THE QUESTION OF NAMIBIA

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Since the independence of Zimbabwe, Namibia has become the next candidate for liberation in southern Africa. While Namibia has been the responsibility of the United Nations, that Organization has ironically been frustrated in bringing about the decolonization of Namibia. The General Assembly of the United Nations will hold an emergency special session from 3 to 11 September 1981 on the question of Namibia. The purpose of this article is to review some of the legal and political problems which have arisen in the context of the United Nations in relation to the question of Namibia up to the present time of the eve of this momentous session of the United Nations General Assembly.

Namibia, formerly called South-West Africa, has a special place in the jurisprudence of the International Court of Justice (I. C. J.) and in the life of the United Nations as a whole. Spread out over more than two decades, there have been more cases (advisory opinions and contentious cases) on Namibia than on any other single subject. As a result a number of precise issues have been resolved on the legal, if not the political, plane. These decisions given by the Court should be borne in mind as the current events regarding Namibia unfold.

Existence of a Sacred Trust

In 1950,[1] the I. C. J. examined the international status of the Territory of South-West Africa and the international obligations of the Union of South Africa arising therefrom.

Issue 1: Does South Africa continue to have international obligations under the Mandate of South West Africa (originally established under article 22 of the Covenant of the League of Nations) and, if so, what are those obligations? The Court opined that the Mandate had not lapsed. Contentions to the contrary were misconceived. South Africa could not retain the rights, while denying the obligations derived from the Mandate.

There were two kinds of obligation: first of all, administration of the territory, which involved a "sacred trust of civilization" (article 22 of the League Covenant and articles 2 to 5 of the Mandate) whose fulfilment was independent of the League and, secondly, the obligation to submit to supervision (as well as render annual reports and transmit petitions of the inhabitants of South-West Africa to the U. N. General Assembly). However, the degree of supervision exercised by the General Assembly should not exceed that which applied under the Mandate System and should conform as far as possible to the procedure of the League of Nations Council.

Issue 2: Are the provisions of Chapter XII of the U. N. Charter ("International Trusteeship System") applicable and, if so, in what manner, to the territory of South-West Africa? The U. N. Charter did not automatically transform the Mandate into a trust territory. The relevant articles (75 and 77) only provided that certain territories, including "territories now held under Mandate," "may be placed" under the

Trusteeship System. Thus while South Africa was bound by article 22 of the League of Nations Covenant, it would go too far to deduce from the merely permissive language of the relevant articles (75, 77 and 80 (2)) of the U. N. Charter, that the Charter imposed a legal obligation on South Africa to place South-West Africa under the trusteeship system. South Africa probably felt strengthened to some extent by the latter pronouncement.

Issue 3: Has the Union of South Africa the competence to modify the status of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify South-West Africa's international status? South Africa could not unilaterally modify the status of South-West Africa because South-West Africa had an international status. The Council of the League of Nations formerly exercised supervisory functions; these were inherited by the U. N. General Assembly, which also approved the conclusion and amendment of trusteeship agreements. Therefore, by analogy, the General Assembly had competence regarding any modification of status, the more so as South Africa had made several statements recognizing General Assembly competence in this matter.

Some Procedural Questions

In 1955[2] and 1956,[3] the Court gave its opinions on a number of procedural questions arising from the earlier advisory opinion of 1950. Since South Africa refused to co-operate in the implementation of the 1950 opinion, the Committee on South-West Africa, established by the U. N. General Assembly, proposed rules for procedure for the Assembly regarding reports and petitions concerning South-West Africa. According to a rule of voting (called "Rule F") proposed by the Committee, such decisions were to be regarded as "important questions" (under article 18 (2) of the U. N. Charter) and, hence, should be adopted by a two-thirds (instead of a simple) majority of the members of the Assembly.

Issue 4: Was Rule F a correct interpretation of the 1950 advisory opinion and, if not, what voting procedure should be followed? In 1955, the Court unanimously held that Rule F was a correct interpretation, rejecting the South African argument that the degree of supervision to be exercised by the Assembly exceeded that applied under the Mandate System and holding that the Assembly had gone "as far as possible" to make its procedure conform to that of the League of Nations Council.

