 at 27. Zafrulla's speeches on Palestine are addressed below. I address his speeches on Kashmir in my book manuscript.

11. On Zafrulla's popularity in the Arab world, see S.M. BURKE, *Pakistan's Foreign Policy: An Historical Analysis* (Oxford: Oxford University Press, 1990) at 142. Regarding the persecuting of the Ahmadiyya community, see Surendra Nath KAUSHIK, *Ahmadiyya Community in Pakistan: Discrimination, Travail and Alienation* (New Delhi: South Asian Publishers, 1996) at 30 (explaining that two mock

of India, observed, when the Kashmir dispute was addressed in the UN Security Council in 1949, Zafrulla's "brilliant advocacy stole a march over the Indian delegation".<sup>12</sup> Zafrulla effectively "turned the tables on India".<sup>13</sup>

The only paper in a law journal that has ever been published on Zafrulla is by Ijaz Hussain, a Pakistani scholar. This paper appeared in *Archiv Des Völkerrechts* in the year of Zafrulla's death. Hussain, who met Zafrulla in his twilight years, attributed the paucity of Zafrulla's separate and dissenting opinions at the ICJ to his years at the Federal Court of India, where the practice of writing voluminous separate opinions was apparently not common.<sup>14</sup> Accordingly, he argued that "his approach to the case before the Court was pragmatic and lawyer-like rather than philosophical or professorial".<sup>15</sup> Hussain concluded his paper by suggesting that Zafrulla will "be remembered for playing a low-key and conservative role on the Court when many of his colleagues like Alvarez, Tanaka and others preached revolution".<sup>16</sup>

This paper challenges this assumption. There was a reason why Zafrulla was silent. As we shall see, Zafrulla faced opposition to his presence at the ICJ before being elected to the Court, due to his energetic political activity at the UN General Assembly where he had vocally attacked Western imperialism. This reputation would haunt Zafrulla and would cause him difficulties after he was elected to the Court, especially during the *South West Africa* cases in the 1960s when Zafrulla was forced to recuse himself.

This paper argues that Zafrulla's "silence" at the ICJ was deliberate: a form of protest and political calculation. For, in the lead up to Indian independence, Zafrulla had been a faithful servant of the British Empire. Zafrulla was knighted by King George V in 1935—a title he did not renounce after Pakistan became independent in 1947.<sup>17</sup> In many ways, Zafrulla epitomized Macaulay's injunction to the British government in his famous 1835 Minute on Indian Education, in which he implored the Raj to form an elite class of Indians in India: "Indian in blood and colour, but English in taste, in opinions, in morals, and

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funerals of Zafrulla took place at a demonstration in Gujranwala, where the demonstrators called on the government to sack Zafrulla).

12. Burke, *ibid.*, at 143.

13. *Ibid.* (paraphrasing a statement made by Alan Campbell-Johnson, Mountbatten's press attaché).

14. This is to a certain extent true. However, Zafrulla did deliver some of the judgments on the Federal Court which ran to dozens of pages. His Judgment in the case of *Hulus Narain Singh v. The Province of Bihar* ran to almost twenty pages. This case is reported in The Indian Law Reports, Patna Series, Volume XXI, Federal Court (1942) at 521, with Zafrulla's Judgment appearing at 525–44. See also Zafrulla's Judgments in *Hulus Narain Singh v. Deen Mohammed Singh* reported in The Indian Law Reports, Patna Series, Volume XXII, Federal Court, (1943), 428 at 429–33. See further Zafrulla's Judgment in The Indian Law Reports, Patna Series, Vol. XXIII, Federal Court, (1944), 517 at 518–28.

15. Hussain, *supra* note 8 at 483.

16. *Ibid.*, at 492.

17. On the knighthood, see *The London Gazette*, 19 February 1935, 1175. Zafrulla did not generally use the term "Sir" when he was head of the UN General Assembly in the early 1960s. It was not used in the UN Blue Book and does not appear before his name when UN debates are reported. See the interview with Khan in "UN Assembly Head at Home Equally in Orient or West", *The Blade*, Toledo, Ohio (20 September 1962) at 33. However, Zafrulla did use the title "Sir" when he was a judge at the ICJ.

in intellect”.<sup>18</sup> Zafrulla studied law at King’s College London. He spoke English fluently, along with Urdu and Arabic.

Despite Zafrulla’s pro-British credentials, he was not afraid to speak his mind or to challenge “his betters” in the colonial service. As a judge on the Federal Court of India, Zafrulla acquired a reputation for being “the most strident critic of the [British] government from the bench”.<sup>19</sup> As Motilal Setalvad, who later became India’s Attorney-General, recalled of his days appearing as a barrister before the Federal Court:

Zafrulla Khan shone by the clarity of his mind, which enabled him, without any very great knowledge either of general or case-law, to appreciate the niceties of the arguments addressed to him, and he had the indispensable quality in a Judge—strong commonsense.<sup>20</sup>

Zafrulla had publically sparred with Winston Churchill on constitutional proposals to accord India dominion status. Churchill, who resisted calls to dismantle the British Empire, respected Zafrulla for having the ability and courage to question him in a meeting of the Joint Select Committee of both Houses of Parliament which were addressing Indian reforms, and which would result in the adoption of the Government of India Act (1935).<sup>21</sup>

As Pakistan’s first Minister for Foreign Affairs and Commonwealth Relations, Zafrulla supported the cause of self-government for dependent peoples, and attacked the policies of the colonial powers “inside and outside the United Nations on the questions of Indonesia; the Italian colonies of Libya, Eritrea and Somaliland; Morocco and Tunisia; and her support to Egypt and Iran in their disputes with Britain”.<sup>22</sup> Zafrulla’s support for the Iranian government’s decision to nationalize its oil industry, and a speech he gave at a plenary session of the UN General Assembly in which he condemned the colonial powers for quashing nascent self-determination movements and praising the Eastern bloc countries for supporting self-determination in the Third World, particularly upset the British government—which prior to this speech had even considered appointing Zafrulla a Privy Counsellor, an exceptional gesture, which in those days was often conferred on Commonwealth heads of state.<sup>23</sup>

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18. See Thomas Babington MACAULAY, “Education for India” in Philip D. CURTIN, ed., *Imperialism* (London: MacMillan, 1972), 182 at 190.

19. Rohit DE, “Emasculating the Executive: The Federal Court and Civil Liberties in Late Colonial India: 1942–1944” in T. HALLIDAY *et al.*, eds., *Fates of British Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge: Cambridge University Press, 2012), 59 at 74.

20. Motilal C. SETALVAD, *My Life: Law and Other Things* (New Delhi: Universal, 1970, reprinted 2013) at 87.

21. Churchill told Zafrulla that he had given him “the two most difficult hours before this committee”. See *The Reminiscences of Sir Muhammad Zafrulla Khan: Interviews Conducted by Professor Wayne Wilcox and Aisle T. Embree for Columbia University with an Introduction by Professor Pervez Perwazi* (Maple, Ontario: Oriental Publishers, 2004) 53–6.

22. B.C. RASTOGI, “Alignment and Non-Alignment in Pakistan’s Foreign Policy 1947–1960” (1961) 3 *International Studies* 159 at 167.

23. See inward telegram to Commonwealth Relations Office, 28 March; the letter from Gladwyn Jebb to Sir William Strang, 15 December 1951; and the Extract from Sir Mohammed Zafrulla Khan’s Speech in the Plenary Session on Thursday, 13 December 1951, FO 371/101197. TNA. See

The British government may have also been unhappy when they learned that the US government was planning to enter into a security pact with Pakistan (without informing them) by flooding it with American arms and largesse, thus displacing Britain as the main power in the region.<sup>24</sup> Some officials may have wondered, to what extent, if any, Zafrulla, as Pakistan's foreign minister, had a role in engineering this development.<sup>25</sup>

Consequently, in the light of his criticism of British imperialism, Zafrulla's candidacy for election to the ICJ to replace Judge Sir Benegal Rau—who had died in office—caused consternation in the Foreign Office.<sup>26</sup> After much debate, Britain reversed its earlier support for Zafrulla and opposed his nomination in the 1954 election to the ICJ—although officially on the grounds that the prime minister had already publically pledged his support for Dr Pal, the Indian candidate, to Jawaharlal Nehru, the Indian prime minister. According to a confidential telegram sent from the Foreign Office in London to the United Kingdom Delegation to the United Nations in New York, where Zafrulla's candidacy was being considered, Fitzmaurice, as the senior legal adviser, complained that Zafrulla was not a man with “a judicial and balanced approach to things; indeed, rather the reverse”.<sup>27</sup> It was also complained that Zafrulla “will not be amenable to anyone's influence. In fact, we should think that he will be extremely difficult to influence.” In contrast, Dr Pal:

[h]as been a colleague of Professor Lauterpacht's on the International Law Commission and, except perhaps on directly colonial issues, might well be influenced by him or by some of the other better Judges, such as Judges Basdevant of France, Klaestad of Norway and Read of Canada.<sup>28</sup>

It was Fitzmaurice's opinion that:

If there is to be an indifferent Judge on the Court, it is perhaps better, within limits, to have someone who will at least pay some regard to what his betters may think, than someone who will obstinately adhere to his own view in all circumstances.<sup>29</sup>

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also Privy Counsellorships: Suggested Appointment of Sir Zafrulla Khan (1948–9), DO 142/281. TNA.

24. See Anita Inder SINGH, “Divergent World-Views, Divergent Strategies: How America Took Britain's Place in Pakistan, 1947–54” (1992) 6 *Contemporary Record* 474.
25. Unfortunately, Inder Singh does not examine the role of Zafrulla in securing US backing and military support in her paper (*ibid.*), even though he was Pakistan's Foreign Minister from 1947 to 1954.
26. There are substantial records in the Foreign Office files on this election. Zafrulla's candidacy led to more debate in the Foreign Office than any other candidate. See “Candidature of Sir Zafrulla Khan for the International Court of Justice”, Secret, 9 July 1954, DO 35/7124. TNA.
27. See the confidential telegram sent from the Foreign Office in London to the United Kingdom Delegation to the United Nations in New York dated 19 November 1954 signed by Kelvin White on behalf of P.E. Ramsbotham in “Election of the Successor to the Late Sir Benegal Rau as Judge at the ICJ”, 14 December 1954, DO 35/7123. TNA.
28. *Ibid.*, at para. 3.
29. *Ibid.*



The tone and content of Fitzmaurice's strident criticism of Zafrulla surprised several Foreign Office officials who regarded Zafrulla highly.<sup>30</sup> Evidently, something about Zafrulla particularly perturbed Fitzmaurice because Dr Pal had also attacked Western imperialism in his dissentient opinion in the Tokyo Tribunal, and yet he was not subject to the same opprobrium.<sup>31</sup> In any event, Fitzmaurice indicated to the Foreign Office his preference for a European over either Dr Pal or Zafrulla.<sup>32</sup> One can only surmise that the extraordinary venom directed at Zafrulla by Fitzmaurice might have been due to the fact that, unlike Dr Pal, Zafrulla had been close to the British establishment prior to his appointment as Pakistan's Foreign Minister. His speeches in the UN must have therefore really rankled Fitzmaurice—who might have been present for some of them when he visited the UK mission to the UN in New York.

What makes Fitzmaurice's aversion to Zafrulla surprising is that in 1946, the British government had supported Zafrulla's election to the ICJ, although he was defeated in the Security Council.<sup>33</sup> Eric Beckett, who was then the Foreign Office Legal Adviser, had described Zafrulla "from the point of view of mere qualifications and ability, almost certainly head and shoulders above any candidate" from the "Mohammedan and Middle Eastern bloc".<sup>34</sup> As the Foreign Office observed, looking back to the elections in 1946 from the vantage point of 1954:

At the first elections to the International Court in 1946 the UK supported Zafrulla as a candidate for undivided India. He failed by a very narrow margin to secure election partly, it would seem, through mistaken tactics on our part. There is some evidence that he was hurt at this failure and he might well take very much to heart any failure by us to support him on this occasion.<sup>35</sup>

Although there is no evidence that Zafrulla was an Anglophobe (when he was not in Pakistan or New York, London was his main residence), Zafrulla may have been

30. See the surprise expressed in several letters and memos in DO 35/7124. TNA.

31. Britain supported Justice Pal despite his dissentient judgment in the Tokyo Tribunal in which he criticized the US bombings of Hiroshima and Nagasaki, writing that he did not perceive much of a difference between what the German Emperor is alleged to have announced during the First World War in justification of atrocious methods directed by him in the conduct of that war and what is being proclaimed after the Second World War in justification of these inhuman blasts.

He later compared the actions of the Americans in dropping the atom bombs to those of the Nazi leaders before observing that nothing like this could be attributed to the Japanese war leaders. See *International Military Tribunal for the Far East Dissentient Judgment of Justice R. B. Pal*. (Calcutta: Sanyal & Co., 1953), 63–4 and at 621. In the Appendix to this publication there is also a "Special Edition of the Atomic Destruction" accompanied by photographs of Hiroshima and Nagasaki after the bombings. Unsurprisingly, the US government was opposed to Pal because of this dissentient judgment.

32. See letter from C.L.S. Cope, Foreign Office, 23 September 1954, DO 35/7124. TNA.

33. See PREM 8/381. TNA. Zafrulla received sufficient votes in the UN General Assembly (27) but only got four votes in the Security Council. See UN Doc. A/32 (6 February 1946). There is a copy of this document in DO 35/1216. TNA. See also the record in the Indian National Archives 14 (18) PWR 146, International Court—Electing judges—United Nations—to the—(Ministry of External Affairs).

34. "The Election of Judges to the International Court of Justice" (very confidential) by W.E. Beckett, 19 January 1946, DO 35/1216. TNA.

35. See "Candidature of Sir Zafrulla Khan for the International Court of Justice", *supra* note 26 at para. 6(iv).

perceived as an Anglophobe or even as a “turncoat” by some Foreign Office officials, after he became an early champion of decolonization and nationalization in the Third World.

Tellingly, the Foreign Office had expected Dr Pal to win the election to fill the vacancy caused by the untimely death of Judge Rau.<sup>36</sup> They were therefore quite surprised when their candidate lost to Zafrulla. According to the British Foreign Office, “Zafrulla Khan got in through some sort of bargain between the Arabs and the Moslem part of the Asian group with the Latin Americans”.<sup>37</sup> The Foreign Office also noted that this time Zafrulla could count on the support of the US government in the Security Council.<sup>38</sup> Clearly, Zafrulla had learned his lesson from his failure to get elected in 1946: if you want to be successful in United Nations politics, it is American support that counts, not British support. Zafrulla’s early lesson in UN electoral politics would serve him well, as in his later years he would win several more elections to the ICJ and to high office in the UN General Assembly.

Fitzmaurice’s vocal opposition to Zafrulla in the Foreign Office in 1954 did not wane when he was elected to the ICJ in 1960 (and knighted as “Sir Gerald”) to replace Lauterpacht, who died in office, where he found himself sitting on the bench beside Zafrulla. During the second phase of the *South West Africa* cases, Sir Gerald’s opposition to Zafrulla led to pressure on Zafrulla from Sir Percy, the President of the Court, to recuse himself, although, as we shall see, he did not in fact do so. It is entirely possible that during these discussions Zafrulla was informed of Sir Percy’s and Sir Gerald’s opposition by a friendly member of the Court.<sup>39</sup> Accordingly, in knowledge of this opposition, Zafrulla would have been wary of upsetting these judges and may have moderated his remarks and avoided areas of controversy until it was safe to do so. Sir Gerald’s opposition to Zafrulla was also likely personal. He was probably envious that Zafrulla had been elected by his peers to become the Vice President in his first term at the ICJ, and later the President in his second term. Sir Gerald never attained either post despite being a judge at the ICJ for thirteen years.<sup>40</sup> And on the last occasion when he could have become elected President, he lost to Zafrulla.<sup>41</sup>

If, as this paper argues, Zafrulla’s personal struggle at the ICJ should be analogized to the larger political struggle outside the Court, it is likely that Zafrulla would have steered himself away from political controversy, aware that he would be able to place himself in a position of influence at a later stage when the composition of the Court was more “balanced”. In other words, only after Sir Percy had stepped down from the Court in 1966, and after the composition of the Court had been

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36. See the Letter from the United Kingdom Delegation to the United Nations to the Foreign Office, 9 October 1954, DO 35/7124. TNA.

