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THE SOUTH WEST AFRICA MANDATE

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INTRODUCTION

Both past and present litigation over South West Africa, especially the recent decision handed down on July 18, 1966 by the International Court of Justice, has attracted much public attention from lawyers and laymen alike. This recent judgment will be of great significance to scholars in the areas of international law and international politics for some time to come.

The South West Africa Case, however, is mostly important for what it symbolizes to the outside world. "To the outside world it symbolizes the struggle between black and white in South Africa."[1] Essentially, to many observers, both those in the outside world, and to those in the new independent African States, the struggle is between human dignity and equality on the one hand, and subordination, inequality and discrimination on the other. The critical issue, then, revolves around the South African policy of Apartheid, i.e., total segregation and separation of the races, with special privileges going to the white race.[2] In other words, the rule of white supremacy and the ideology of white superiority.

To South Africans, apartheid is a good humane policy.[3] It is because of this policy, they argue, that the native Africans have made so much improvement. However, to other African nations, such as Ethiopia and Liberia, apartheid is not a beneficial policy. They feel that it cannot contribute to the advancement of the native African people.[4]

Therefore, in the recent South West African Case, Liberia and Ethiopia based their case on two major grounds. First, that the United Nations is the legal successor to the League of Nations. And secondly, that apartheid is morally wrong. Thus,

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[1]Paul Fordham, *The Geography of African Affairs* (Baltimore: Penguin Books, 1965), p. 224.

[2]Charles A. W. Manning, "In Defense of Apartheid," *Foreign Affairs,* Vol. 43 (October, 1964), pp. 135-136.

[3]*Ibid.*

[4]John Stevenson, "Judicial Decisions," *The American Journal of International Law* (January, 1967), pp. 116-118.

South Africa by virtue of this policy, they claim, "has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the . . . ." mandated territory.[5] Hence, for this reason the mandate should be terminated.

In short, then, Ethiopia and Liberia, former members of the League, argue both the morality of apartheid and South Africa's right to the mandate in view of the fact that this policy has been judged by them to be in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League.[6]

To the contrary, South Africa (hereafter referred to as the Union) rested its case on one major principle, i.e., the United Nations is not the legal successor to the League and therefore cannot terminate the mandate.[7] They did not argue the goodness or badness of apartheid. For the Union, the morality of apartheid was not the key issue. The overriding problem as they saw it, was whether or not the United Nations had a right to terminate a mandate, to which they didn't have a clear title.[8] In other words, as far as the Union was concerned, the U. N. right to South West Africa was questionable and this right had not been established in international law. Apartheid was played down.

What did the International Court of Justice do? How did they resolve the issue? What did they say about apartheid? What is the present status of South West Africa? These are some of the key questions which this paper attempts to answer. In addition, the paper surveys briefly the historical background of the mandated territory, past judicial decisions and the prospects for the future. However, this study does not claim to be comprehensive in nature, but covers only the most important aspects of the case, with heavy emphasis upon recent United Nations' action in the area.

Although the conclusion of this study will speak for itself, it is hoped that this type of presentation will be both enlightening and useful.

THE HISTORICAL BACKGROUND OF SOUTH WEST AFRICA

At the Paris Peace Conference following World War I, it was felt that if the world was to remain free of war, then, among other things, the victor states should not be permitted to annex former German colonial territories.[9] This idea was embodied in Articles 118 and 119 of the Treaty of Versailles,[10] which provid-

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[5] *Ibid.*, p. 118.
[6] *Ibid.*
[7] *Ibid.*, pp. 118-119.
[8] *Ibid.*
[9] Ernest Gross, "The South West Africa Case: What Happened?" *Foreign Affairs*, Vol. 45 (October, 1966), pp. 36-37.
[10] Treaty of Peace Between the Allied and Associated Powers and Germany Signed at Versailles June 28, 1919, 3 Malloy's Treaties 3329 (1910-1923).

ed that German colonial territories in Africa were to be ceded to the Principal Allied and Associated Powers. The Covenant of the League of Nations, which was made a part of the Treaty of Versailles, specifically stated how and under what principles these territories were to be administered.[11] Finally, on December 17, 1920 the Principal Allied and Associated Powers conferred on the Union of South Africa a mandate to administer South West Africa on their behalf until such time as it became ready for independence.