Issue 5: Was it consistent with the 1950 advisory opinion to grant oral hearings to petitioners on matters relating to South-West Africa? The Court found that it was consistent, in light of the purpose and requirements of effective supervision. The Court also pointed out that the predecessor of the Assembly was competent to grant oral hearings and, although it had not actually done so, the degree of supervision by the Assembly was not necessarily tied to only what the predecessor had done. Furthermore, the Court noted that the lack of co-operation by South Africa had made it necessary to provide an alternative procedure for examining petitions.

Contentious Proceedings

South Africa was under an obligation to submit any dispute with "another Member of the League of Nations" regarding the Mandate to the World Court, if negotiation had failed. Ethiopia and Liberia, unlike the newly independent countries, had been members of the League.

Ethiopia and Liberia instituted contentious proceedings[4] in the World Court alleging that South Africa had violated and continued to violate its duties by, for example, failing to promote the material and moral well-being and social progress of the inhabitants, practicing apartheid, adopting arbitrary, unreasonable and unjust legislative measures which were detrimental to human dignity, suppressing civil rights and liberties essential to orderly evolution towards self-government, failing to render annual reports regarding South-West Africa and to transmit petitions to the U. N. bodies and unilaterall modifying the terms of the Mandate through its actions. South Africa raised a number of preliminary objections to the Court's jurisdiction, and the efforts of Ethiopia and Liberia were eventually shipwrecked on a shoal of technicalities.

Issue 6: Was the Mandate ever, or at any rate since the dissolution of the League of Nations, a "treaty or convention in force?" For the Court to have compulsory jurisdiction in accordance with article 37 of the Court's Statute, the Mandate had to be a "treaty or convention in force." The first technicality raised by South Africa was that the Mandate did not meet this requirement.

Issue 7: Was either Ethiopia or Liberia "another member of the League of Nations" as required in order to have standing before the Court (article 7 of the Mandate)?

Issue 8: Was the alleged conflict or disagreement (between Ethiopia and Liberia on the one hand, and South Africa, on the other hand) really a "dispute" under article 7 of the Mandate, especially since it did not affect any material interests of the applicant states or their nationals?

Issue 9: If there was a "dispute", was it one that could not be settled by negotiation within the meaning of article 7?

In an extensive judgment delivered in 1962,[5] a sharply divided Court answered yes to all the above questions and, thereby, rejected South Africa's preliminary objections to its jurisdiction.

A Complete Reversal?

But, there were more obstacles still to come.

Issue 10: Did the Mandate still submit?

Issue 11: Did the applicants have sufficient legal rights or interest in the present proceedings?

In 1966,[6] the Court dealt with the latter issue without pronouncing on the former. Liberia and Ethiopia could be regarded as having sufficient legal interest if South Africa had direct obligations towards other League members individually in respect of the provisions of the Mandate defining the mandatory's powers and obligations. The best method of giving practical effect to the principle of "sacred trust of civilization" was to have the mandatories undertake the tutelage of the peoples concerned as agents of the League and not as agents of each member individually.

Each League member had no right separately and individually to require due performance of a Mandate, but only through their participation in the organs of the League. For their conduct of the Mandates, the mandatories were responsible solely to the League as a whole, in particular to the Council of the League. Otherwise, mandatories would be caught between the different points of view of some 40 or 50 states and, since normal voting in the League required unanimous consent and the mandatory was a member of the Council in Mandates questions, the assent or at least non-dissent of the mandatory had to be obtained.

The Court then rejected an argument of great general interest, namely the argument that humanitarian considerations are sufficient in themselves to generate legal rights and obligations. As a court of law, it could take account of moral principles only insofar as these were given a sufficient expression in legal form.

A major argument was that the question of the legal right or interest of Ethiopia and Liberia had been settled by the 1962 judgment and could not remain for the applicants to establish a sufficient interest on the merits, and this could not be precluded by the 1962 proceedings on the preliminary objections.

The Court also held that the Mandates did not constitute a parallel with the minority treaties regarding which League members had a separate right of action.