37. *Ibid.*

38. *Ibid.*

39. In my book manuscript, I suggest that these individuals were Judge Jessup and Stanislas Acquarone, the Registrar of the Court. Zafrulla was particularly close to the latter and went on holiday with him.

40. The website of the ICJ lists all the members of the Court and whether they were President or Vice President, online: <<http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2>>.

41. Muhammad Zafrulla KHAN, *Servant of God: A Personal Narrative* (Old Woking: Unwin Brothers, 1983) at 288. See also J.G. MERRILLS, *Judge Sir Gerald Fitzmaurice and the Discipline of International Law* (The Hague: Kluwer Law International, 1998) at 15.

modified to reflect the emerging nations in Africa and Asia would Zafrulla be able to produce the judgment he always wanted to. This he accomplished in the aftermath of the 1966 *South West Africa* Judgment,<sup>42</sup> when he was elected to become President of the ICJ in 1970, a position that enabled him and the majority on the bench to ensure a favourable decision in the legally innovative Advisory Opinion on *Namibia* in 1971. This was despite an attempt by South Africa to have him dismissed from the Court, along with two other judges, for allegedly being “biased” against South Africa.<sup>43</sup> In other words, one reason why Sir Zafrulla acquired a reputation for being the “silent judge” may be due to efforts outside and inside the Court to have him removed. If this was the case then his silence could be attributed to an instinct for self-preservation, or the saying “the less said the better”.

## II. ZAFRULLA’S FORAY INTO INTERNATIONAL POLITICS

Zafrulla was appointed Pakistan’s first foreign minister at a time when international relations were undergoing a major upheaval. The UN was in its infancy. Its membership still reflected the “old world”, although the domination of the Western powers was being increasingly challenged. A Cold War had descended on Europe. In 1945, Germany and Korea were divided. There was revolution in China, Indochina, and Indonesia. In August 1947, British India was partitioned and three months later an attempt was made by the UN to partition Palestine. In North Africa, Moroccans, Algerians, Tunisians, Egyptians, and Libyans were clamouring for independence.<sup>44</sup> In Southern Africa, there was a dispute between the government of South Africa and the governments of India and Pakistan over South Africa’s discriminatory treatment of persons of Indian origin.<sup>45</sup>

The ICJ was not immune to these challenges. Legal disputes soon arose concerning membership in the United Nations, its immunities and privileges, whether the ICJ had replaced its successor, and whether League of Nations Mandates should be converted into UN Trusteeships.<sup>46</sup> In the aftermath of World War I, the League of Nations had conferred Mandates on the victors of the war concerning the territories they captured from Germany and Turkey. After World War II, the Soviet Union and those states that had recently won their independence argued that all Mandates

42. See *South West Africa, Second Phase*, *supra* note 2.

43. The two other judges were Padilla Nervo of Mexico and Morozov of the USSR. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Rep. 16 at 18, para. 9; and Orders No. 1, 2, and 3 of 26 January 1971, [1971] I.C.J. Rep. 1971 at 3–9.

44. Khan, *supra* note 41 at 165–82.

45. See Lorna LLOYD, “A Family Quarrel: The Development of the Dispute over Indians in South Africa” (1991) 34 *The Historical Journal* at 703. For the UN resolution on Treatment of Indians in the Union of South Africa, see *The United Nations and Apartheid, 1948–1994*, with an introduction by Boutros BOUTROS-GHALI, Secretary-General of the United Nations (New York: United Nations Department of Public Information, 1994) at 221. For further background, see Mark MAZOWER, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton, NJ: Princeton University Press, 2009), 171–83 at 178–9.

46. See *Admission of a State to the United Nations*, (Charter, Art. 4), Advisory Opinion, [1948] I.C.J. Rep. 57; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174; *Competence of Assembly Regarding Admission to the United Nations*, Advisory Opinion, [1950] I.C.J. Rep. 4; and the *South West Africa* Advisory Opinions and cases, *supra* note 2.

should be granted independence, and if not, they should be placed under the UN's Trusteeship system. However, Palestine and South West Africa were not transferred to the Trusteeship system.<sup>47</sup>

Although Zafrulla was not involved with the affairs of South West Africa until he became a judge at the ICJ, he was intimately involved in the UN debates on the proposal to partition Palestine in November 1947. There, Zafrulla was given the task of leading the effort to oppose the UN's plans and he was soon to become the darling of the Arab world.

In Zafrulla's mind, self-determination was not a principle but a legal right, which he associated with democracy, which he understood to mean majority rule. This is why Zafrulla opposed the partition of Palestine with such passion and why he opposed minority rule in South Africa. They were both born of British imperialism in which political power was devolved to minority settler communities.<sup>48</sup> In the former case, this was due to the Balfour Declaration (1917), where Britain pledged to devolve political power to the Zionist Organization even though the population was overwhelmingly Palestinian Arab.<sup>49</sup> Similarly, in South Africa, Britain had devolved political power to the White minority as a result of the Union of South Africa Act (1909), even though the population was overwhelmingly Black African.<sup>50</sup>

The situation in South West Africa mirrored that in South Africa; for the former was merely a vassal of the latter. The League of Nations had conferred Mandates on Palestine and South West Africa to Britain. Only in South West Africa did Britain allow South Africa to administer the territory as though it were its own. This is because, unlike Palestine, which was categorized as an A-class Mandate, South West Africa was categorized as a C-class Mandate, in which it would "be best

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47. James CRAWFORD, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006) at 580.
48. See Richard P. STEVENS, "Smuts and Weizmann: A Study in South African-Zionist Cooperation" in Ibrahim ABU-LUGHOD and Baha ABU-LABAN, eds., *Settler Regimes in Africa and the Arab World: The Illusion of Endurance* (Wilmette, IL: Medina University Press International, 1974), 173.
49. A photostatic copy of the original Balfour Declaration is reproduced in John Norton MOORE, ed., *The Arab-Israeli Conflict, Volume III: Documents* (Princeton, NJ: Princeton University Press, 1977) at 885. According to the first British census in Palestine conducted in 1918, only seven percent of the population was Jewish (58,728). The remaining ninety-three percent of the population were Christian (70,429) and Muslim (611,098). See Justin McCARTHY, *The Population of Palestine: Population History and Statistics of the Late Ottoman Period and the Mandate* (New York: Columbia University Press, 1990), Table 2.2 at 26. Even after twenty-five years of the British Mandate (1922–48), when after successive waves of Jewish immigration, the population of Jews in Palestine in proportion to Arabs was altered, Arabs still constituted a majority of the population. In 1947, the population of Palestine was fifty-five percent Arab, and they remained in ownership of eighty percent of the land. See M. Cherif BASSIOUNI, "The 'Middle East': The Misunderstood Conflict" in John Norton MOORE, ed., *The Arab-Israeli Conflict, Volume II: Readings* (Princeton, NJ: Princeton University Press, 1977), 175 at 186. See also the population statistics for Jewish immigration in Victor KATTAN, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891–1949* (London: Pluto Press, 2009) at 11–12.
50. See *South Africa Act, 1909*, 9 Edward VII. Chapter 9. An Act to Constitute the Union of South Africa, 20 September 1909. For academic analysis and historical context, see L.M. THOMPSON, *The Unification of South Africa 1902–1910* (Oxford: Clarendon Press, 1960); Martin LEGASSICK, "British Hegemony and the Origins of Segregation in South Africa, 1901–12" in William BEINART and Saul DUBOW, eds., *Segregation and Apartheid in Twentieth-Century South Africa* (London: Routledge, 1995), at 43; and Bernard Makhosezwe MAGUBANE, *The Making of a Racist State: British Imperialism and the Union of South Africa 1875–1910* (Trenton: Africa World Press, 1996).

administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population”.<sup>51</sup> In contrast, Palestine was situated in West Asia, where it had been a part of the Ottoman Empire for four centuries. As an A-class Mandate, its existence as an independent nation had been “provisionally recognized” by the League of Nations Covenant “subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone”.<sup>52</sup> Despite their different categorizations, in both Palestine and South West Africa there applied “the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant”.<sup>53</sup>

In the interwar years, the members of the League only paid lip-service to the wording employed in Article 22 of the Covenant of the League of Nations. They had little desire to grant the Mandates, let alone independence, to their colonies.<sup>54</sup> The only A-class Mandate that was granted independence prior to World War II was Mesopotamia (Iraq) in 1933. It was only when a new world war became inevitable that Britain and France realized that they needed Arab support to defeat the Axis powers. They slowly came around to the realization that in order to secure such support they would have to grant the Mandates independence. Thus, Lebanon and Syria became independent in 1944 and Transjordan became independent in 1946.<sup>55</sup>

In Palestine, the situation was more complicated because of the policy enunciated by the British government in its 1917 Balfour Declaration, which led to the mass immigration of Jews into Palestine fleeing persecution in Nazi-occupied Europe. After the extermination camps were discovered, the survivors were encouraged to immigrate to Palestine, and the UN General Assembly—the composition of which in 1947 still reflected the interests of the colonial powers—proposed putting to vote a plan to recommend Palestine’s partition in order to establish a Jewish state in a portion of the territory, alongside an Arab state in the remainder of the territory.<sup>56</sup> An alternative plan that sought to confer independence on Palestine as a single territorial unit, which had been proposed by Subcommittee 2 where Zafrulla was the rapporteur, was defeated in committee and not put to vote in the Assembly.<sup>57</sup>

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51. See art. 22 of the Covenant of the League of Nations, (1920) 1 League of Nations Official Journal 9.

52. *Ibid.*

53. *Ibid.*

54. In Palestine, the British army put down a three-year revolt in which the Palestinian Arabs sought independence from Britain. By 1939, approximately 5,000 Palestinian Arabs had been killed, 10,000 were wounded, and 5,670 were detained. This effectively meant that over ten percent of the Palestine adult male Arab population had been killed, wounded, imprisoned, or exiled. See Appendix IV in Walid KHALIDI, ed., *From Haven to Conquest: Readings in Zionism and the Palestine Problem Until 1948* (Washington, DC: Institute of Palestine Studies, 1987) at 846–9.

55. Although due to the Soviet veto, Jordan did not join the UN until 1955.

56. *Ad Hoc Committee on the Palestinian Question*, Report of Sub-Committee 1, UN Doc. A/AC.14/34 (19 November 1947).

57. *Ad Hoc Committee on the Palestinian Question*, Report of Sub-Committee 2, UN Doc. A/AC.14/32 (11 November 1947). See also *Ad Hoc Committee on the Palestinian Question*, Summary Records of the Thirty-First and Thirty-Second Meetings, UN Docs. A/AC.14/SR.31 and SR.32 (24 to 25 November 1947). For academic criticism of the composition of the subcommittees, see Nabil

Zafrulla's analysis of the problems posed by the partition of Palestine formed the "chief inspiration" for the report that was produced by Subcommittee 2.<sup>58</sup>

In November 1947, the UN General Assembly convened to consider the proposal to partition Palestine. The debate was extremely acrimonious and lasted three days.<sup>59</sup> The six Arab states that had attained independence by 1947 (Egypt, Lebanon, Iraq, Syria, Saudi Arabia, and Yemen) argued that the UN Partition Plan was illegal, and an attempt was made to refer a question to the ICJ challenging the authority of the UN General Assembly to partition Palestine when the majority of its inhabitants opposed partition.<sup>60</sup>

The Arab states that were independent in 1947 and who were present in the UN General Assembly debate on Palestine did not have an articulate spokesman. They embraced Zafrulla who effectively became the spokesperson for the Arab cause in Palestine. In his capacity as Pakistan's first foreign minister and its representative to the UN, Zafrulla questioned whether the vote would be a fair one due to allegations of vote rigging, and told the world's media that "[t]he United Nations is today on trial".<sup>61</sup> Zafrulla reminded the UN General Assembly that pledges had been given to the Arabs during World War I concerning Palestine, and that if there were any doubts concerning the wording and legality of those pledges they could be resolved in seeking the answers to these questions from the ICJ.<sup>62</sup> He made the same point with regard to the Balfour Declaration, and suggested that a prior pledge that was inconsistent with a later pledge should be resolved by the ICJ. He then dismissed the argument that Palestine alone should be a refuge for Jewish survivors. He observed that the states which most desired this solution refused to allow the survivors access to their own countries.<sup>63</sup>

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ELARABY, "Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements" (1968) 33 *Law and Contemporary Problems* at 97.

58. As observed by T.J. FRASER, *Partition in Ireland, India, and Palestine: Theory and Practice* (London: MacMillan, 1984) at 176.
59. 26, 28, and 29 November 1947.
60. See (1947–48) *Yearbook of the United Nations* at 241.
61. See the verbatim debate of the Hundred and Twenty-Sixth Plenary Meeting, UN Doc. A/PV.126 (28 November 1947) where Zafrulla gave the opening address.
62. Zafrulla was referring to the 1915 Hussein-McMahon correspondence between the British High Commissioner in Cairo and the Sherif of Mecca. See Kattan, *supra* note 49 at 98–116.
63. See Kattan, *supra* note 49 at 256. Palestine had admitted 287,063 Jewish refugees between the years 1933 and 1946, and a further 118,378 between 1920 and 1932. This was despite Palestine's small size and limited resources, and despite the fact that the Palestinian Arabs were in open conflict with the Zionist movement over Palestine's political destiny. In contrast, the US, despite its size and resources, had only admitted 188,648 Jewish refugees between 1933 and 1946. Likewise, the UK only admitted 65,000 Jewish refugees, Canada 12,000 Jewish refugees, Australia 8,500 Jewish refugees, and South Africa 8,000 Jewish refugees. See *Ad Hoc Committee on the Palestinian Question*, Report of Subcommittee 2, *supra* note 57 at 28, para. 44. When survivors of the Holocaust were asked for their preferences as regards the countries in which they would like to seek asylum and refuge, Palestine was often their last choice. Most Austrian and German Jewish refugees, for instance, preferred to stay in Europe or go to the US. These were the findings contained in a report submitted by Sir Herbert Emerson, the High Commissioner for Refugees to the League of Nations at its final session in Geneva in April 1946. See *International Assistance to Refugees: Report Submitted by Sir Herbert Emerson, G.C.I.E., K.C.S.I., C.B.E., High Commissioner for Refugees, Annex 20, 11 March 1946* (presented at Geneva session in April 1946), in *League of Nations, Official Journal, Special Supplement No. 194, Records of the Twentieth (Conclusion) and Twenty-First Ordinary Sessions of the Assembly, Text of*

Zafrulla then made an argument that would bear an uncanny resemblance to the argument that would later be advanced by the ICJ in its *Namibia* Advisory Opinion in 1971. Zafrulla drew attention to Paragraph 4 of Article 22 of the Covenant of the League of Nations, which provided that the communities inhabiting West Asia that formerly belonged to the Turkish Empire “have reached a stage of development where their existence as independent nations can be provisionally recognized”. The only proviso was that this independence was “subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone”. As Zafrulla explained to the General Assembly, Palestine was now able to “stand alone”: “That stage of rendering administrative advice and assistance having been concluded, the legal position, is that Palestine, whose provisional independence has been recognized juridically, will be from that date independent.”<sup>64</sup> Great Britain, the Mandatory Power, had already conceded independence by referring the Palestine Question to the UN in 1946, and the United Nations Special Committee for Palestine (UNSCOP) had reached the conclusion that Palestine must become an independent state. The only problem was whether Palestine should become independent in a single unitary state or whether it should be partitioned, as in the case of British India. The European countries favoured partition, whereas the former colonies opposed partition. In the end, partition was proposed, as the imperial powers still held sway in the UN General Assembly.<sup>65</sup> It was not until 1960 that the UN General Assembly would pass its resolution on the granting of independence to colonial countries and peoples, which precluded partition as a method of decolonization.<sup>66</sup>

Coming from a country that had been recently partitioned by the British government, Zafrulla had a unique insight into the politics of partition. And this was an issue on which he had the support of India, which would also vote—along with Pakistan—against the UN’s proposal to partition Palestine.<sup>67</sup> For despite the bitter legacy of partition, “South Asians”, be they Indians or Pakistanis (or after 1971, Bangladeshis), had a shared history of European colonial rule, where they had been treated as second-class citizens or worse.<sup>68</sup> Zafrulla came from a generation of

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the Debates at the Plenary Meetings and Minutes of the First and Second Committees, Final Assembly, Geneva, 1946, 228–35 at 233.