The peoples in this former German colony were "not yet able to stand by themselves under the strenuous conditions of the modern world," therefore, they "were to be governed for their own well-being and development and as a sacred trust for civilization."[12]

"South West Africa was classified as a 'C' Group Mandate —that is to say, one which was regarded as appropriate to be administered as an integral portion of the Mandatory's territory; and it was allotted to His Britannic Majesty "to be exercised on his behalf by the Union of South Africa."[13] Under Article 2 of this mandate, the Union was required to promote the material, moral well-being and social progress of the inhabitants. Under Article 6, the Union agreed to submit reports annually to the League Council.

The basic framework for the Mandate operation might well be likened to the concept of separation of powers. The Mandatory was ultimately responsible to the Council of the League of Nations, which included all of the Principal Allied Powers except the United States.[14] There could be no alteration in the status of the Mandate without the permission of the Council. To act as a "watchdog" the League created a Permanent Mandates' Commission to ". . . receive and examine the Annual Reports of the Mandatories and to advise the Council on all matters relating to the observance of the Mandates."[15] It is important to note, however, that should it find that the Mandatory had violated its obligations under the Covenant and the Mandate, the Commission had no enforcement powers. Finally, Article 7 of the Mandate provided that disputes "between the Mandatory and another member of the League of Nations" over the interpretation of the Mandate should be submitted to the Permanent Court of International Justice. Thus, under this general framework, the Mandate was administered throughout the life of the League.

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[11]League of Nations Covenant, Art. 22, paras. 2, 3, 6, 7, 8, 9.

[12]Rosalyn Higgins, "The International Court and South West Africa," *International Affairs* (October, 1966), p. 573.

[13]*Ibid.* See also Gross, *op. cit.*, p. 37.

[14]The United States did not sign the Treaty of Versailles and consequently was not a member of the League of Nations. See Rayford Logan, *The Senate and the Versailles Mandate System* (Washington, D. C., Minorities Publishers, 1945). This book is an analysis of the attitude of the Senate toward the World War I mandates. See also Quincy Wright, *Mandates Under the League of Nations* (Chicago: University of Chicago Press, 1930). This book is a comprehensive account of the League's mandate system.

[15]League of Nations Covenant, Art. 22, para. 9.

However, "as early as 1922, South Africa adopted the view that 'C' Mandates were in the words of the South African leader, General Jan Christian Smuts 'in effect not far removed from annexation.' "[16] And by 1927, another observer had "showed that the Union of South Africa was desirous of annexing South West Africa to the Union."[17] She stated:

> No councils of native notables had been appointed and little seems to have been done in way of furthering the principle of native self-government. No village councils existed in Ovamboland and only in the region of Okavango River did chiefs and headmen control to any extent the natives through tribal law . . . No natives occupy administrative posts in the public service.[18]

In addition to these observations, "the Permanent Mandate Commission, until it ceased to function in 1939, frequently recorded its disagreements with South African assertions of sovereignty over the Territory, as well as of the right to incorporate it as a fifth province."[19] The Union, nevertheless, submitted reports to the Commission and recognized the legal existence of the Mandate.

At the conclusion of World War II the Union became one of the nations ratifying the U. N. Charter. Subsequently, the League of Nations by its own resolution, ceased to exist. "When the League died, the United Nations established a system, which was comparable in many respects to the mandate system, i.e., the trusteeship system."[20]

"South Africa was the only Mandatory not to place her territory under trusteeship, and after 1949 ceased to send any reports to the U. N. She denied any legal obligation to submit to the supervision of the U. N., declaring that the Mandate, and all the duties incurred thereunder, had lapsed with the dissolution of the League."[21] Therefore, in addition to the political measures which the U. N. took to break out of this impasse, the General Assembly posed several questions concerning the Mandate and asked the Court for advisory opinions. In other words, what has been the previous Court decisions regarding South West Africa?

PAST JUDICIAL DECISIONS RELATING TO SOUTH WEST AFRICA

It was precisely the question of what obligation the Union has as Mandatory to the United Nations which was submitted

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[16]Gross, *op. cit.*, p. 37.

[17]Rayford Logan, *The Operation of the Mandate System in Africa* 1919-1927 (Washington, D. C.: Foundation Publishers, 1942), p. 2.

[18]Frances E. Johnson, "Operation of the Mandate System in Southwest Africa for 1927," (Unpublished Master's Thesis, Atlanta University, 1928), p. 2.

[19]Gross, *op. cit.*, p. 37.

[20]Higgins, *op. cit.*, pp. 573-574.

[21]*Ibid.*, p. 574.

by the General Assembly to the International Court of Justice in 1950. Specifically, did South Africa continue to have international obligations under the Mandate? The Court in the first Advisory Opinion held:

> These obligations represent the very essence of the sacred trust of civilization. Their raison d'etre and original object remain. Since their fulfillment did not depend on the existence of the League of Nations, they could not be brought to an end merely because the supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with the rules depend thereon.[22]

The effect of this judgment was to continue the Mandate under the U. N. with the same obligations as were present under the League.