The Court rejected the "necessity" or actio popularis argument (that a member of a community had a right to take legal action in vindication of the public interest) on the ground that, though known to the municipal law of certain countries, it was not known to international law, nor could it

be imported by general principles of law. The Court held that it could not engage in filling the gaps in the relevant legal instruments because that would involve rectification or revision rather than interpretation.

The Court was equally divided (seven to seven) and it was only by the President's casting vote that it was decided to reject the claims of Ethiopia and Liberia. This decision was extensively criticized because it appeared to be a complete reversal of the 1962 decision. One problem was the long time lag between the Court's proceedings. Four years had passed since the 1962 decision, the composition of the Court had changed and the opinions of a number of judges, who were in the minority in 1962, were carried by the majority (including the President's casting vote) in 1966.

Issue 12: What are the legal consequences for states of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?

Through General Assembly resolution 2145 of 1966 after negative decision of the Court of the same year, the G. A. terminated the mandate of South-West Africa and assumed direct responsibility for the territory until its independence. Security Council resolution 276 (1970) went further, declaring that all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the mandate were illegal and invalid. It also referred to other resolutions, including one which called upon states to refrain from all dealings with South Africa in respect of Namibia.

In its advisory opinion of 1971,[7] the International Court held that: (1) as the continued presence of South Africa in Namibia was illegal, South Africa was under an obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory; (2) states members of the U. N. were under obligation to recognize the illegality of South Africa's presence in Namibia, and to refrain from any acts, and in particular any dealings with the Government of South Africa, implying recognition of the legality of, or lending support or assistance to, such presence and administration; (3) it was incumbent upon states not members of the U. N. to give assistance, within the scope of subsection (2) above, in the action which had been taken by the U. N. with regard to Namibia.

The U. N. Plan

With those basic legal issues resolved, the question of Namibia moved squarely and almost exclusively into the realm of political negotiation with a view to arriving at an internationally acceptable settlement. The 1970's were characterized by a long series of high-level consultations, exchanges of letters, meetings and missions to South Africa and Namibia, and of important resolutions of the Security Council, the General Assembly and other bodies. U. N. Secretary-General Hurt Waldheim undertook a number of contacts with the South African Government which were terminated in 1973 for lack of progress. In the same year, the General Assembly recognized the South West African Peoples' Organization (SWAPO) as the sole and authentic representative of the Namibian people.[8]

The question of Namibia picked up momentum in 1976 when the Security Council unanimously reiterated the demand for South African withdrawal and called for free elections under U. N. supervision and control.[9] In 1977 and 1978, the five Western members of the Security Council (Canada, France, the Federal Republic of Germany, the United Kingdom and the United States), which became known as the Western Contact Group of Five, held a number of rounds of talks with the South African Government and SWAPO, and in April 1978 placed a settlement proposal[10] before the Security Council.

This activity culminated within the U. N. in 1978 with the adoption of Security Council resolution 435, as the cornerstone of the United Nations plan for the independence of Namibia.[11] Some basic elements of the U. N. Plan were as follows: elections under the supervision and control of the United Nations; repeal of all discriminatory or restrictive laws, regulations or administrative measures; release of all Namibian political prisoners or detainees; cessation

of all hostile acts by all parties and the restriction of South African and SWAPO armed forces to base; phased withdrawal from Namibia of all but 1500 South African troops within three months; maintenance of law and order during the transition period through the existing police forces limited to carrying small arms and accompanied when appropriate by U. N. personnel; remodelization of the citizen forces, commandos, and ethnic forces and the dismantling of their command structures; provision for SWAPO personnel outside of the territory to return peacefully through designated entry points to participate freely in the political process.

The purpose of such elections will be to select a Constituent Assembly which will adopt a Constitution for an independent Namibia. The U. N. Special Representative[12] plays the central role in making sure that conditions are established which allow free and fair elections and an impartial electoral process. He must satisfy himself at each stage as to the fairness and appropriateness of all measures affecting the political process at all levels of administration before such measures take effect.