64. See Zafrulla’s speech at the Hundred and Twenty-Sixth Plenary Meeting, *supra* note 61.

65. The UN Partition Plan was adopted by UN General Assembly Res. 181 (II), 29 November 1947.

66. See UN General Assembly Res. 1514, 14 December 1960. Para. 6 provides: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”

67. The states that voted against partition included Afghanistan, Cuba, Egypt, Greece, India, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria, Turkey, and Yemen.

68. In his autobiography, Jawaharlal Nehru recalls the following memories from his childhood, which bear an uncanny resemblance to the way in which non-Europeans were treated in South Africa:

It was a notorious fact that whenever an Englishman killed an Indian he was acquitted by a jury of his own countrymen. In railway trains compartments were reserved for Europeans, and, however crowded the train might be and they used to be terribly crowded no Indian was allowed to travel in them, even though they were empty. Even an unreserved compartment would be taken possession of by an Englishman, and he would not allow any Indian to enter it. Benches and chairs were also reserved for Europeans in public parks and other places.

See Jawaharlal NEHRU, *An Autobiography* (Delhi: Penguin Books India, 2004 [1936]) at 7.

Indians who had struggled for independence from British rule and who had closely followed developments in Palestine.<sup>69</sup> In their minds, since the Arabs formed the majority of the population of Palestine and continued to own the vast majority of the land, it was only right that the identity of Palestine after independence remain Arab.<sup>70</sup>

Zafrulla's espousal of the Palestinian cause, and before then of the Pakistan cause before the Radcliffe Boundary Commission,<sup>71</sup> meant that he had to become adept at reading population statistics, and to familiarize himself with the League of Nations mandates system. He had to make the argument that self-determination meant majority rule; that the future of Palestine belonged to the majority of its people, and not to the minority settler community. He had to interpret the Covenant of the League of Nations creatively. He had to make an argument that international law did not remain stagnant, so that it would always accord with the interests of the colonial powers, but that law was evolutionary. Zafrulla's support for majority rule in 1947 was the same argument that would be employed by the African National Congress (ANC) in South Africa and the South West Africa's People's Organization in South West Africa (SWAPO). And Zafrulla's argument that international law had to take into account changes in the composition of the international community after decolonization was something that would form the basis for the ICJ's 1971 Opinion on *Namibia*. In other words, a strong case can be made that Zafrulla's early experience with the Palestine issue influenced his approach to the dispute over South West Africa.

### III. ZAFRULLA'S FIRST TERM AT THE ICJ

Elected in 1954, Zafrulla was a judge at the ICJ until the end of his term in 1961. In that year, none of the outgoing judges was re-elected for a second term.<sup>72</sup> It was during Zafrulla's first term at the Court that Sir Percy would also be elected judge. Shortly after Sir Percy's election, Judge Klaestad was elected President, whilst Zafrulla was elected Vice President. In his autobiography, Zafrulla tells us that he

69. As Jawaharlal Nehru put it, the Zionists "preferred to take sides with the foreign ruling power, and have thus helped it to keep back freedom from the majority of the people". See Jawaharlal NEHRU, *Glimpses of World History* (New Delhi: Penguin, 2004) at 764–5. In a similar vein, Mahatma Gandhi complained that "Palestine belongs to the Arabs in the same sense that England belongs to the English or France to the French". "It would be a crime against humanity", he added, "to reduce the proud Arabs so that Palestine can be restored to the Jews partly or wholly as their national home." See Mahatma K. GANDHI, "The Jews in Palestine" *Harijan* (26 November 1938).

70. As UNSCOP admitted in 1947, "the Arab population is and will continue to be the numerically preponderant population in Palestine". Despite the numerous attempts employed by the Zionist Organization to acquire Arab lands through various forms of purchase, as late as 1946, eighty-five percent of the land held in private ownership was still Palestinian. See Official Records of the Second Session of the General Assembly, Supplement No. 11, United Nations Special Committee on Palestine, Report to the General Assembly, Volume 1, Lake Success, New York, 1947, UN Doc. A/364 (3 September 1947), chapter II at paras. 162 and 164.

71. On the Radcliffe Boundary Commission, see the arguments of the Muslim League by Sir Muhammad Zafrulla Khan reproduced in *The Partition of the Punjab 1947: A Compilation of Official Documents* (Lahore: National Documentation Centre, 1983) at 252. For academic analysis, see Lucy P. CHESTER, *Borders and Conflict in South Asia: The Radcliffe Boundary Commission and the Partition of the Punjab* (Manchester: Manchester University Press, 2009).

72. Khan, *supra* note 41 at 231.



played a very active role in his first term at the Court, and he drafted many of the judgments when Klaestad was President of the Court.<sup>73</sup>

It is noticeable that the two cases in which Zafrulla participated as judge, and which he did not mention at all in the English translation of his autobiography, were the two Advisory Opinions pertaining to South West Africa.<sup>74</sup> (However, according to the Urdu version of Zafrulla's autobiography, he mentions that he drafted the Advisory Opinion in the *Admissibility of Hearings* along with Judge Read of Canada.<sup>75</sup>) The omission of these cases from the English translation of his autobiography may have been because he did not think that the cases were particularly memorable or of interest to English readers. Nonetheless, their omission is curious in the light of what would later transpire in the *South West Africa* cases.

To recap, South West Africa was a German colony prior to World War I. After Germany's defeat in that war, the League of Nations conferred on "His Britannic Majesty" a Mandate over South West Africa, "to be exercised on his behalf by the Government of the Union of South Africa to administer the territory".<sup>76</sup> The Mandate for South West Africa was categorized as "C-class". In making it a C-class Mandate, the League of Nations considered that South West Africa needed extra tutelage of an undetermined duration until it would be ready for self-government. As part of its responsibilities as the Mandatory Power, South Africa was required to furnish annual reports to the Council of the League of Nations.<sup>77</sup> However, following World War II, after the League of Nations had been dissolved, South Africa refused to place South West Africa under the new UN Trusteeship system on the basis that the League had been dissolved and that it did not have any legal obligations to the new organization. Instead, it wanted to continue administering South West Africa in "the spirit of the Mandate", which would have enabled South Africa to administer South West Africa as it saw fit irrespective of what the UN General Assembly might have to say about human rights. Accordingly, South Africa refused to furnish the UN General Assembly with annual reports.

In this connection, it must be remembered that after the National Party assumed power in 1948, South Africa began officially applying its apartheid policy, although

73. According to Ijaz Hussain, some of the cases whose decisions were drafted by Zafrulla in this period included: Advisory Opinion in the *Admissibility of Hearings* (along with Judge Read of Canada); Judgment in *Certain Norwegian Loans* (along with Judge Winiarski of Poland); Judgments in *The Right of Passage over Indian Territory* (preliminary objections, along with Judge Lauterpacht of Great Britain; Merits (along with Judge Basdevant); Judgment in *The Sovereignty over Certain Frontier Land* (along with Judge Sir Percy Spender of Australia); and Judgment in *The Arbitral Award Made by the King of Spain on 23 December 1906* (along with Judge Wellington Koo of China). See Hussain, *supra* note 8 at 484. Hussain cites from the Urdu version of Zafrulla's autobiography. The English translation does not mention his role in these cases.

74. *South-West Africa—Voting Procedure*, Advisory Opinion of 7 June 1955, [1955] I.C.J. Rep. 67. *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion of 1 June 1956, [1956] I.C.J. Rep. 23 (voting with the majority in both cases).

75. Hussain, *supra* note 8 at 484.

76. For the text of the Mandate for South West Africa, see Dugard, *supra* note 5 at 72.

77. Para. 7 of art. 22 of the Covenant of the League of Nations provided that: "In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge."

racial segregation in South Africa existed long before then.<sup>78</sup> South Africa's discriminatory policies led to a dispute between South Africa and India, and Pakistan, as soon as the latter states became independent, over the treatment of persons of Indian origin in South Africa.<sup>79</sup> The Indian and Pakistani governments took a particularly vocal stance against apartheid in the UN General Assembly.<sup>80</sup> Zafrulla participated in the debates on the treatment of persons of Indian and Pakistani origin in South Africa, although he did not speak about the situation in South West Africa.<sup>81</sup> Nonetheless, in 1946, the Indian government (when Zafrulla was a judge on the Federal Court) had criticized South Africa's plans to incorporate South West Africa into the Union of South Africa on the grounds that annexation was contrary to the conception of Mandates and Trusteeship; that sovereignty resides in the people concerned and their wishes and interests were paramount; that the proposed consultation with the people of South West Africa was a farce; that the proper course of action would be for South Africa to first place South West Africa under Trusteeship and then present its case; and that, in any event, South Africa promoted racial prejudice, and had not shown any sympathy for the "weaker races", which India found particularly objectionable.<sup>82</sup>

South Africa's curt dismissal of India's concerns about its treatment of persons of Indian origin in South Africa, its plans to annex South West Africa, and its refusal to recognize the competence of the UN General Assembly, soon led to a dispute between South Africa and the UN. Accordingly, in an effort to forestall the incorporation of South West Africa into the Union of South Africa, in 1949 the UN General Assembly asked the ICJ for an Advisory Opinion on a number of questions relating to the status of South West Africa: whether South Africa still had legal obligations as the Mandatory Power towards South West Africa despite the dissolution of the League of Nations; whether the UN Trusteeship system was applicable to South West Africa; and whether South Africa had the competence to modify the status of South West Africa.<sup>83</sup>

In 1950, the Court concluded that the UN General Assembly:

is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it.<sup>84</sup>

The Court also indicated that South Africa could not modify the status of South West Africa (i.e. incorporate South West Africa into the Union of South Africa) without

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78. See Ian LOVELAND, *By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa 1855–1960* (Oxford: Hart, 1999) at 9, 19–20, 36–7, 70–1, and 115.

79. See Lloyd, *supra* note 45, and Mazower, *supra* note 45.

80. See K. Sarwar HASAN, *Pakistan and the United Nations* (New York: Manhattan Publishing Company, 1960) at 212–22.

81. *Ibid.*, at 215–16.

82. Union of South Africa—South West Africa—United Nations. Proposal of the Government of the—to incorporate—in the Union. File No. 6(12)-CC/46, 1946. Indian National Archives.

83. See UN General Assembly Res. 338 (IV), 6 December 1949.

84. *International Status of South-West Africa*, *supra* note 2 at 137.

the consent of the UN General Assembly.<sup>85</sup> In the process of reaching this conclusion, the Court explained that South Africa “is under an obligation to accept the compulsory jurisdiction of the Court”.<sup>86</sup> It is worth stressing that the ICJ was of the view that South Africa was under an obligation to accept the compulsory jurisdiction of the Court in its 1950 Advisory Opinion because the same Court (albeit with a different composition) effectively reached the opposite conclusion in 1966.

The problem with the Advisory Opinion, from the perspective of those states that sought to challenge South Africa’s retention of South West Africa, was that although the Opinion was accepted and acted on by the UN General Assembly, it was considered ineffective, because South Africa refused to accept its validity and refused to participate in the special supervisory machinery which the UN had devised to oversee South Africa’s administration of the territory. Accordingly, in the light of South Africa’s refusal to abide by the ICJ’s 1950 Opinion, two further Advisory Opinions were delivered by the Court in 1955 and 1956, at the request of the General Assembly. In the 1955 Opinion, the ICJ approved of the voting procedure that had been adopted by the General Assembly on questions relating to reports and petitions concerning South West Africa. And in its 1956 Opinion, the Court held that it would not be inconsistent with its 1950 Opinion for the General Assembly to authorize a procedure for the grant of oral hearings by the Committee on South West Africa to petitioners.<sup>87</sup>

Although these two Advisory Opinions were hardly momentous legal moments, Zafrulla’s omission of these cases in the English translation of his autobiography is curious in the light of his purported recusal from the second phase of the *South West Africa* cases in 1965 and of his role as President of the Court when it delivered its Advisory Opinion on *Namibia* in 1971. Indeed, at the heart of these Advisory Opinions were not questions about procedure. The central unspoken issue in all these cases was really apartheid. The UN General Assembly was concerned that South Africa might alter the status of South West Africa without its consent, thereby extending its racially discriminatory laws there, which indeed it did.

#### IV. THE FIRST PHASE OF THE *SOUTH WEST AFRICA* CASES AND THE REACTION TO ZAFRULLA’S APPOINTMENT AS JUDGE *AD HOC*

Due to the failure of the 1955 and 1956 Advisory Opinions to amplify the 1950 Advisory Opinion to spur concrete political developments, in 1957 the General Assembly approached the Committee on South West Africa to investigate the possibility of a contentious action against South Africa.<sup>88</sup> On 11 May 1960, Ambassador George Padmore of Liberia requested the Honourable Ernest A. Gross of the New York Bar to

85. *Ibid.*, at 143.

86. *Ibid.*, at 138.

87. *South-West Africa—Voting Procedure*, *supra* note 2 at 78. *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, *supra* note 2 at 32.

88. Anthony A. D’AMATO, “Legal and Political Strategies of the South West Africa Litigation” (1967) 4 *Law in Transition Quarterly* 8 at 16.

prepare a memorandum of law concerning the problems involved in bringing a contentious proceeding against South Africa.<sup>89</sup> Gross recommended bringing a contentious case against South Africa, and heeding his advice, the Second Conference of Independent African States met at Addis Ababa in June 1960 and resolved to submit the question of South West Africa to the ICJ as a contentious case under Article 7(2) of the Mandate of South West Africa.<sup>90</sup>

As the ICJ concluded in its 1950 Advisory Opinion, the reference to the Permanent Court of International Justice in Article 14 of the Covenant of the League of Nations was “to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court”.<sup>91</sup> Apart from South Africa, Ethiopia and Liberia were the only two sub-Saharan states that had been members of the League of Nations. Accordingly, Ethiopia and Liberia each instituted a separate application at the Court, but because the two applications were in identical terms, the Court, by a procedural order, joined them together.<sup>92</sup>

While apartheid in South Africa itself could not be tackled before the ICJ, for lack of any basis of jurisdiction, South Africa’s racial policies in South West Africa, which was a former League of Nations Mandate could, in the views of the applicant states, be addressed. Their argument was based on the ICJ’s reasoning in its 1950 Advisory Opinion on *South West Africa* and Article 17(2) of the Mandate of South West Africa. In the event that the applicants were able to persuade the ICJ that it had jurisdiction to examine the claims of Ethiopia and Liberia against South Africa, a favourable decision on the merits would indirectly provide judicial condemnation of the racial practices within South Africa itself. This is because an authoritative judicial determination by the principal judicial organ of the United Nations that apartheid was an unacceptable and unlawful form of official racial policy in South West Africa would also provide the basis for an additional complaint that if apartheid was unlawful in South West Africa it must equally be unlawful in South Africa.

It must be remembered that, in 1960, when Ethiopia and Liberia brought the case to Court, the illegality of racial discrimination under customary international law was not clear.<sup>93</sup> In the 1960s, the struggle against racial discrimination was linked to

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89. Cheng, *supra* note 4 at 183.

90. Art. 7(2) provides:

The Mandatory agrees that, if any dispute whatsoever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

91. *International Status of South-West Africa*, *supra* note 2 at 143.