Subsequently, however, the Union contended that it was impossible to continue the Mandate "under the same obligation" as was present during the time of the League, since under League procedure a change in the Mandate required a unanimous vote, while in the U. N. there was no unanimity rule. The Court held in a Second Advisory Opinion in 1955, that the General Assembly, in voting on questions relating to reports and petitions on South Africa, should follow its own procedure. The South African contention was dismissed by the Court.

A year later, in a Third Advisory Opinion, it was held that the Assembly's subcommittee on South West Africa (established in 1953) was entitled to grant oral hearings instead of written to petitioners. Again South African contention of only written hearings was denied.

From 1956 to 1960 the question of the Mandate was dealt with largely in the General Assembly of the United Nations, but, in spite of a plethora of committees assigned to examine the question, little progress was made.[23] By the end of that decade, with many new African states now members of the U. N., a new idea took root—namely, to explore the possibilities which contentious litigation offered in respect to South West Africa.

The roots of this new idea sprang mainly from South Africa's refusal to obey the three judgments of the Court, and the added fact that an advisory opinion cannot be enforced by the Security Council.[24] Thus, Ethiopia and Liberia instituted a representative suit on behalf of the U. N. against South Africa in 1960. The Court rendered a decision in 1962.

The applicants had asked the Court to confirm that South West Africa is a territory under the Mandate, and to find that the Mandate is a treaty within the meaning of Article 37 of the Court's statute; that the Union retain the obligations under

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[22]Nolan Atkinson, Jr., and A. I. Neuman, "International Law and the South West Africa Cases," *Howard Law Journal* (Winter, 1967), p. 132.

[23]Higgins, *op. cit.*, p. 575.

[24]Atkinson and Neuman, *op. cit.*, p. 133.

the Mandate and under Article 22 of the League; and that the U. N. was entitled to exercise the supervisory function of the League in relation to the mandated territory.[25] In addition, the Court was invited to go beyond its Advisory Opinions, and to find that the Union had violated its obligations under the Mandate through, introducing apartheid, establishing military bases in South West Africa and refusing to submit reports and transmit petitions.[26]

The Union Government denied that the Court had jurisdiction to examine these claims. She argued that the Mandate was not a treaty, that neither Ethiopia nor Liberia had any interest in the territory and that the dispute could not be settled by negotiation.

Given these objections, the Court decided that a preliminary judgment concerning its jurisdiction was needed, to see if it had the authority to examine the substantive claims made by the applicants. On December 21, 1962, the Court found by the narrowest possible majority, 8 to 7 that it had jurisdiction to proceed to an examination of the merits of the case. All of the applicants' contentions were upheld and the Union Government's arguments were rejected.

Having rejected all of the Union's objections to its jurisdiction, the Court proceeded to examine the case. A decision came in 1966.

THE 1966 DECISION

The judgment which the Court eventually handed down on July 18, 1966 came as a great surprise to the waiting world, because it did not in fact provide any answers to the substantive issues raised by the parties. Instead, the Court declared (by the President's casting vote, seven votes to seven) that it had first decided to deal with an "antecedent" question; namely, whether Ethiopia and Liberia had any "legal interest" in the subject matter of their claim.[27] The Court said that unless this could be answered in the affirmative, Ethiopia and Liberia would not be entitled to a judgment from the Court.[28] The Court then proceeded to find that those clauses of the Mandate which referred to the "conduct" or carrying out of the Mandatory, did not give a right to all League Members to have recourse to the Court; that in respect of these "conduct" provisions they first had to show special, national interest before they were entitled to get a pronouncment from the Court.[29] And the Court found that neither Ethiopia nor Liberia had such "special interests." The Court, then declined to adjudicate, one way or the other, on the merits of the case.

Many problems were presented by the judgment. Among the most important is the disparity between the 1962 ruling

[25] Higgins, *op. cit.*, p. 575.
[26] *Ibid.*, p. 576.
[27] Stevenson, *op. cit.*, pp. 119-120.
[28] *Ibid.*, pp. 120-121.
[29] *Ibid.*, pp. 121-150.

and the 1966 ruling. However, the Court attempted to answer this question by distinguishing between the two phases of the case. To support this distinction the Court stated that there was a difference between "standing before the Court" and the "legal right or interest regarding the subject matter of the claim."[30] In other words, the Court in the 1962 decision had given the Applicants rights to institute the Case, but this did not mean that they had the legal interest which would entitle them to a judgment on the merits. The 1966 decision, then found that the Applicants did not have the legal interest which would entitle them to a judgment on the merits.