Though both South Africa and SWAPO accepted the Western proposal, South Africa raised objections to the Secretary-General's subsequent report[13] on implementation of it. South Africa objected mainly to the lack of provision for the United Nations Transition Assistance Group (UNTAG) to monitor SWAPO bases in the neighbouring states and to the designation of bases in Namibia for SWAPO after a cease-fire.[14]

To facilitate the implementation of resolution 435, discussions were held after July 1979 regarding the establishment of a demilitarized zone extending fifty kilometres on each side of Namibia's borders with Angola and Zambia.[15] The front-line states (Angola, Botswana, Mozambique, Tanzania, and Zambia) and SWAPO accepted the broad outline of the proposal, but South Africa's agreement was provisional upon general agreement that there would be no SWAPO bases in Namibia.

Collapse of the Pre-Implementation Meeting

By the end of 1980, the Secretary-General suggested March 1981 as the time-frame for the commencement of the implementation of resolution 435 and concluded that Namibian independence should be achieved in 1981. He proposed a pre-implementation meeting to secure the cooperation of all the parties

That meeting, attended by SWAPO and South Africa, was held in Geneva from 7 to 14 January 1981. The South African delegation included internal political parties from Namibia, namely the Democratic Turnhalle Alliance (DTA) and the Action Front for the Retention of Turnhalle Principles (AKTUR). The front-line states, the Organization of African Unity (OAU), Nigeria, and the Western Five were observers.

The U. N. Secretariat indicated that there were no outstanding technical issues which could justify any failure to proceed with implementation of the U. N. Plan.[16] It was proposed that the parties make a declaration of intent supporting the provisional establishment of a cease-fire to take effect on 30 March.

However, South Africa, apparently emboldened by the more conciliatory stand of the new United States Administration, refused to cooperate in the signing of a cease-fire agreement and the implementation of the U. N. Plan. Thus, South Africa's intransigence caused the collapse of the pre-implementation meeting.

Recent Events

In the aftermath, a number of meetings have been held by, inter alia, the OAU, the non-aligned countries and the front-line states. At its resumed thirty-fifth session, the General Assembly adopted a number of resolutions on Namibia. The International Conference on Sanctions against South Africa held in Paris at the end of May[17] and the extraordinary plenary meeting of the U. N. Council for Namibia in Panama in early June[18] reiterated a number of proposals, including a programme of political and economic sanctions that states might adopt unilaterally against South Africa.

But, two particularly important meetings

have been held by the Security Council. Firstly, at the end of April, draft resolutions[19] proposing comprehensive and mandatory sanctions against South Africa, under Chapter VII of the U. N. Charter, were placed before the Security Council. These were vetoed by France, the United Kingdom and the United States.[20]

Secondly, after the South African incursion into Angola at the end of August to attack SWAPO bases there, the Security Council considered a draft resolution condemning South Africa.[21] The United States vetoed this draft, even though a proposal of comprehensive and mandatory sanctions against South Africa had been deleted.[22]

Conclusion

The pronouncements of the International Court of Justice on a number of issues provide a firm legal basis for U. N. action as Namibia moved toward independence. The question of Namibia, as an integral part of the liberation of southern Africa as a whole, has moved into the realm of political negotiation. But, negotiation has been slow and is frequently impeded by South Africa's intransigence.

On the eve of the emergency special session of the U. N. General Assembly on Namibia, South Africa continues to pursue a dangerous course. Its presence in Namibia has been marked by bantustanization,[23] entrenchment of the system of apartheid, the conscription of Namibians, increased militarization,[24] the introduction of new governmental structures,[25] and other forms of exploitation of Namibia's human and natural[26] resources. South Africa has even embarked upon an armed attack against Angola in a misguided attempt to buy time or to impose a military solution.