92. See *South West Africa Cases (Ethiopia v. Union of South Africa)*, Order of 20 May 1961, [1961] I.C.J. Rep. 13.

93. Although art. 1(2) UN Charter makes reference to “respect for the principle of equal rights and self-determination of peoples”, and although art. 7 of the Universal Declaration of Human Rights (UDHR) has a provision on non-discrimination, the exact contents of these provisions were still unclear in the 1960s. Moreover, it was still questioned whether and to what extent the UDHR reflected customary international law. The applicants argued that there had evolved over the years a norm of non-discrimination as a result of international undertakings in the form of principles, conventions, declarations, judicial decisions, state practice, and general principles of law as recognized in various

the struggle for self-determination and was associated by many governments in the Western world with Communism.<sup>94</sup> In 1960, Nelson Mandela was on trial in South Africa with another 156 people for high treason for opposing racial discrimination.<sup>95</sup> On 18 April 1960, the South African government declared the ANC an illegal organization under the Suppression of Communism Act.<sup>96</sup> In the previous year, the Cuban revolution had brought an end to racial discrimination in Cuba—an event that influenced the young Mandela, who admitted to reading “works by and about Che Guevara, Mao Tse-tung, [and] Fidel Castro”.<sup>97</sup> This was an era when Communism, decolonization, and revolution were in vogue. Moreover, as Mandela recalled, “[i]n 1960, seventeen former colonies in Africa were scheduled to become independent states. In February, British Prime Minister Harold MacMillan visited South Africa and gave a speech before Parliament in which he talked of ‘winds of change’ sweeping Africa.”<sup>98</sup> On 21 March 1960, the South African police shot dead sixty-nine African protestors in Sharpeville—which the South African government insisted was “the result of a Communist conspiracy”.<sup>99</sup> In 1961, in an all-White referendum, South Africans voted to end their ties with the British Commonwealth by changing South Africa’s status from a union to a republic.<sup>100</sup> After Mandela was found not guilty of treason, he was rearrested when he called on Black South Africans “to strike against the unilateral declaration of a Republic by the white government without any consultation with the black majority of South Africans”.<sup>101</sup>

It was in this context that Mr Gross approached Zafrulla—who had already acquired a reputation in the UN for vocally challenging imperialism and who had just returned from a series of trips to Africa and the USSR—to see if he could sit as

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constitutional and statutory provisions. In the end the Court never addressed the argument as to whether a norm of non-discrimination had emerged in customary international law, although Judge Tanaka did address the issue in his Dissenting Opinion. See Warwick McKEAN, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983), 260–77. In the early 1960s, the principles which later found expression in the International Convention on the Elimination of Racial Discrimination were still developing; they were most likely the *lex ferenda*, rather than the *lex lata*. Moreover, Australia did not ratify this convention until 1975, the US until 1994, and South Africa until 1998.

94. For instance, photographs from the early 1960s show demonstrators in the US holding banners declaring that “race mixing is Communism”. On the Cold War politics of racial discrimination, see Paul Gordon LAUREN, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (Boulder, CO: Westview Press, 1996), 218–21. See also Mary L. DUDZIAK, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, NJ: Princeton University Press, 2011).
95. The treason trial lasted until 1961. For Mandela’s recollections and the political context of the trial, see Nelson MANDELA, *The Autobiography of Nelson Mandela: Long Walk to Freedom* (New York: Back Bay Books, 2013 edn., first published 1994) at 307–60. See also, L.J. BLOM-COOPER, “The South African Treason Trial: R. v Adams and Others” (1959) 8 *International and Comparative Law Quarterly* 59.
96. Mandela, *ibid.*, at 335.
97. *Ibid.*, at 377.
98. *Ibid.*, at 326.
99. *Ibid.*, at 328.
100. *Ibid.*, at 356.
101. See Joel JOFFE, *The State vs. Nelson Mandela: The Trial that Changed South Africa* (Oxford: Oneworld Publications, 2007) at 13.

Judge *ad hoc* for the applicants.<sup>102</sup> In 1961, after Zafrulla and his colleagues were not re-elected to the Court, Zafrulla was appointed Pakistan's Permanent Representative to the UN. On 20 September 1962, Zafrulla was elected President of the UN General Assembly. In a secret ballot, he defeated the USSR's favoured candidate Professor G.P. Malalasekera of Ceylon by seventy-two votes to twenty-seven.<sup>103</sup>

The 1962 UN General Assembly was a very different place to the UN General Assembly that Zafrulla had addressed when he was Pakistan's foreign minister in the late 1940s and early 1950s. In December 1960, the UN General Assembly had passed the Declaration on the granting of independence to colonial countries and peoples, in which colonialism was associated with "alien subjugation, domination and exploitation", which "constitutes a denial of fundamental human rights".<sup>104</sup> In the same resolution, the UN General Assembly also declared that colonialism is "contrary to the Charter of the United Nations".<sup>105</sup> The USSR had placed this Declaration on the agenda of the UN General Assembly.<sup>106</sup>

Gross's decision to approach Zafrulla sparked a chain of events that led Sir Percy to pressure Zafrulla from sitting, not just as Judge *ad hoc* in the first phase of the *South West Africa* cases, but also as a permanent member of the Court after he had been elected judge for a nine-year term just prior to the second phase of the *South West Africa* cases. The significance of Gross's decision to approach Zafrulla to ask if he could sit as Judge *ad hoc* in the first phase of the *South West Africa* cases is that it further tainted Sir Percy's already negative perception of Zafrulla's impartiality on all matters concerning colonialism when Zafrulla was elected to the Court for the second time in 1963.

Zafrulla and Sir Percy had already clashed on the question of Morocco in a debate that had taken place in the UN General Assembly in 1953.<sup>107</sup> In that debate, Zafrulla supported Morocco's struggle for independence from French rule, whereas Sir Percy was aligned with the European colonial powers. During the debate, Sir Percy singled out Zafrulla for specific censure due to a comment Zafrulla had made criticizing Australia's policy of aligning itself with the European colonial powers, many of whom were then thwarting self-determination in the Third World.<sup>108</sup> In subsequent debates at the UN, Australia refused to accept the competence of the UN General Assembly or of a Good Office Commission to study the racial situation in South Africa. As David Lowe explains:

Fear of interference with Australia's restrictive immigration policy was never far from the surface of discussions on South Africa. And the Australians were no less obstinate in

102. On Zafrulla's trips to Africa and the USSR, see Khan, *supra* note 41 at 247–72. Zafrulla does not mention that he had been approached to see if he could sit as Judge *ad hoc* in the first phase of the *South West Africa* cases in his autobiography.

103. See "Zafrulla Khan Is Elected President of the UN" *The Straits Times* (20 September 1962) at 2.

104. UN General Assembly Res. 1514 (XV), 14 December 1960.

105. *Ibid.*

106. See Bill BOWRING, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Abingdon: Routledge, 2013) at 88.

107. The Question of Morocco: Report of the First Committee (A/2526), 455th Plenary Meeting, 3 November 1953, UN General Assembly, Eighth Session, Official Records, UN Doc. A/PV.455, at 262.

108. *Ibid.*, at 263–4.

denying the legitimacy of international protest and in defending their administration of Papua New Guinea and Nauru in the Fourth Committee and from Trusteeship Council reports.<sup>109</sup>

According to W.J. Hudson, there “was virtually no Australian criticism of South African conduct towards the United Nations or the territory [of South-West Africa]”. Instead, “there was constant criticism of South Africa’s opponents and their methods”.<sup>110</sup>

After Sir Percy had been elected to the ICJ in 1958, he again found himself in conflict with Zafrulla in *The Right of Passage* case (1960).<sup>111</sup> This case was ostensibly about whether India had committed a breach of an international obligation when it prevented the passage of military forces, arms, ammunition, stores, civil personnel, nationals, goods, and merchandise between Daman, one of Portugal’s territories on the west coast of India, and its two enclaves of Dadar and Nagar Haveli in the Indian hinterland, across Indian territory, north of Bombay. In reality, the case was about colonialism. The colonial context was Portugal’s retention of Goa and a number of disconnected enclaves on the Indian subcontinent, and the government of India’s desire to obtain and incorporate them into the Union of India.

Zafrulla and Sir Percy would have been aware of the parallels between India’s policy on the subcontinent and what South Africa was trying to accomplish by incorporating South West Africa, but would have taken opposing views due to their differing approaches to the issue of colonialism. Sir Percy would have probably considered India’s actions in Dadar and Nagar Haveli and its stated intention to incorporate them into the Republic of India (India became a Republic in 1950) as analogous to South Africa’s desire to incorporate South West Africa. In contrast, Zafrulla would probably have taken the stance that India’s actions were not analogous to South Africa’s because it was in pursuance of a legitimate goal, namely, the eradication of colonialism, whereas South Africa’s policies in South West Africa were in furtherance of colonialism. It was therefore a question of perspective.

In *The Right of Passage* case, Zafrulla was Vice President of the Court and he had been elected the senior member of the drafting committee.<sup>112</sup> The Court was evenly split on the issue of whether India had committed a breach of an international obligation when it prevented Portugal from transporting its armed forces etc. across Indian territory. In his autobiography, Zafrulla tells us that he managed to persuade Judge Winiarski—who had asked for more time to make up his mind—to vote with those judges who believed that India had not committed

109. David LOWE, “Australia at the United Nations in the 1950s: The Paradox of Empire” (1997) 51 *Australian Journal of International Affairs* 171 at 175–6.

110. W.J. HUDSON, *Australia and the Colonial Question at the United Nations* (Sydney: Sydney University Press, 1970) at 95.

111. *Case Concerning Right of Passage Over Indian Territory (Merits)*, Judgment of 12 April 1960, [1960] I.C.J. Rep. 6.

112. Khan, *supra* note 41 at 230.

a breach of an international obligation. With Winiarski's support, the Court decided by eight votes to seven that no breach had been committed by India in this respect.<sup>113</sup>

In contrast, in his Dissenting Opinion, Sir Percy argued that Portugal had acquired a right of passage in respect of its armed forces, and that "there was a correlative obligation on India not to prevent the exercise of that passage".<sup>114</sup> Sir Percy devoted four pages of his Dissenting Opinion to statements by the government of India in which it sought Portugal's assent to the integration of her territories within the Republic of India.<sup>115</sup> He concluded "that the dominant purpose of India ... was to exclude Portuguese thenceforth from any further access to the enclaves".<sup>116</sup> In other words, India was making Portugal's continued presence in India unsustainable in an effort aimed at incorporating the territories into India so as to end colonialism in the Indian subcontinent. Presumably, Sir Percy was aware that the Court was evenly split, and may even have been aware of Zafrulla's discussion with Winiarski, and taken umbrage at Zafrulla's influence. If so, it was to prove a harbinger of things to come with respect to the *South West Africa* cases. This was especially so after India chose to forcibly incorporate the Portuguese colony of Goa into the Republic of India by recourse to armed force only a year after the ICJ gave Judgment in *The Right of Passage* case. A proposal that the Security Council deplore the Indian use of force and call for the withdrawal of Indian forces received seven affirmative votes, against four negative votes, but was defeated by the negative vote of the USSR.<sup>117</sup>

In contrast to Zafrulla's vocal support for the decolonization movement at the United Nations, and more surreptitiously at the ICJ in *The Right of Passage* case, Sir Percy had been made Knight Commander of the Order of the Bath by Queen Elizabeth II in her very first honours list, prior to his move to The Hague, when Sir Percy was Australia's ambassador to the US.<sup>118</sup> According to David Lowe, Sir Percy's biographer, Lord and Lady Spender "felt very special, and distinctively part of a British Commonwealth, when royalty made itself felt in America".<sup>119</sup> In the 1950s, the US still enforced racial segregation in many of its states, which caused the US administration acute embarrassment when African diplomats were "prevented from obtaining accommodation, ordering meals, or securing transportation in the land of the free".<sup>120</sup> Moreover, Sir Percy's period as Australia's ambassador to the US coincided with the hysteria of the "McCarthy era", when Communism

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113. See *Right of Passage* case, *supra* note 111 at 46. Judge Winiarski's Joint Dissenting Opinion with Judge Badawi did not concern this particular point.

114. See Dissenting Opinion of Judge Sir Percy Spender, *ibid.*, 97 at 110.

115. *Ibid.*, at 110–14.

116. *Ibid.*, at 114–15.

117. Leland GOODRICH, ed., *Charter of the United Nations: Commentary and Documents* (New York: Columbia University Press, 1969) at 55.

118. "Queen Knights Percy Spender, Envoy Here" *Washington Post* (6 June 1951) at 4. The knighthood would have been awarded by the Queen in right of Australia on the recommendation of the prime minister of Australia.

119. David LOWE, *Australian Between Empires: The Life of Percy Spender* (London: Pickering and Chatto, 2010) at 156.

120. See Lauren, *supra* note 94 at 219.



affected not only domestic US politics but also the foreign policy establishment.<sup>121</sup> Although Sir Percy and Zafrulla had both forged close relationships with the US government, a relationship that in Zafrulla's case helped secure his election to the Presidency of the UN General Assembly, as well as to the ICJ, they were divided on the question of decolonization.<sup>122</sup> Despite a shift in US policy favouring decolonization in the early 1960s, Sir Percy nonetheless maintained his "reputation for trying to slow down the process of decolonization".<sup>123</sup> As Lowe observes in the *Australian Dictionary of Biography*, Sir Percy was "sensitive to the sudden addition to the UN of twenty-three new members, many of which were former colonies in Africa or Asia". Accordingly, he sought to counter "what he assumed would be an Afro-Asian bloc voting against Australia on colonial issues by seeking votes in other countries".<sup>124</sup>

In Sir Percy's mind, the mere fact that Mr Gross had approached Zafrulla to see if he could sit as Judge *ad hoc*, when he had been president of the UN General Assembly and when he was head of Pakistan's Permanent Delegation to the United Nations in an atmosphere of Cold War tension and decolonization, was enough to convince him that there was some kind of conspiracy. After the UN General Assembly had passed Resolution 1514 outlawing colonialism,<sup>125</sup> after the UN failed to condemn India for its invasion and annexation of Goa, Daman, and Diu, and after Zafrulla had been appointed head of the UN General Assembly, Sir Percy must have been irritated when he learned that Zafrulla had been approached by the applicant states to see if he could sit as Judge *ad hoc* in the most controversial case to have been brought before the Court on the very subject that had divided them.

On 15 January 1962, the Registrar of the Court wrote to the Agent for the government of South Africa to inform him that the Agent for Ethiopia and Liberia desired to approach Zafrulla to inquire if he could sit as Judge *ad hoc* in the *South West Africa* cases and set a deadline within which South Africa could raise any objections it had to Zafrulla's proposed appointment as Judge *ad hoc*.<sup>126</sup>

Sir Percy wrote about his recollections of this incident for a memoir, which he decided not to publish, and in which he reproduces confidential letters (only available to members of the Court) that he had taken from the Registry of the ICJ, and kept

121. See Richard FRIED, *Nightmare in Red: The McCarthy Era in Perspective* (Oxford: Oxford University Press, 1990). See also Lowe, *supra* note 119 at 153.

122. On America's support for Zafrulla, see Note for the Record, 29 July 1954, DO 35/7123, TNA. (In a meeting at the Foreign Office, Zafrulla explained that the Americans had put his name forward for candidacy to the ICJ and had undertaken to speak to Cuba and Brazil. Mr Romulo of the Philippines (a close friend of Zafrulla's from his days at the UN supporting the Palestinians) was campaigning for him, the Afghans were willing to support him, as were the Scandinavian countries, and all of the Commonwealth countries supported Zafrulla except for the UK. France was considering supporting Zafrulla "despite his speeches about Tunisia".)

123. Lowe, *supra* note 119 at 165.

124. David LOWE, "Spender, Sir Percy Claude", *Australian Dictionary of Biography*, online: <<http://adb.anu.edu.au/biography/spender-sir-percy-claude-15475>>.

125. See UN General Assembly Res. 1514 (XV), 14 December 1960.

126. Document 37. The Registrar to the Agent for the Government of South Africa, 15 January 1962, Part IV, *South West Africa Cases, Correspondence*, 532.

after retirement.<sup>127</sup> According to Sir Percy, after the Court got wind of Zafrulla's nomination, President Winiarski convened a discussion amongst the judges to ascertain whether there might be any complications that could arise from having Zafrullah appointed Judge *ad hoc* in the light of Paragraph 2 of Article 17 of the Statute of the Court.<sup>128</sup> Article 17(2) provides that no member of the Court:

may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.<sup>129</sup>

President Winiarski recalled the case of Sir Benegal Rau who, having represented India at the Security Council in October 1951 when it dealt with the UK complaint against Iran for its failure to comply with interim measures indicated by the Court in July 1951, in the *Anglo-Iranian Oil Company* case, "had considered it his duty in agreement with the Court not to sit in th[at] case". "In these circumstances", President Winiarski went on to say, according to Sir Percy's recollections of the conversation, that:

It was possible that the Court might consider it inappropriate for Zafrulla Khan to assume the functions of a Judge *ad hoc* in the *South West Africa Cases*. There would be two possibilities in that case: to write to Zafrulla Khan that in the opinion of the Court he ought not to sit, or alternatively to submit the difficulty to him, leaving him with the responsibility for the decision.<sup>130</sup>

Most of the judges thought that there would be no harm in writing Zafrulla a letter to ascertain whether he had directly participated and voted in the debates on South West Africa. In their opinions, chairing a session of the UN General Assembly or representing one's country as a permanent delegate, did not automatically disqualify a candidate for Judge *ad hoc*.<sup>131</sup> Judge Jessup thought that Paragraph 2 of Article 17 was not applicable to Zafrulla. He said that Zafrulla's case was different to that of Sir Benegal Rau, "for the role of a delegate of the Security Council was not the same as that of the Chairman of a delegation to the General Assembly".<sup>132</sup> This is because Sir Benegal had participated in a vote, whereas Zafrulla as chairman did not. Similarly, Judge Tanaka said that he "did not believe that Sir Muhammad Zafrulla Khan was disqualified from sitting by virtue of Article 17, paragraph 2", but he was in "complete agreement" with the President's proposal to write Zafrulla

127. See Sir Percy SPENDER, "The World Court in Conflict" (undated, on file with author). This document has been available at the National Library of Australia in the Papers of Sir Percy Spender, 1937–1978, for almost two decades, but no one cited this manuscript until David Lowe's biography of Spender, *supra* note 119 at 211–12, notes 16, 26, and 52.