In a dissenting opinion, Judge Philip Jessup of the United States commented that: "No authority is produced in support of this assertion, which suggests a procedure of utter futility."[31] In short, this distinction was overly technical and specious. In addition, it put the applicants in a peculiar and frustrating position: even though the Court had the competence to hear and determine the dispute, an adjudication on the merits could not be obtained. What, then, is the future of South West Africa?

PROSPECTS FOR THE FUTURE

The future of South West Africa is mainly political. Despite the fact that the Court declined to pronounce on the Mandate, the Advisory Opinions of 1950, 1955, and 1956 seem to have remained authoritative. Legally, the Mandate continues to existence, and South Africa and the United Nations retain their respective rights and obligations there under. But the law on the compatibility of apartheid with the Mandate, and with general international law, remain uncharted.

Thus, with these facts in mind, it is quite possible that the Mandate can be revoked. However, whether the U. N. General Assembly has the legal authority to revoke the Mandate unilaterally is questionable.[32] But it has the power to do so and this is where the political problem arises. What stand will the General Assembly members take?

After the Court's 1966 decision, "the General Assembly terminated South Africa's one-time League of Nations mandate as a protest against her apartheid policies."[33] Subsequently, on March 8, 1967 four African countries (Egypt, Ethiopia, Nigeria and Senegal) suggested a U. N. Program for bringing South West Africa to Independence by June, 1968.[34]

[30]Atkinson and Neuman, *op. cit.*, p. 148.

[31]Stevenson, *op. cit.*, p. 180. Jessup continued with these observations. "Why should any State institute any proceeding if it lacked standing to have judgment rendered in its favor if it succeeded in establishing its legal or factual contentions on the merits? Why would the Court tolerate a situation in which the parties would be put to great trouble and expense to explore all the details of the merits, and only thereafter be told that the Court would pay no heed to all their arguments and evidence because the case was dismissed on a preliminary ground which precluded any investigation of the merits?

[32]Higgins, *op. cit.*, pp. 594-595.

[33]"4 U. N. Members Present Program for S-W Africa," *The Washington Post* (March 9, 1967), p. A-30.

[34]*Ibid.*

Their proposal "recommends that the Security Council take enforcement action against the Republic of South Africa if she should obstruct the creation of a new U. N. Council to administer and maintain order in the former mandate territory."[35]

However, since none of the big powers are eager for a confrontation with South Africa involving the Security Council, the proposal of these four African nations stands almost no chance of being accepted in its present form. In addition, the United States Delegate William P. Rogers, has hinted that the U. S. may unveil a proposal of its own soon.

Nevertheless, the plan is to be one basis for discussion in the Ad Hoc Committee on South West Africa, which is to report to a special session of the General Assembly on April 21.[36]

Recently, there have been hints that the proposed session on South West Africa, by the U. N. might be postponed.[37] Significantly, these "hints come from Eastern European diplomats."[38]

Only five countries are said to be really insistent on holding the session as planned and they are: Algeria, Guinea, Mali, Tanzania, and Zambia. Among others, Western, Communist, and non-aligned alike, there are varying degrees of non-enthusiasm. "Latin American members lean toward the African approach but without the reference to enforcement action or a specific deadline for indpendence.[39]

"Canada, Italy, and the United States, however, advocate a much more gradual approach to independence by nurturing self-government."[40] On the other hand, South Africa has decided to create a separate tribal state of Ovamboland in South West Africa.

The Soviet Union has been on all sides of the question. It has appeared to support the African proposal and has denounced the United States and other Western powers but has also opposed any U. N. presence or enforcement action.[41]

Therefore, in 1968, the Vietnam conflict ushered the South West African Mandate to a back seat position and nothing was accomplished. By 1969, the U. N. had to focus its attention on Biafra and the devastating effects of that war on the Nigerian population. The situation didn't change in 1970. New crises such as the Middle East crisis, Laos, Cambodia, and International hijacking of airlines focus the U. N.'s attention away from the South West Africa mandate and the situation has continued unchanged.

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[35]*Ibid.*

[36]*Ibid.*

[37]Robert Estabrook, "U. N. Hints at Postponing Session on S-W Africa," *The Washington Post* (March 27, 1967), p. A-27.

[38]*Ibid.*

[39]*Ibid.*

[40]*Ibid.*

[41]*Ibid.*