There appear to be few real remaining objections to the U. N. Plan. South Africa has expressed some concern about the placement of South African, SWAPO and U. N. forces under the Plan, constitutional guarantees of minority rights, and the impartiality of the U. N. in any elections. Significantly, as a result of recent meetings of the Western Five, an attempt may be made to agree on basic constitutional principles before the elections, contrary to resolution 435. But, the signs are that the differences on these points are not insurmountable.[27]

The prevailing international conditions have permitted South Africa to assume a position of total non-compliance with U. N. decisions and proposals aimed at its withdrawal from Namibia, free elections under U. N. supervision and control, and Namibian independence. It is clear that further international pressure must be brought to bear upon South Africa to induce it to cooperate. On the question of Namibia, which has preoccupied the United Nations since its very beginning, the task of the U. N. is by no means complete.

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NOTES

1. (1950) I.C.J. Reports 128
2. (1955) I.C.J. Reports 67
3. (1956) I.C.J. Reports 23
4. See the judgment at (1962) I.C.J. Reports 319
5. Id.
6. (1966) I.C.J. Reports 6
7. (1971) I.C.J. Reports 16
8. G. A. res. 3III (XXVIII) of 12 December 1973
9. S. C. res. 385 (1976)
10. U. N. Doc. S/12636, Official Records of the Security Council, (S. C. O. R.), 33rd Year, Supp. for April, May and June 1978.
11. S. C. res. 435 (1978) is central to the current efforts to achieve negotiated settlement. It was adopted by 12 votes to none, with 2 adstentions (Czechoslovalia and U.S.S.R.). China did not participate in the voting. See also S.C. res. 385 (1976).
12. See U. N. Doc. S/12636, supra note 10, for the original elements of the U. N. Plan. The Secretary-General was requested by S. C. res. 431 (1978) to appoint a Special Representative for Namibia. Martti Ahtisaari, the U. N. Commissioner for Namibia, was appointed to the post. A United Nations Transition Assistance Group (UNTAG) was established by S. C. Res. 435 to assist him in carrying out his mandate.
13. U. N. Doc. S/13120, S.C.O.R., 34th Year, Supp. for Jan., Feb., and March 1979.
14. For South Africa's objections, see U. N. Doc. S/13143, id., and U. N. Doc. A/34/23/Rev. I, Official Records of the General Assembly (G. A. O. R.) 34th Sess., Supp. No. 23.
15. U. N. Doc. S/13862, S.C.O.R., 35th Year, Supp. for Jan., Feb., and March 1980.
16. U. N. Doc. A/AC. 109/653, para. 55.
17. See the Paris Declaration on Sanctions against Namibia and the Special Declaration on Namibia, U. N. Doc. A/36/319. For information on the Conference and on the position of The Bahamas on Namibia and southern Africa in general, see The Herald, 28 May and 4 June 1981.
18. See the Panama Declaration and Programme of Action on Namibia, U. N. Doc. A/36/327.
19. Contained in U. N. Docs. S/14459, S/14460/Rev. I, S/14461 and S/14462.
20. See U. N. Doc. S/PV. 2277.
21. U. N. Doc. S/14664/Rev. 2.
22. See U. N. Doc. S/14664.
23. Restriction of the inhabitants to tribal homelands, consisting of relatively infertile and undeveloped tracts of land. See, e.g., U. N. Doc. A/AC. 109/653, paras. 4-8.
24. Note that a mandatory arms embargo was imposed by the Security Council against South Africa in 1977 (S.C. res. 418 (1977)).
25. This article has not dealt with the governmental structures introduced by South Africa. See, e.g. U. N. Doc. A/AC. 109/653, paras. 64-98. By S.C. res. 439 (1978), the Security Council declared the elections held by South Africa in Namibia

in December 1978 null and void. Also, for a cogent argument that South Africa's claim of sovereignty over Walvis Bay is untenable in international law, see T. Huaraka, "Walvis Bay and International Law", (1978) 18 Indian J. Int. L. 160.

26 See Decree No. I for the Protecion of the Natural Resources of Namibia, adopted by the U. N. Council for Namibia in 1974 (Namibia Gazette No I). Regarding the difficulties of incorporation of this landmark Decree into the domestic law of various countries, see H. G. Schermers, "The Namibia Decree in National Courts", (1977) 26 I.C.L.Q. 81.

27. See Newsweek magazine, 7 September 1981, p. 31, and New York Times, Sunday, 30 August 1981.