128. The Statute of the International Court of Justice is annexed to the Charter of the United Nations. A copy is available online on the Court's website: <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>>. For commentary, see Philippe Couvreur, "Article 17" in Andreas ZIMMERMAN, ed., *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2012), at 272–85.

129. Statute of the International Court of Justice, *Ibid.*

130. Spender, *supra* note 127 at 11–12.

131. *Ibid.*, at 12–21.

132. *Ibid.*, at 14.

Khan a letter seeking information and asking for his views on the matter.<sup>133</sup> Only Sir Percy and Sir Gerald were resolutely opposed to Zafrulla sitting. Sir Percy argued that “Article 17, paragraph 2 created a statutory disqualification in the event of incompatibility between an activity previously exercised and the functions of a Judge”.<sup>134</sup> Sir Gerald thought that it would “be morally and humanly impossible that Zafrulla Khan could be other than against South Africa, and in view of the attitude adopted by Pakistan in the United Nations, this would be obvious to the whole world”.<sup>135</sup>

On 22 March 1962, President Winiarski wrote Zafrulla a letter. In the letter, he inquired as to whether there were any impediments to Zafrulla’s designation as a Judge *ad hoc* in the *South West Africa* cases and whether there was not some difficulty in reconciling his appointment as Judge *ad hoc* with the functions Zafrulla exercised at the UN.<sup>136</sup>

On 2 April 1962, Zafrulla replied at length.<sup>137</sup> In his reply, he described the procedure that was followed by the Pakistan delegation under his leadership. He then explained: “During the current session I was in charge of the items allotted to the plenary session and the items allotted to the First Committee. These items did *not* include South Africa.”<sup>138</sup> Zafrulla added that when Ethiopia and Liberia approached him to see if he could sit as Judge *ad hoc*, he inquired with his government whether they had any objections to him accepting it. When the government informed him that they did not, he informed Mr Hamdani, who was in charge of the item relating to South West Africa in the Fourth Committee:

That in view of the possibility of my acting as Judge *ad hoc* in these cases I did not desire to be associated in any way with the consideration and discussion of and voting on the South West Africa case in the Fourth Committee or Assembly.<sup>139</sup>

In reply to Zafrulla’s letter, President Winiarski wrote: “the Court has decided not to enter into discussion as to the arguments advanced but to leave to your own conscience the problem whether or not you should sit as Judge *ad hoc* in the *South West Africa Cases*.”<sup>140</sup>

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133. *Ibid.*, at 19.

134. *Ibid.*, at 17.

135. *Ibid.*, at 21.

136. Winiarski drew specific attention to the case of Sir Benegal Rau in the *Anglo-Iranian Oil Company* case and statements made by the Pakistan delegation at meetings of the Fourth Committee on 1 and 8 December 1961 when Zafrulla was Pakistan’s Permanent Delegate to the UN—although the comments that were made in this Committee were not attributable to Zafrulla as they had been made by another member of the Pakistan delegation. Winiarski concluded the letter by assuring Zafrulla that his colleagues “have the pleasantest memories of you as Judge and Vice President”, before mentioning that the Court would be glad to receive from him information concerning facts that may cause difficulties with regard to his appointment as a Judge *ad hoc* in the light of his chairmanship of the UN General Assembly.

137. Spender, *supra* note 127 at 24.

138. *Ibid.*, at 24 (emphasis added).

139. *Ibid.*, at 25.

140. *Ibid.*, at 27.

Two days later, Zafrulla replied that:

In view of the doubt held by the Court, it would not be right for me to take upon myself the responsibility of deciding whether I am competent to sit. I hasten, therefore, to let you know that I would not be available to act in that capacity.<sup>141</sup>

Four days later, the registrar of the Court received a letter from Tesfaye Gebre-Egze and Ernest Gross, which explained that as agents for Ethiopia and Liberia they “have been informally advised that Sir Mohammad Zafrulla Khan is unable to sit as Judge *ad hoc* in the *South West Africa Cases*”.<sup>142</sup>

The importance of this sequel to the second phase of the *South West Africa* cases, and Zafrulla’s “recusal” in 1965, is that Zafrulla never did sit as Judge *ad hoc* and that he withdrew on his own volition. It is also important to note that throughout the correspondence between the Court and Zafrulla, at no point did the South African government object to Zafrulla’s appointment as Judge *ad hoc*.<sup>143</sup>

On 21 December 1962, the ICJ, in the absence of Zafrulla, delivered its Judgment on South Africa’s preliminary objections to the cases that Liberia and Ethiopia had brought against it, deciding that it had jurisdiction to adjudicate upon the merits of the dispute.<sup>144</sup> The decision was, however, very close—it was only decided in an eight–seven vote that would be reversed in 1966 after a death, an illness, and the casting vote of the President of the Court. In dismissing every single one of South Africa’s four objections, the 1962 Court concluded that:

Article 7 of the Mandate is a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court and that the dispute is one which is envisaged in the said Article 7 and cannot be settled by negotiation. Consequently the Court is competent to hear the dispute on the merits.<sup>145</sup>

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141. *Ibid.*

142. The letter added “[p]ursuant to the Order of the Court dated 20 May 1961, the Governments of Ethiopia and Liberia hereby designate Sir Adetokunbo A. Ademola, Chief Justice of the Federation of Nigeria, as Judge *ad hoc* to sit in the *South West Africa* cases in the place and stead of Sir Mohammed Zafrulla Khan, whose designation is hereby withdrawn”. See Document 42. The Agents for the Governments of Ethiopia and Liberia to the Registrar, 24 May 1962, Part IV, *South West Africa* cases, Correspondence, 534.

143. No objection appears in the Court’s published correspondence. As yet, I have not found any objections in the South African archives. South Africa would not object to Zafrulla until the *Namibia* Opinion in 1971. In fact, South Africa would vote in favour of Zafrulla’s candidacy to be a judge at the ICJ in 1954 and 1963. There is no indication of South African hostility to Zafrulla in a confidential letter from A.M. Hamilton dated 2 July 1954, and sent from the Permanent South African Mission to the United Nations to the Secretary for Foreign Affairs of the Union of South Africa. The letter is an account of a meeting between A.M. Hamilton, the chargé d’affaires and Zafrulla in New York, where Zafrulla was canvassing South African support for his election to the ICJ. Zafrulla explained that he had lost the 1946 election to the Polish candidate Judge Winiarski, and that had he been elected “he would today, in spite of the Partition of 1947, be representing India on the Court”. Zafrulla was emphasizing this point to counter the argument that had been raised that only an Indian should replace Judge Rau. From the correspondence, it seems that Zafrulla had met Dr Malan and had friendly relations with Dr Geyer, whom he knew from meetings of the Institute of International Affairs. Zafrulla also explained to Hamilton that before partition he was the second judge in order of seniority on the Federal Court of India, and if he had not chosen to join the new state of Pakistan, he would now be the chief justice of India and therefore senior to the late Sir B.N. Rau, who was a member of a lower court at Calcutta. See “International Court: Candidature of Sir Zafrulla Khan”, External Affairs: UNO Mission (1947–1965), Vol. 14, file nr. 11, South African National Archives.

144. *South West Africa Cases*, Preliminary Objections, *supra* note 2 at 319.

145. *Ibid.*, 319 at 347.

It is particularly noteworthy, for reasons that would become apparent after the 1966 Judgment, that in reaching this conclusion the Court dismissed South Africa's third objection that there was no dispute between the applicants and the respondent and that the dispute did not affect "any material interests of the Applicant states or their nationals".<sup>146</sup>

## V. THE PRELUDE TO ZAFRULLA'S "RECUSAL"

In 1964, when Zafrulla was elected to become a judge at the ICJ for the second time, he observed that by the time he ended his first term of appointment, he was "the senior most Judge, next only to the President".<sup>147</sup> However, in his second term, "he came in at the bottom".<sup>148</sup> On this occasion, Sir Percy had been elected the President of the Court in succession to President Winiarski, and in the summer of 1964 Sir Percy decided to raise the issue of the propriety of Sir Zafrulla participating in the merits stage of the *South West Africa* cases in the light of his 1962 decision that he should not sit as Judge *ad hoc*.

Sir Percy invited Zafrulla to see him in his room, where he explained that he thought it his duty "to seek the views of his colleagues on the Court if he intended to sit in these cases".<sup>149</sup> Zafrulla replied by saying that "he had expected the issue to arise again, but he saw no reason why he should not sit".<sup>150</sup> Sir Percy then explained that he did not see any distinction between the position that Zafrulla took in 1962, when he declined to sit as Judge *ad hoc* in the preliminary objections phase of the *South West Africa* cases, and the present position when Zafrulla was a permanent judge of the Court. Sir Percy told Zafrulla that he would be reluctant, "because of our long association", to have to give him notice under Article 24 of the Court's Statute, as this would involve a formal decision of the Court.<sup>151</sup> Article 24 provides that if the President of the Court considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly, and that if the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.<sup>152</sup> However, Sir Percy suggested that instead of invoking Article 24, he would prefer to "ascertain, quite informally, the views of his colleagues meeting in committee. If they thought there was no reason why he should not sit, that would dispose of the matter. If, however, they thought to the contrary, other considerations would arise."<sup>153</sup> Apparently, when Sir Percy recommended this course of action to Zafrulla, he "expressed no dissent".<sup>154</sup>

146. *Ibid.*, at 343.

147. Khan, *supra* note 41 at 274.

148. *Ibid.*

149. Spender, *supra* note 127 at 30.

150. *Ibid.*

151. *Ibid.*

152. See the Statute of the International Court of Justice, *supra* note 128. For commentary, see Sir Robert Jennings and Philippe Couvreur, "Article 24", in Zimmerman, *supra* note 128, at 453-64.

153. Spender, *supra* note 127 at 30.

154. *Ibid.*

On 6 July 1964, Sir Percy convened a meeting of all the permanent judges of the Court to discuss the issue of whether Sir Zafrulla should participate in the merits phase of the *South West Africa* cases in the light of his nomination as Judge *ad hoc* by Ethiopia and Liberia and his role at the UN.<sup>155</sup> Three days later, Sir Percy explained: “I asked Zafrulla to see me in my room in order to inform him of the fact that a substantial majority of his colleagues, after debate, were of the opinion he should not sit.”<sup>156</sup> Yet at no point in the draft manuscript that Sir Percy wrote about this incident, does he provide any indication of who the “substantial majority” of judges are. Nor does Sir Percy elaborate on the nature of the conversation that transpired between himself and Zafrulla after he informed him of the views of the “substantial majority”, other than to write that upon hearing this news, Zafrulla’s initial reaction was that “he felt that the right course was for him not to sit”.<sup>157</sup> Sir Percy tells us that he then called Zafrulla on 24 July, and again on the 27 July, anxious to get a commitment from him that he would not sit, before he went on holiday. However, Zafrulla would not give it. Instead he told Sir Percy that “he could not accept that there was any disqualification under Article 17, and that he understood that there had been no decision on either Article 17 or Article 24 [of the Court’s Statute]”.<sup>158</sup>

When Sir Percy returned from his holiday a month later, on 27 August 1964, he found a letter from Zafrulla waiting for him. Zafrulla explained that, in his view, Article 17 did not debar him from sitting in the second phase of the *South West Africa* cases. He added that if the President wanted to raise Article 24, which allowed the President to give a judge notice that he should not sit where there was a special reason, then he needed to follow the procedure in Article 24. This provided that if the President and the judge disagree then the matter was to be settled by a decision of the Court. But Sir Percy would not tell Zafrulla what the “special reason” that prevented him from sitting was. Moreover, Sir Percy refused to follow the procedure in Article 24 and put the matter to a vote. In his letter, Zafrulla explained that he had heard that Sir Percy had tried to introduce a “new factor” for consideration after he had been unable to persuade the Court that Article 17 was applicable to Zafrulla. This new factor was, in fact, Zafrulla’s nomination as a Judge *ad hoc* by Ethiopia and Liberia in the preliminary objections phase of the *South West Africa* cases, which in Sir Percy’s opinion led to a “perception of bias”.<sup>159</sup> As Sir Percy had not raised this “new factor” directly with Zafrulla, he asked Sir Percy to enlarge upon this aspect as he did not think it made any material difference to the issue of whether or not he could sit in the merits phase of the *South West Africa* cases. This was because although Zafrulla had been approached by Ethiopia and Liberia to

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155. According to Sir Percy, Zafrulla was present at the meeting and was able to present his side of the story to the judges and answer questions. After a while, Zafrulla left the room so that the judges could discuss the issue among themselves.

156. Spender, *supra* note 127 at 32.

157. *Ibid.*

158. *Ibid.*, at 33.

159. *Ibid.*, at 34.

sit as Judge *ad hoc* in the first phase of the *South West Africa* cases, he did not sit in that capacity.<sup>160</sup>

As Sir Percy conceded in his letter to Zafrulla, only two judges were of the opinion that Zafrulla's nomination as Judge *ad hoc*, even without sitting in that capacity, constituted participation in the case within the meaning of Article 17. Presumably, these two judges were Sir Percy and Sir Gerald, since according to Sir Percy's own notes, no one else objected to Zafrulla.<sup>161</sup> As regards the views of the other judges, according to Sir Percy, they did not think it wise that Zafrulla should sit in the cases as a permanent member of the Court as the respondent state might have a feeling that Zafrulla had committed himself to the applicant states, even though, as Zafrulla pointed out in his response: "no discussion whatever had taken place between the Agent of the Applicant states or anyone acting on their behalf and myself on any aspect of the cases."<sup>162</sup>

Zafrulla then addressed the statements made by the Pakistan delegation on South West Africa at meetings of the Fourth Committee on 1 and 8 December 1961 by reiterating that his participation in the debates was only vicarious. In contrast, another sitting member of the Court had personally participated in the Fourth Committee on the item of South West Africa.<sup>163</sup> Zafrulla reminded Sir Percy: "[y]ou yourself were, for a number of years, chairman and vice-chairman of your own country's delegation when the question of South West Africa came under discussion."<sup>164</sup> Indeed, in Volume 12 of the *Yearbook of the International Court of Justice* (1957–1958), there appears a brief biographical note of Judge Sir Percy Spender. According to this note, among his many other appointments, Sir Percy was "Vice-President of the 5th General Assembly of the United Nations, 1950–1951" and "Vice-Chairman and Chairman of the Australian Delegation to various United Nations Assemblies, 1950–1957".<sup>165</sup> In other words, Sir Percy had spent seven years immersed in UN politics. During these seven years, the question of South West Africa was extensively discussed. Also, it was during these years that South Africa resolutely refused to abide by Advisory Opinions given by the ICJ on various aspects of the status of South West Africa. As Sir Percy's biographer observed, prior to his election to the Court, Sir Percy had repeatedly invoked Article 2(7) of UN Charter in debates in the UN General Assembly to deflect attempted condemnation of apartheid in South Africa.<sup>166</sup> Furthermore, as Australia's UN representative, Sir Percy had

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160. *Ibid.*, at 35. Zafrulla confessed that in his meetings with Sir Percy, and in the meeting with the Court, he "felt in the dark as to the procedure to be followed and the problem to be discussed and elucidated". Indeed, Zafrulla's recollection of the meeting with the other judges in the Salle Bol was at variance with Sir Percy's. According to Zafrulla, he did not want to be present with the other judges when his case was discussed because he did not know what the "special reason" was that had been raised by Sir Percy that precluded him from sitting in the cases. According to Zafrulla's opinion of what transpired, he made a brief statement to the Court, and then withdrew, so Sir Percy could consult with the members of the Court alone.

161. See Sir Gerald's comments, *ibid.*, at 21.

162. *Ibid.*, at 36.

163. *Ibid.*, at 37.

164. *Ibid.*, at 38.

165. (1957–1958) 12 Yearbook of the International Court of Justice 16–17 at 17.

166. Lowe, *supra* note 119 at 164–5.

opposed the inclusion of an Article on “the so-called right of self-determination” in the draft covenant on civil and political rights when it was being debated in the Third Committee in the 1950s.<sup>167</sup>

Clearly, Sir Percy and Zafrulla did not see eye-to-eye on the issues that were before the Court in the *South West Africa* cases. They had already clashed openly in the UN General Assembly on the question of Morocco, where it became apparent that they had diametrical views on colonialism. Their differing views on colonialism were also apparent from Sir Percy’s dissent in *The Right of Passage* case.

As Australia’s former Minister for External Territories (1949–51), Sir Percy had an additional reason for wanting to ensure that the claims of the applicant states failed on the merits. He would have been concerned that a decision in favour of the applicants in the merits phase of the *South West Africa* cases might provide a precedent that would allow Australia’s former Mandates (Papua New Guinea and Nauru) to sue Australia for colonial misdemeanours.<sup>168</sup> As Lowe explains: “Spender could be held up as a dogged defender of empire when strategic considerations were uppermost in his thinking.”<sup>169</sup> As Hudson observes: “Defence of South Africa’s rights in South-West Africa was part of Australia’s defence of her own rights and intentions in Papua-New Guinea.”<sup>170</sup> Moreover, Sir Percy’s plan for the administration of Papua New Guinea was not that dissimilar to the manner in which South West Africa was administered by South Africa. In his autobiography, *Politics and a Man*, Sir Percy criticized “the socialist approach” of his predecessor in office, who “never saw much merit in private enterprise” and who viewed “the territory and its people as a large native museum of which they were the devoted custodians”.<sup>171</sup> In contrast to the approach that had been adopted by the Labor government, Sir Percy, as Minister for External Territories, sought to open up Papua New Guinea to private capital by forming, “in conjunction with the British Aluminium Company, of London, a further company to be known as the New Guinea Resources Prospecting Company”.<sup>172</sup> Furthermore, when Sir Percy was Australia’s Minister for External Territories, Australia was considering proposals to transfer the Nauruans to another island because Nauru, to quote Australia’s Acting Minister for External Territories, had been reduced to a “barren skeleton of coral pinnacles” due to Australia’s extraction of phosphate deposits.<sup>173</sup>

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167. See the statement by Sir Percy Spender proposing the deletion of Article 1 on self-determination in its entirety from the draft covenant on civil and political rights at the Tenth Session of the UN General Assembly, Third Committee, 647th meeting, Friday, 28 October 1955, UN doc. A./C.3/SR.647, 114–16, paras. 17–27.

168. I am grateful to Antony Anghie for this prescient observation. It is something I hope to explore further for my book manuscript. On Nauru more generally, see Antony ANGHIE, “‘The Heart of My Home’: Colonialism, Environmental Damage, and the Nauru Case” (1993) 34 *Harvard International Law Journal* 445.

169. Lowe, *supra* note 119 at 170.

170. Hudson, *supra* note 110 at 97.

171. Percy SPENDER, *Politics and a Man* (Sydney: Collins, 1972) at 275.

172. *Ibid.*, at 277.

173. Quoting Mr Chambers as reported in the *Brisbane Telegraph* in Christopher WEERAMANTRY, *Nauru: Environmental Damage Under International Trusteeship* (Oxford: Oxford University Press, 2002) at 285.



Sir Gerald also had reasons to oppose Zafrulla. Like Sir Percy, Sir Gerald came from a country that had colonial interests which needed protection.<sup>174</sup> In the 1950s, when Sir Gerald was the Senior Legal Adviser to the British Foreign Office, the British government was in the midst of putting down the “Mau Mau” uprising in Kenya, and establishing the Central African Federation (of Rhodesia and Nyasaland), in which it was taken for granted that the White political leadership would continue to rule for the indefinite future, even though Whites were only a small fraction of the population.<sup>175</sup> One British civil servant involved in establishing the federation described the views of some of the ministers, civil servants, and businessmen whom he met on a visit to Southern Rhodesia in 1951 as having views that were “indistinguishable from South African apartheid”.<sup>176</sup> Occasionally such views were even reflected in legislation.<sup>177</sup> According to the British historian John Darwin, the Federation “was a new ‘dominion’ in the making, to be set one day beside Canada, Australia, New Zealand, and South Africa”.<sup>178</sup> As Andrew Cohen explains, the establishment of the Central African Federation and “Britain’s lukewarm record of criticising South African policies led to it being cast as a member of ‘the Unholy Alliance’ of white interests in Southern Africa with the South Africans and the Portuguese”.<sup>179</sup> When Zafrulla was President of the UN General Assembly, the representative of Ghana asked:

How can a colonial territory in Africa be self-governing when the three million Africans have no say in the administration—which is in the hands of only 280,000 European settlers who, by the grace of the British Government, have been allowed to maintain a racist regime, comparable only to the apartheid state of South Africa?<sup>180</sup>

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174. I write about this at length in my book manuscript. With regard to Namibia, the UK had large mining interests, including in nuclear energy, and the extraction of uranium with the aid of Rio Tinto Zinc. For a brief examination of UK policy in Southern Africa, see Mark CURTIS, *The Ambiguities of Power: British Foreign Policy Since 1945* (London: Zed Books, 1995) at 121–2.
175. See W.M. Roger LOUIS and Ronald ROBINSON, “The Imperialism of Decolonization” (1994) 22 *Journal of Commonwealth History* 462 at 470 and at 488. Louis and Robinson observe that after Britain had put down the “Mau Mau” rebellion, Downing Street was reluctant to impose Black majority rule on British kith and kin in Kenya, let alone in Rhodesia and Nyasaland. The Central African Federation was established on 1 September 1953 and was dissolved on 31 December 1963.
176. Those who held such views, Hyam adds, were not the majority, “who generally took simply an attitude of kindly superiority towards blacks (as opposed to treating them as permanent children)”. Hyam was paraphrasing from a memorandum that was written by Patrick Gordon Walker, parliamentary under-secretary, for the Secretary of State Philip Noel-Baker. See Ronald HYAM, “The Geopolitical Origins of the Central African Federation: Britain, Rhodesia, and South Africa, 1948–1953” (1987) 30 *Historical Journal* 145 at 154. Writing in 1987, Hyam described the Central African Federation as “a quite extraordinary mistake, an aberration of history (‘like the Crusader Kingdom of Jerusalem’), a deviation from the inevitable historical trend of decolonization”.
177. Thus, the Penal Code of Nyasaland made it a criminal offence, punishable by up to five years’ imprisonment, for a White woman to have illicit sexual intercourse with an African. See A.W. Brian SIMPSON, *Human Rights and the End of Empire* (Oxford: Oxford University Press, 2001) at 317.
178. John DARWIN, *The Empire Project: The Rise and Fall of the British World-System 1830–1970* (Cambridge: Cambridge University Press, 2009) at 619.
179. Andrew COHEN, “‘A Difficult, Tedious, and Unwanted Task’ Representing the Central African Federation in the United Nations, 1960–1963” (2010) 19 *Itinerario* 105 at 108.
180. *Ibid.*, at 114.

Statements like these at the UN would likely have annoyed Sir Gerald.<sup>181</sup> When he was a legal adviser at the British Foreign Office, he was involved with efforts to “do everything possible to keep any idea of a further reference to the International Court [on South West Africa] in the background”.<sup>182</sup> The British government was opposed to the *South West Africa* cases from their beginning to their end.<sup>183</sup>

Zafrulla’s vocal support for decolonization in Africa might explain why Sir Gerald was opposed to Zafrulla’s nomination to the Court in 1954, and why Sir Percy and Sir Gerald both opposed his nomination as Judge *ad hoc* in the first phase of the *South West Africa* cases in 1962. When Zafrulla ran for election to the ICJ in 1963, Sir Gerald, who was a member of the National Group for the United Kingdom, and who was nominated by the same group for re-election to the ICJ, was instrumental in ensuring that Zafrulla’s name did not appear on the same shortlist.<sup>184</sup> The decision not to nominate Zafrulla caused consternation in the Foreign Office and this time it led to a dispute with the legal advisers whose views ultimately prevailed.<sup>185</sup> But again

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181. Sir Gerald’s father was Vice-Admiral Sir Maurice Swynfen Fitz Maurice. See the entry written by Ian Brownlie for “Fitzmaurice, Sir Gerald Gray (1901–1982)” in the *Online Oxford Dictionary of National Biography*. Sir Maurice Swynfen Fitz Maurice was descended from Irish nobility, and spent his youth in the service of the British Empire fighting colonial wars in Africa. See Obituary, Vice-Admiral Sir M. Fitz Maurice, “War Service Afloat” *The Times* (24 January 1927) at 7, col. A.
182. Intriguingly, when Sir Gerald was a legal adviser to the Foreign Office, he concluded that a former member of the League of Nations *could* sue South Africa in the International Court on the grounds that it was not discharging its obligations under the Mandate. See “Meeting in the Commonwealth Relations Office”, para. 9 in “Advisory Opinion of the International Court of Justice Concerning Voting Procedure on Questions Relating to South West Africa”, note by Sir G. Fitzmaurice, 24 August 1955, FO 371/117419. TNA.
183. Fitzmaurice was opposed to the Advisory Opinions on *South West Africa* when he was the Legal Adviser to the British Foreign Office, and he strongly dissented from every case with which he was involved (such as 1962 Judgment and the 1971 Advisory Opinion) except for the 1966 Judgment. In a paper prepared in 1970 by Ian Sinclair, another Foreign Office Legal Adviser, he observed that the UK did not intervene in either the written or oral stage of the proceedings in any of the *South West Africa* cases that came before the Court. See the Minute on “South-West Africa and the I.C.J.” by Ian Sinclair, 30 July 1970, FCO 45/746. TNA. According to the material that is available in the Foreign Office archives, the UK wanted to steer a middle course to the extent that it could without upsetting either what it called “Black Africa” or South Africa. When the issue came to Court again in 1971, however, the UK would side with South Africa. See Cabinet: Defence and Overseas Policy Committee. *South West Africa—The Advisory Opinion of the International Court of Justice*, Memorandum by the Secretary of State for Foreign and Commonwealth Affairs, 20 September 1971, CAB 148/116. TNA.
184. Francis Vallat mentions a conversation he had with Sir Gerald, in which he put to him the arguments in favour of Zafrulla. Fitzmaurice told him that the National Group would take these arguments into consideration but expressed concern over his “recent political activities”. See the minute by Vallat dated 13 June 1963, FO 371/172614. TNA. The members of the National Group in 1963 were Lord McNair, Lord Evershed, Lord Hodson, and Sir Gerald Fitzmaurice. They nominated the following candidates: Sir Gerald Fitzmaurice, Professor André Gros, Sr Luis Padilla Nervo, and Sir Okyere Asafu-Adjaye. See “Elections to the International Court of Justice”, 19 June 1963, FO 371/172615. TNA. Oddly, Zafrulla’s name appears on a later list drawn up by the Foreign Office. See Provisional Agenda Item number 15: Elections to the International Court of Justice, 13 September 1963, FO 371/172616. TNA.
185. There are some quite astonishing exchanges of letters in the files. It seems that, as in 1954, the political arm of the Foreign Office and the Commonwealth were in favour of Zafrulla, whereas the legal advisers, particularly Fitzmaurice, had an aversion to him. See, for instance, a letter from David Le Breton of the Commonwealth Relations Office dated 29 May 1963 (“we were a little surprised to see that Sir Zafrulla Khan did not win a nomination by the group. Although again we accept that final decisions about British voting have yet to be made, I should like to reaffirm our view that Sir Zafrulla has an extremely strong claim both as a Commonwealth candidate and for reasons of personal eminence ... we very much hope that he will receive one of our votes.”). See also, the letter by

their decision was controversial.<sup>186</sup> As in 1954, the legal advisers' opposition to Zafrulla did not prevent his re-election and, in 1963, Zafrulla was re-elected for a second term, which commenced in 1964.<sup>187</sup>

In his letter to Sir Percy, Zafrulla expressed his opinion that, although other members of the Court (in addition to Sir Percy) had taken part in events connected to the *South West Africa* cases, his position was that:

none of these members of the Court is affected by Article 17 of the Statute as the expression "any case" in paragraph 2 of that Article is confined to the case before the Court during its stages of preparation and hearing and does not include questions involved in the case discussed anywhere else.<sup>188</sup>

Zafrulla argued that mere nomination as Judge *ad hoc* and not sitting in that capacity did not amount to participation for the purposes of Article 17 of the Court's Statute. As Zafrulla explained to Sir Percy:

I am, with all respect, unable to accept the view that the nomination of a person as Judge *ad hoc* in a case raises any presumption that he is committed to taking a particular view of any question involved in the case in that the other side in that case would have any justification or excuse for entertaining a doubt concerning the impartiality of the person so nominated.<sup>189</sup>

After noting that the Court had made no decision against him under Paragraph 3 of Article 17 or under Paragraph 3 of Article 24, Zafrulla wrote that in view of the fact that, according to Sir Percy, "a large majority of the Court" had come to the view that it would not be proper for Zafrulla to sit in these cases, a view which Zafrulla did not share, he would nevertheless respect their views and conform to them.<sup>190</sup>

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P.H. Dean to Francis Vallat, 26 June 1963, FO 371/172615. TNA. ("The more I think about it, the more I am convinced that the British Delegation must vote for Sir Zafrulla Khan in these elections ... Nor am I at all impressed by the argument which our National Group consider important, namely that Sir Zafrulla has switched his career from law to politics and back again. Surely, if a man is a good lawyer, and Sir Zafrulla is undoubtedly a very good lawyer and a very eloquent one into the bargain, it is a great additional advantage that he should have had wide political experience and be a highly respected figure as a statesman as well as a lawyer.")

186. The opposition was clearly coming from Fitzmaurice. In a letter dated 9 May 1963, Vallat wrote in language reminiscent of Fitzmaurice's earlier remarks: "I think we must accept that the National Group have good reasons for preferring to nominate other candidates this time. One reason which is pretty strong is that it is not a very good thing for a Judge to leave the Court, go back into the hurly-burly of the General Assembly and political life and become its President, and then go back again as a Judge of the Court." This letter seemed to be drafted to B.G. Smallman in Canberra. See FO 371/172614, TNA. Again, this argument did not go down well and Vallat was asked to reconsider. In a minute dated 27 June 1963, Vallat wrote that he had "on no less than three occasions, impressed on Lord McNair (who was the chair of the National Group) the merits of Sir Zafrulla Khan". See FO 371/172615. TNA.

187. In the 1963 election, Zafrulla received seven votes in the Security Council and fifty-eight in the General Assembly. See "Results of the Voting in the Security Council and the General Assembly", 23 October 1963, FO 371/172616. TNA.

188. Spender, *supra* note 127 at 38.

189. *Ibid.*, at 41-2.

190. *Ibid.*, at 43.

In his reply, Sir Percy did not address or acknowledge the arguments that Zafrulla had raised in his letter. Sir Percy did not, for instance, counter Zafrulla's claim that other members of the Court had played political roles in the UN, including on issues directly relevant to the *South West Africa* cases—a point that was applicable to Sir Percy, for instance. All Sir Percy had to say to Zafrulla was that none of the judges “held any view reflecting in the slightest degree, upon your personal impartiality”.<sup>191</sup> Sir Percy's penultimate sentence before he ended his letter to Zafrulla was to say that he was:

glad that the matter may now be considered closed and that it has been possible to resolve the difference of views between us by your readiness to abide by the views of the majority of your colleagues. We will be appreciative of your decision to do so.<sup>192</sup>

Thus, in the same sentence that Sir Percy explained that he now considered the matter closed, he also wrote that he expected a decision from Zafrulla that he would not sit in the cases.

But Zafrulla never gave Sir Percy what he wanted. The correspondence ended there and Zafrulla did not sit in the merits phase of the *South West Africa* cases, even though he was a permanent judge of the ICJ.<sup>193</sup> Zafrulla clearly did not recuse himself, since recusal, by definition, only applies to a judge who excuses himself from a case because of a potential conflict of interest or lack of impartiality. But this did not apply to Zafrulla. Instead, Zafrulla was placed under pressure to sit out of the cases by the President of the Court on questionable grounds, based on what transpired to be a mythical majority. It is important to note that no decision, no vote, was taken by the Court with respect to Zafrulla.<sup>194</sup> The ICJ's 18 March Order of 1965 that is occasionally cited with respect to Zafrulla concerned another judge.<sup>195</sup>

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191. *Ibid.*, at 49.

192. *Ibid.*, at 51.

193. The only way of finding out whether there was further correspondence on the matter would be for the Registrar of the ICJ to disclose the correspondence and to publish the report of the 1967 Committee that was established to examine the circumstances in which a member of the Court should refrain from participating in a case. The Committee consisted of Judges Fitzmaurice, Gros, and Ammoun. The report, which is believed to have addressed the issues caused by the controversies regarding Zafrulla and Padilla Nervo has never been published. See Jennings, *supra* note 6 at 424. See also the reference in the 2012 edition updated by Couvreur, *supra* note 6 and note 128 at 460.

194. In Mauritius's challenge to the appointment of Judge Sir Christopher Greenwood as an arbitrator in a case concerning the British government's decision to establish a Marine Protection Area around the British Indian Ocean Territory (BIOT), the Arbitral Tribunal made reference in passing to Zafrulla's “recusal” in 1965, although Zafrulla never recused himself and no decision was taken by the Court under either art. 17(2) or art. 24 of the Court's Statute. See *Matter of an Arbitration before an Arbitral Tribunal Constituted Under Annex VII of the 1982 United Nations Convention on the Law of the Sea* at 26, para. 144. This decision is available online: <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1429](http://www.pca-cpa.org/showpage.asp?pag_id=1429)>.

195. The only official challenge to a sitting member of the Court in the second phase of the cases was with regard to Judge Padilla Nervo who had been Mexico's Secretary of State for Foreign Affairs from 1952 to 1958. See *South West Africa*, Order of 18 March 1965, [1965] I.C.J. Rep. 5, and *I.C.J. Pleadings, South West Africa, Vol. VIII, Minutes of the Hearings Held From 15 March to 14 July, 20 September to 15 November, and 29 November 1965, 21 March and on 18 July 1966, First Public Hearing, 15 March*, 4. For commentary, see Cheng, *supra* note 4 at 196, note 36, and Dugard *supra* note 4 at 291–2. See also, Higgins, *supra* note 4 at 587, note 22. Most revealingly, in the light of Sir Percy's claim that a majority of judges were opposed to Zafrulla sitting in the second phase of the *South West*

Due to the death of Judge Badawi and the illness of Judge Bustamante, only twelve of the fifteen judges of the Court, plus the two *ad hoc* judges, were able to take part in the adjudication of the cases. Both Badawi and Bustamante were expected to side with the applicants on the merits, as they had voted for Ethiopia and Liberia when they rejected the preliminary objections that had been raised by South Africa in the 1962 Judgment. Accordingly, the Court, absent Zafrulla, was heading towards a tie. This was because six of the judges who had voted with the minority in the first phase of the *South West Africa* cases (Winiarski, Spiropoulos, Spender, Fitzmaurice, Morelli, and Judge *ad hoc* Van Wyk) were still judges of the Court in 1966. In the meantime, Judge Gross of France had been elected to the Court and was expected to side with the respondents, as his French predecessor Judge Basdevant had. In contrast, the eight judges who had voted with the majority in 1962 had been reduced to four (Wellington Koo, Koretsky, Jessup, and Judge *ad hoc* Sir Louis Mbanefo), due to the retirement of Judges Alforo and Moreno Quintana, the illness of Bustamante and the death of Badawi. However, Padilla Nervo, who was elected to the Court in 1964 to replace Moreno Quintana, was expected to side with the applicants, and indeed South Africa actually objected to his presence on the Court.<sup>196</sup> In addition, Judge Forster of the Senegal, who had been elected to the Court in 1964, was expected to side with the applicants. Although Judge Tanaka did not participate in the 1962 Judgment, he was expected to side with the applicants.<sup>197</sup> Like Padilla Nervo and Tanaka, Zafrulla was expected to side with the applicants in the second phase of the *South West Africa* cases, and, had he done so, he would have swung the balance from an evenly split Court to an eight–seven majority. This would have denied Sir Percy a casting vote. This is because in the event of there being a tie, Sir Percy, as the Court’s President, would have an extra vote (i.e. two votes).<sup>198</sup>

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*Africa* cases, the Court by eight votes to six decided *not* to proceed with the application lodged by South Africa against the presence of Judge Padilla Nervo. Judge Padilla Nervo had been Mexico’s delegate to the League of Nations Assembly, the UN General Assembly, the Security Council, had acted as Chairman of the Mexican delegation to the UN General Assembly, and was Mexico’s representative on the Trusteeship Council as well as Vice President of that Council. See (1964–1965) 19 Yearbook of the International Court of Justice at 19–21. In contrast to Zafrulla, Padilla Nervo had played a political role on an issue that was directly relevant to the *South West Africa* cases. As Vice President of the UN Trusteeship Council he spoke on issues that were germane to South Africa’s dispute with the United Nations on South West Africa. See e.g. the statement made by Padilla Nervo at the Hundred and Fifth Plenary Meeting held in the General Assembly Hall at Flushing Meadow, New York, Saturday, 1 November 1947, at 591–6. Despite his having been Vice President of the Trusteeship Council, and participating in debates on the question of South West Africa, the Court did not think that this disqualified Judge Padilla Nervo from participating in the hearings and Judgment in the second phase of the *South West Africa* cases. In view of the fact that the majority of judges voted to reject the South African application against the participation of Judge Padilla Nervo in the *South West Africa* cases, despite his role in the UN Trusteeship Council, in which the case of South West Africa was discussed, one can only conclude that Sir Percy was being dishonest to Zafrulla in an effort to dissuade him from sitting in the cases.

196. See *South West Africa*, Order of 18 March 1965, *ibid.*

197. Indeed, Tanaka, according to Sir Percy’s notes, was one of the judges who explicitly spoke in favour of Zafrulla sitting as Judge *ad hoc* in the preliminary phase of the *South West Africa* cases.

198. Art. 55 (2) of the Court’s Statute provides: “[i]n the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.”

## VI. THE SECOND PHASE OF THE *SOUTH WEST AFRICA* CASES

On 18 July 1966, the ICJ delivered what John Dugard described as “the most controversial judgment in its history”.<sup>199</sup> Because the Court was evenly split, the Judgment was determined by the casting vote of Sir Percy.<sup>200</sup> According to J.G. Merrills, Sir Gerald was “one of the architects of the Court’s *volte-face*”.<sup>201</sup> Presumably, the other “architect” was Sir Percy, the President of the Court, with whom Sir Gerald wrote a Joint Dissenting Opinion in the first phase of the case in 1962.<sup>202</sup> As Lowe observes, Sir Percy was elected President of the ICJ in March 1954 “with the assistance of British Judge Fitzmaurice, who helped with lobbying of fellow Judges”.<sup>203</sup>

What made the 1966 Decision so controversial, apart from the fact that the President pressured Sir Zafrulla not to sit in the cases, and used his casting vote to ensure that the Decision went against Ethiopia and Liberia, is that the Court did not address the merits of the case that had been pleaded before it.<sup>204</sup> Even though the entire proceedings had been directed at the merits of the case, namely, whether South Africa was accountable to the UN for its administration of South West Africa and whether apartheid violated the Mandate and the Covenant of the League of Nations, “the Court declined to pronounce on these issues, and instead returned to a matter which it was generally believed had been finally disposed of in 1962—the legal standing of the applicant States”.<sup>205</sup> Accordingly, the Court reversed the finding of its 1962 Judgment, which resulted in the minority of 1962, who dissented from that Judgment, becoming the majority of 1966 to conclude that it did not have jurisdiction to address the merits after all.

The reason adduced by the Court for not addressing the merits was essentially a point which the Court, on its own motion, decided to raise, even though this had not been a point that had been substantively raised in the hearings. In the mind of the Court, objections could be raised, not only as to the preliminary phase of the cases, but also as to the merits phase of the cases, despite the fact that neither the applicants nor the respondent had raised this issue in their pleadings.<sup>206</sup>

The Court undertook a cursory examination of the Mandates system to explain why there could be no question of any legal tie between the mandatories and other individual members of the League that allowed any member of the League to seek a declaratory Judgment from the Court to prohibit a mandatory power from breaching its obligations

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199. Dugard, *supra* note 5 at 292.

200. *South West Africa, Second Phase*, Judgment, [1966] I.C.J. Rep. 6 at 51.

201. Merrills, *supra* note 41 at 15.

202. *South West Africa Cases*, first phase, Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice, *supra* note 2 at 465.

203. Lowe, *supra* note 119 at 167.

204. As complained by Ernest Gross, who was the lead counsel for Ethiopia and Liberia. See Ernest A. GROSS, “The South West Africa Cases: What Happened?” (1966) 45 *Foreign Affairs* 36.

205. Dugard, *supra* note 5 at 292–3.

206. The Court felt compelled to explain that it was addressing the matter now even though this was something that should have been addressed in 1962 because “the Court was unable to go into it until the Parties had presented their arguments on the other questions of merits involved”. See *South West Africa, Second Phase*, *supra* note 2 at 18, para. 5.

towards the inhabitants of the territory under the Mandate. The Court explained that, irrespective of the wording that was employed in the Covenant of the League of Nations, what mattered were the intentions of the states that drafted the Mandates:

as they appear to have existed, or are reasonably to be inferred, in the light of that situation. Intentions that might have been formed if the Mandate had been framed at a much later date, and in the knowledge of circumstances, such as the eventual dissolution of the League and its aftermath, that could never originally have been foreseen, are not relevant.<sup>207</sup>

Accordingly, the Court concluded that, as regards the carrying out of the “conduct” provisions of the various mandates (those defining the mandatory’s powers, its obligations towards the inhabitants of the territory, the League, and its organs), there could:

be no question of any legal tie between the mandatories and other individual members. The sphere of authority assigned to the mandatories by decisions of the organization could give rise to legal ties only between them severally, as mandatories, and the organization itself.<sup>208</sup>

The Court explained that members of the League “not being parties to the instruments of mandate ... could draw from them only such rights as these unequivocally conferred, directly or by a clearly necessary implication”.<sup>209</sup> Accordingly:

The Applicants did not, in their individual capacity as States, possess any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the “sacred trust”.<sup>210</sup>

Instead this right was “vested exclusively in the League and was exercised through its competent organs”.<sup>211</sup>

Therefore, despite the six years the applicants had invested in these cases, four years of which had been invested in the merits phase of the cases, after the same Court had already ruled in favour of the applicants by dismissing all of South Africa’s preliminary objections, the applicants would therefore have to accept the fact that the same Court, albeit differently composed, had now concluded that: “There is no principle of law which, following upon the dissolution of the League, would operate to invest the Applicants with rights they did not have even when the League was still in being.”<sup>212</sup>

Despite the Court’s earlier Judgment rejecting the preliminary objections raised by South Africa in 1962, the 1966 Court found that “the Applicants cannot be considered to have established any legal right or interest appertaining to them in the

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207. *Ibid.*, at 23, para. 16.

208. *Ibid.*, at 26, para. 25.

209. *Ibid.*, at 28, para. 32.

210. *Ibid.*, at 29, para. 33.

211. *Ibid.*

212. *Ibid.*, at 31, para. 40.

subject-matter of the present claims, and that, accordingly, the Court must decline to give effect to them".<sup>213</sup> In other words, the 1966 Court reversed the decision of the 1962 Court, which, in Zafrulla's opinion:

Was binding on them, with the help of the casting vote of the President, against the vote of the remaining six members of the Court and the Judge *ad hoc* nominated by the Applicant States. The Court thus dismissed the Application on a preliminary point which was raised suo mutu [sic] by the Court, after the oral hearings had been closed, without giving any opportunity to the Applicant States to make their submissions on the point.<sup>214</sup>

And, of course, Sir Percy was only able to secure this result because he did not let Zafrulla sit in the case.

## VII. ZAFRULLA'S REACTION TO THE JUDGMENT

In an interview with *The Observer* newspaper in London on 31 July 1966, Zafrulla explained that his purported recusal, which everyone not in the know had assumed to be voluntary, was in fact, involuntary. He told *The Observer*:

I never disqualified myself. There were no grounds for disqualifying me. The President of the Court (Sir Percy Spender) was of the view that it would be improper for me to sit, as I had at one time been nominated judge *ad hoc* for the applicant States (Liberia and Ethiopia), though I had not sat in that capacity.<sup>215</sup>

He added: "I disagreed entirely with that view and gave the President my reasons, which I still consider were good reasons. But he told me that a large majority of the judges agreed with him that I should not sit. So I had no option."<sup>216</sup>

Needless to say, the 1966 Judgment and the news that Zafrulla had been prevented from sitting in the cases provoked outrage.<sup>217</sup> South Africa declared victory and went ahead with its scheme for grand apartheid in South West Africa, confident that international reprisals would be ineffective.<sup>218</sup> On 27 October 1966, the UN General Assembly, furious at the Court's decision, unilaterally revoked South Africa's

213. *Ibid.*, at 51, para. 99.

214. Khan, *supra* note 41 at 275.

215. "I Was Asked Not to Sit—World Court Judge", *The Observer* (31 July 1966) at 2.

216. *Ibid.*

217. The UN delegate for Guinea complained to the General Assembly:

The underhand tactics of Sir Percy Spender, both in the improper disqualification of the Pakistan Judge, Sir Zafrulla Khan, and in the timing of the judgment, handed down when the verdict favourable to South Africa and erroneously labelled "technical" gave rise to no doubt, show clearly that this Judge, from a country where it is not so long since the aborigines were treated worse than the non-Whites of South Africa, has chosen to hold high the torch of anachronistic racism and colonialism, to the detriment of the dignity, respectability and impartiality of his office. It is indeed the alliance of colonial and racist forces with the illegitimate interests of an obsolete world that prevailed in the decision of this Judge, who is guilty of the attempted murder of the International Court of Justice.

See statement by Mr Achcar (Guinea) speaking on the question of South West Africa at the Twenty-First Session of the UN General Assembly, 1414th Plenary Meeting, 23 September 1966, at 14-15, para. 116.

218. William MINTER, "With All Deliberate Delay: National Security Action Memorandum 295 and US Policy Toward South West Africa" (1984) 27 *African Studies Review* 93 at 100.



mandate over South West Africa.<sup>219</sup> Also, in the same year, Sam Nujoma, the SWAPO leader, announced that his organization would seek to liberate Namibia by force, since constitutional change was being frustrated by South Africa.<sup>220</sup>

One of the issues that arose following the passage of the resolution revoking South Africa's Mandate over South West Africa was whether it would have been legally preferable to obtain an advisory opinion from the ICJ before pursuing this course of action.<sup>221</sup> Zafrulla raised the possibility that the UN General Assembly might refer a further question to the ICJ for an Advisory Opinion in an interview that he gave to the English-language Karachi-based newspaper *Dawn*, ten days after the ICJ delivered its Judgment. Zafrulla told the reporter that the Judgment:

Is confined to the question of the competence of the applicant States. It has made no pronouncement on the merits. It is open to the Security Council or the General Assembly to request an advisory opinion from the Court on the matters of substance raised by the applicant States in their application.<sup>222</sup>

But, due to the anger that was directed at the Court, it took a lot of persuading before countries would have faith in it again, which may explain the five-year delay before a further question was actually referred to the Court on the legal consequences for states of South Africa's continued presence in South West Africa.

But it is clear from this interview that Zafrulla was already thinking along the lines of drumming up support in the UN General Assembly to make a further request for an Advisory Opinion from the ICJ so that it would be given an opportunity to address the question of apartheid in South West Africa that it had resolutely refused to address in its Judgment in the second phase of the *South West Africa* cases in 1966. Zafrulla stressed that the advantage in seeking a further Advisory Opinion from the Court was that not only would it augment and amplify the Court's previous Opinions that were delivered in 1950, 1955, and 1956, but that it would be more difficult for the conservative-minded Europeans on the Court to avoid addressing the merits. Presumably, in the aftermath of the furor over the 1966 Judgment, and with a change in the composition of the Court, Zafrulla and his fellow Third-World judges could assure the outcome that everyone had initially been expecting from the 1966 Judgment.<sup>223</sup>

219. See UN General Assembly Res. 2145 (XXI), 27 October 1966.

220. Michael SPICER, "Namibia: Elusive Independence" (1980) 10 *World Today* 406 at 407.

221. See John DUGARD, "The Revocation of the Mandate for South West Africa" (1968) 62 *American Journal of International Law* 78 at 82.

222. Zafrulla was responding to the following question, which was addressed to him: "Does the judgment of the Court mean that the merits of the dispute cannot be judicially determined and, if so, would not that constitute a shattering blow to procedure for the peaceful settlement of international disputes, a blow dealt by the principal judicial organ set up for that purpose?" See Nasim AHMAD, "Zafrullah Throws Light on World Court Judgment" *Dawn* (Karachi) (28 July 1966) at 9.

223. The US State Department had been expecting, and had been prepared for, a judgment against South Africa. An approved policy paper prepared by all bureaus and agencies of the US government responsible for formulating US policy towards South Africa had predicted that "the ICJ will decide the case before it by mid-1965 and that its decision will be unfavourable to South Africa's contentions

## VIII. DECOLONIZING THE INTERNATIONAL COURT OF JUSTICE: THE 1971 ADVISORY OPINION ON *NAMIBIA* (SOUTH WEST AFRICA)

In 1970, Zafrulla was elected President of the Court in a contest in which he was pitted against Sir Gerald, the senior judge whom he resoundingly defeated.<sup>224</sup> According to Merrills, Sir Gerald's failure to secure election to that office was "an abiding disappointment".<sup>225</sup> After the uproar over the 1966 Judgment, the new UN majority thought that "the Court's membership should reflect the changed political situation and that it should contain more Afro-Asian representation, if necessary, by an enlargement of the Court".<sup>226</sup> Accordingly, at the first possible opportunity in 1966, the Afro-Asian countries exerted all their influence to elect five new judges who they believed were more sympathetic towards their views. These new judges were Fouad Ammoun (Lebanon), Charles D. Onyeama (Nigeria), Cesar Bengzon (the Philippines), Manfred Lachs (Poland), and Sture Petre (Sweden).<sup>227</sup>

Earlier, in 1970, the Security Council passed a Resolution in which, after condemning South Africa for its refusal to comply with previous UN resolutions on Namibia, declared that "the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid".<sup>228</sup> Later that year, the UN Security Council submitted a question to the ICJ in which it was asked about the legal consequences for states of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276.<sup>229</sup>

In June 1971, Zafrulla delivered one of the most legally innovative Advisory Opinions the ICJ has ever delivered.<sup>230</sup> The Opinion addressed the issue that the Court as constituted in 1966 did not want to address—and predictably prompted a two-hundred-page Dissent from Sir Gerald.<sup>231</sup> This time, however, Sir Gerald had to write the Dissent alone as Sir Percy had retired from the Court in 1966.

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respecting its asserted freedom to apply apartheid in South-West Africa and freedom from UN supervision". See "National Policy Paper—South Africa", 19 January 1965, in *Foreign Relations of the United States, 1964–1968, Volume XXIV, Africa* (Washington: United States Government Printing Office, 1999), 1007–19. However, according to William Minter, even if there had been a strong court ruling against South Africa in 1966, the US and British governments would still have found ways to delay mandatory UN sanctions. See Minter, *supra* note 218 at 98–100.

224. Khan, *supra* note 41 at 288.

225. See Merrills, *supra* note 41 at 15. Sir Gerald had also lost the 1966 elections to become President.

226. See the debates cited in R.P. ANAND, *Studies in International Adjudication* (Delhi: Vikas Publications, 1969) at 145.

227. *Ibid.*

228. UN SC Res. 276, 30 January 1970. (France and the UK abstaining).

229. See SC Res. 284, 29 July 1970.

230. *Legal Consequences for States, supra* note 2 at 16.

231. Dissenting Opinion of Judge Sir Gerald Fitzmaurice (*ibid.*, at 220).

The Court returned to the approach adopted by the Courts in the 1950, 1955, and 1956 Advisory Opinions, and the 1962 Judgment, but took them several stages further. The Court rejected the view that had been advanced by South Africa, and that had been tacitly accepted in the 1966 Judgment, that C-class Mandates were tantamount to colonies. It explained that such an interpretation “puts too much emphasis on the intentions of some of the parties and too little on the instrument which emerged from those negotiations”.<sup>232</sup> The Court referred to text of the first paragraph of Article 22 of the Covenant of the League of Nations and concluded:

It is self-evident that the “trust” had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own and to possess a potentiality for independent existence on the attainment of a certain stage of development: the mandates system was designed to provide peoples “not yet” able to manage their own affairs with the help and guidance necessary to enable them to arrive at the stage where they would be “able to stand by themselves”.<sup>233</sup>

The Court added that whilst there had been a strong tendency by certain governments to annex former enemy colonial territories after World War I, “the final outcome of the negotiations, however difficult of achievement, was a rejection of the notion of annexation”.<sup>234</sup> The Court explained that “the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them”.<sup>235</sup>

The Court then referred to the Declaration on the granting of independence to colonial countries and peoples, which had not been mentioned in the previous decisions of the Court, an omission that was conspicuous by its absence. In a famous and lengthy passage that is often quoted, the Court set out its method of interpreting historical developments, which was at complete variance with the approach that had been adopted by the 1966 Court. It explained that it was:

Bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—“the strenuous conditions of the modern world” and “the well-being and development” of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the “sacred trust”.<sup>236</sup>

The Court added that:

Viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of international law, through the Charter of the United Nations and by way of customary law.<sup>237</sup>

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232. *Legal Consequences for States*, *supra* note 2 at 28, para. 45.

233. *Ibid.*, at 28–9, para. 46.

234. *Ibid.*, at 30, para. 50.

235. *Ibid.*, at 31, para. 52.

236. *Ibid.*, at 31, para. 53.

237. *Ibid.*

It explained that the previous fifty years brought important developments which “leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned”.<sup>238</sup>

The Opinion then addressed the powers of the UN General Assembly and the UN Security Council, expressing opinions that would prove to be controversial. The Court concluded that “by resolution 2145 (XXI) the General Assembly terminated the Mandate”.<sup>239</sup> However, because the UN General Assembly lacked enforcement powers “to ensure the withdrawal of South Africa from the Territory, it enlisted the co-operation of the Security Council”.<sup>240</sup> The Court explained that UN Security Council resolutions could be legally binding even if they had not been adopted under Chapter VII of the UN Charter.<sup>241</sup> Having reached this conclusion, the Court was also able to reach the conclusion that it had wanted to reach all along: the General Assembly resolution that had terminated South Africa’s Mandate over South West Africa was valid. So were the UN Security Council resolutions that called South Africa’s presence in Namibia illegal; that called for South Africa to immediately withdraw its administration from Namibia and for states to refrain from entering into relations with other countries in respect of Namibia.<sup>242</sup>

The British government, with its extensive trading interests in South and South West Africa—especially in the mining industry—adopted a hostile attitude to the 1971 *Namibia* Opinion.<sup>243</sup> Anthony Kershaw, Under-Secretary of State for Foreign and Commonwealth Affairs, told the House of Commons that the British government did not think that the UN General Assembly could terminate a League of Nations Mandate; that the General Assembly had “no general competence of an executive character”; that Her Majesty’s government “were not persuaded by the reasoning advanced by the Court to sustain the validity of Resolution 2145”; and that “since we have reached the conclusion that the mandate has not been validly terminated, we cannot accept the legal consequences deduced by the Court”.<sup>244</sup>

Despite Britain’s objections, and South Africa’s continued occupation of Namibia (it did not concede independence until 1990), the *Namibia* Opinion was important legally because it was the first case to mention self-determination explicitly. It was the first case to reference the Declaration on the granting of independence to colonial countries and peoples. Also, it was the first case to represent the views of the nations of the Third World who now made up a majority of the members of the UN General Assembly and who were determined to assert their views on legal and political

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238. *Ibid.* It was through such evolutionary modes of reasoning, that the ICJ was able to conclude, as Judge Higgins observes, “that peoples living in a Class C Mandate—a different type of institution, in which self-determination had most certainly *not* been envisaged at the time of drafting—were nonetheless entitled to self-determination”. See Higgins, *supra* note 3 at 1072 (emphasis in original).

239. *Ibid.*, at 51, para. 106.

240. *Ibid.*

241. *Ibid.*, at 52–3, para. 113.

242. *Ibid.*, at 53, para. 115.

243. In Parliament, the British government had to defend accusations that it was more concerned with safeguarding the interests of the company Rio Tinto Zinc than with the welfare of Namibians. See Curtis, *supra* note 174 at 121–2.

244. South-West Africa, HC Deb, 19 October 1971 vol. 823 cols. 668–94 at cols. 678–83.

controversies. The *Namibia* Opinion remains of importance today for those states and scholars that need authority for making arguments based on self-determination. Understanding the tortured history of the *South West Africa* cases, and how the *Namibia* Opinion only became possible after Zafrulla's victory over opposition *within* the Court, provides scholars with more realistic expectations of the impact of arguments they may make that reference self-determination today. The conservatism of the Court that delivered the *Kosovo* Opinion<sup>245</sup> is perhaps merely a return to form.

## IX. CONCLUSION

In one of his last functions as President of the ICJ, Zafrulla gave a speech marking the fiftieth anniversary of the establishment of the international judicial system to mark the Permanent Court's inaugural sitting on 15 February 1922.<sup>246</sup> In his speech, Zafrulla explained that certain states were still influenced by a belief that:

The International Court of Justice is dominated by ideas of international law derived from those states which were most powerful during its formative period—by a system of international law in the elaboration of which the new states took no part; and that it cannot therefore be relied on to do justice to the legitimate claims and aspirations of the newer states.<sup>247</sup>

But Zafrulla disagreed with this view:

The Court is universal: it is not dominated by any legal philosophy bounded by limitations of a historical, geographical or ideological nature. The Court applies international law as it is; and if international law grows and develops under the influence of the legal systems and legal ideas of any state or group of states, new or old, then international law as a whole will be richer, and the Court will apply the new law as faithfully as it has applied the old. The Court must apply the law and cannot change it; but in applying the law the Court must interpret it and also take note of changes and developments in the law. This process is a powerful factor of progress. The Court represents the principal legal systems of the world through its Members, all of whom contribute to the formation of the Court's decisions and rulings.<sup>248</sup>

As was by then apparent, the Court took note of the changes to the development of international law, which occurred as a result of decolonization, in its *Namibia* Advisory Opinion in 1971. What Zafrulla did not mention was the internal power struggle within the Court that he had to win before the Court was able to deliver this decision. Quite literally, the *Namibia* opinion marked the moment the ICJ went through decolonization. *Namibia* is important because it was the first instance when judges representing the Third World were able to have their say on a major

245. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion [2010] I.C.J. Rep. 403.

246. Muhammad Zafrulla KHAN, "Address on the 50th Anniversary of the International Judicial System", 27 April 1972, (1972) 6 *International Lawyer* 449.

247. *Ibid.*, at 460.

248. *Ibid.*, at 460–1.

international legal controversy that had divided world opinion. *Namibia* also set a judicial precedent. For, after *Namibia*, the word “self-determination” was no longer a legal taboo. Moreover, after *Namibia*, the argument could be made that the right of all peoples to self-determination was not just a political right, but a right enshrined in international law. Accordingly, after *Namibia*, the right of self-determination was recognized in the ICJ’s Advisory Opinions in *Western Sahara* in 1975,<sup>249</sup> the *East Timor* case in 1995,<sup>250</sup> and was reaffirmed in the *Wall* Advisory Opinion in 2004.<sup>251</sup> It was also mentioned in the ICJ’s *Kosovo* Advisory Opinion in 2010, although the Court shied away from addressing self-determination, in particular its application to post-colonial situations, in any meaningful way, leaving that role to the separate and dissenting opinions of individual judges.<sup>252</sup>

In his paper on Zafrulla, Hussain observed that although Zafrulla’s tenure at the ICJ was marked by the brevity and conciseness of the very few separate and dissenting opinions that he wrote, he nonetheless “presided over some of the monumental changes that occurred in the Court’s outlook especially in the 1971 *Namibia* advisory opinion”.<sup>253</sup> Following this observation, Hussain asks whether Zafrulla was in any sense responsible for bringing about these changes, or whether they would have occurred without him. Unfortunately, Hussain does not provide a satisfactory answer to his own question. He suggests that instead of praising Zafrulla for the revolutionary change in the Court’s jurisprudence on the right of all peoples to self-determination, the credit should go to Alvarez and Tanaka—even though the former was dead and the latter was not on the Court in 1971.

Hussain also suggests that, due to Zafrulla’s decision to sit out of the second phase of the *South West Africa* cases, “he came under severe criticism by many Third World countries”.<sup>254</sup> He further claimed that Zafrulla’s decision not to sit in the second phase of the *South West Africa* cases “gave credence to rumours ... according to which Zafrulla acquiesced in the decision of the President because his eyes were fixed on the presidency of the World Court”.<sup>255</sup> But nothing could be further from the truth—for Zafrulla did not seek election to be President in the immediate aftermath of the 1966 Judgment. And when he sought election to be President of the Court in 1970, he was competing against Sir Gerald, who had opposed his election to the Court in 1954 and 1963, and who along with Sir Percy had sought to ostracize

249. *Western Sahara*, Advisory Opinion, [1975] I.C.J. Rep. 12 at 31–2, paras. 51–6.

250. *East Timor (Portugal v. Australia)*, Judgment, [1995] I.C.J. Rep. 90 at 102, para. 29.

251. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at 171–2, para. 88.

252. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] I.C.J. Rep. 403 at 436, para. 79, and at 438, para. 82. See further the separate Opinion of Judge Yusuf, especially at 620, para. 5 (lamenting that the Court did not use “this opportunity to define the scope and normative content of the post-colonial right of self-determination”). See also the separate Opinion of Judge Cançado Trindade who wrote on self-determination at length.

253. Hussain, *supra* note 8 at 479.

254. *Ibid.*, at 488.

255. *Ibid.*, at 491.

him from sitting in the first phase of the *South West Africa* cases as well as the second phase.

Although Zafrulla did not write much on the right of peoples to self-determination in the form of separate or dissenting opinions, it is suggested that he did as President of the Court play a significant, if not monumental, role in bringing about a sea change in the Court's jurisprudence on the right of all peoples to self-determination—a topic that was dear to him. But obviously, in the light of his earlier political pronouncements on this question in the United Nations, and in the face of vocal opposition from Sir Percy and Sir Gerald from within the Court, he could not be explicit about it. However, being President of the Court, and being responsible for the direction and drafting of the *Namibia* Advisory Opinion placed him in a position to assert his views with his colleagues on an issue with which he had acquired much experience and expertise. It also meant that his name would not be individually associated with the Judgment.

I believe the time has come to rehabilitate Zafrulla's reputation in the *South West Africa* cases. The 1971 *Namibia* Opinion clearly has Zafrulla's fingerprints all over it. The language, the logic, the style of argumentation, and the mix of teleological and textual interpretations of historical documents is similar to the style of argumentation and interpretation that Zafrulla employed when he supported the struggle of the Palestinian people for self-determination. This, in turn, had been influenced by his experience as a negotiator for the Indian government in its independence negotiations with the British Empire, and later when he was asked to make the case for Pakistan before the Radcliffe Boundary Commission. The ten years that Zafrulla spent engaged in UN politics at the height of decolonization also meant that he was a man who was well versed in the law and politics of self-determination.<sup>256</sup> Although Alvarez and Tanaka also contributed to the Court's jurisprudence on decolonization, they could only do so in the form of dissenting opinions.<sup>257</sup> What made Zafrulla unique—and what Sir Percy and Sir Gerald feared—was that he not only had the ability, knowledge, and experience of drafting Court judgments, he also commanded the respect of many of his colleagues, as evinced by his election as Vice President of the Court in 1958, and as President of the Court in 1970, which ultimately enabled him to influence and change a judgment of the Court. In my opinion, *contra* Hussain, it was Zafrulla, not Tanaka or Alvarez, who should be credited for the revolutionary change in the Court's jurisprudence on the right of all peoples to self-determination.

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256. Zafrulla was Pakistan's Foreign Minister from 1947 to 1954, and was Pakistan's Permanent Delegate to the UN and President of the UN General Assembly from 1961 to 1964.

257. See *International Status of South-West Africa*, Dissenting Opinion of Mr Alvarez, *supra* note 2 at 174. See also *South West Africa, Second Phase*, Dissenting Opinion of Judge Tanaka, *supra* note 2 at 250.