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## **Namibia: The Road to Independence and the Problem of Succession of States**

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### **Introduction**

After more than a century of colonial rule, the dream of independence long cherished by the vast majority of Namibians will soon become a reality. The road from freedom to subjugation and back again has been a long and tortuous one. Declared a protectorate by Germany late in the nineteenth century, Namibia, then known as South West Africa, endured some thirty years of one of the most brutal colonial regimes in Africa. Invaded by South Africa on behalf of the Allied and Associated Powers in World War I, after the War South West Africa became a League of Nations mandate administered by South Africa on behalf of the British Empire. South African rule proved no better than that of Germany and South Africa treated the mandate as a thinly veiled annexation.

The post-World War II years brought a new world order, one in which self-determination became firmly entrenched in the international jurisprudential corpus. As colonial empires were dismantled around the world, South Africa clung tenaciously to South West Africa. Much wrangling over the issue of Namibian independence between South Africa and the United Nations eventually resulted in the world body's terminating the mandate. Nevertheless, South Africa continued its occupation in defiance of the wishes of the international community and international law. Although this prevented the United Nations from assuming its duties in the territory, the United Nations created a Council for Namibia to act as the legal government of Namibia in international fora. Thereafter, the South West Africa People's Organization (SWAPO), which had been founded in 1960 to oppose continued South African occupation, gained United Nations recognition as the official representative of the Namibian people. As a result of Namibia's unique legal status as a ward of the United Nations, SWAPO never declared itself a government-in-exile, preferring instead to work closely with the Council on Namibian matters and accepting observer status in many international bodies.

Then a December 1988 accord put a long-derailed U.N.

plan for Namibian independence back on track. The result of many factors, including super power politics, the independence process began on April 1, 1989, with elections set for November 1. Despite much obfuscation by the South Africans, political wheeling and dealing was in full swing by mid-1989. SWAPO, while perhaps not able to win the majority of the votes needed for it alone to form a government under the U.N. plan, was thought likely to garner enough support to make it a major player in any new Namibian government. Regardless of the outcome of the elections, the future government of Namibia will be faced with numerous social, economic, and legal problems. Prime among these will be the problem of succession of states, i.e. the issue of which legal obligations the government of a newly-independent Namibia will inherit. This article will examine Namibia's long journey from colonial rule to independence. Part I will discuss the history of its unique legal status and the role of the exiled SWAPO as a major actor in the struggle for independence. Part II will consider the problem of succession of states and offer suggestions as to the most prudent path for any new government to take.

## **Namibian Independence**

### **Colonialism and the League of Nations**

In 1795, the captain of a British warship took possession of the southwest African port of Walvis Bay and its hinterland for the British Crown.<sup>1</sup> Six years later, after trying in vain to persuade the British Government to claim all of what is today Namibia, the Cape Colony, acting under Letters Patent issued by Queen Victoria, annexed the port and settlement of Walvis Bay as well as the surrounding area, a total of 434 square miles.<sup>2</sup> It did so only after Germany, in the same year, claimed the rest of South West Africa as a protectorate. Germany proved to be one of the most brutal overlords in the colonial world, adopting, for example, an extermination policy when the Herero people rose in revolt against German rule.<sup>3</sup>

South African forces occupied South West Africa during the First World War. After the War, according to the terms of Article 119 of the Treaty of Versailles, Germany renounced its sovereignty over its South West African protectorate in favor of the Allied and Associated Powers which placed the territory under the mandate system of the League of Nations. The Union of South Africa administered the territory on behalf of the British Empire as a class C mandate. The mandate agreement permitted South Africa to administer the territory as "an integral portion"

of the Union, subject to a trust obligation to advance "to the utmost the material and moral well being and the social progress" of the area's indigenous inhabitants.<sup>4</sup> South Africa was also to submit an annual report to the League detailing its administration.<sup>5</sup> However, the mandate agreement did not include Walvis Bay, the only significant port serving South West Africa, in the mandated territory.<sup>6</sup>

South Africa proceeded to treat the mandate as a veiled annexation. It continually took actions that implicitly asserted South African sovereignty over the territory. In response, the Permanent Mandates Commission questioned the Union's behavior and each time Pretoria explained its actions away or backed down. The League also took South Africa to task over its bombing of civilians in the Bondelswarts Massacre (1922), the high mortality rate among diamond miners, the territorial debt structure, and various aspects of the mandatory's native policy.<sup>7</sup>

The Permanent Mandates Commission had ineffectual supervisory powers. For example, by the time the League discussed them, actions were often faits accomplis. Africans could not voice their complaints in person or through an agent while South Africa had a representative present at all discussions of the mandate's affairs. However, even though the League was captive to western ethnocentrism, the Permanent Mandates Commission repeatedly rejected South Africa's requests for annexation of the territory.

### **The United Nations and the International Court of Justice**

At the end of the Second World War, the United Nations replaced the defunct League. All mandated territories were to come under the United Nations trusteeship system. At the first session of the General Assembly, South Africa sought to incorporate the territory. The Assembly rejected this suggestion and decided that South Africa should place the mandate under trusteeship.<sup>8</sup> At the time, there was much international pressure against South Africa's incorporation of the territory including the lobbying efforts of the Fifth Pan-African Congress held in Manchester in 1945. The Congress demanded the submission of the territory to trusteeship and called for an investigation into the civil and political rights of the territory's indigenous inhabitants.

Despite the international pressure, South Africa refused to comply with the General Assembly's request to submit the territory to trusteeship. Its representative, however, promised that pending a settlement, South Africa would continue to administer the territory "in the spirit of" the mandate.<sup>9</sup> Accordingly, South Africa submitted one annual report on its admini-

stration of the territory. The United Nations analysis of the report's contents was unfavorable to South Africa. In response in 1948, the newly-elected National Party government, which had campaigned with the slogan "apartheid," refused to submit any more reports. The new government also imposed South African citizenship upon all persons born in the territory and gave the territory's white residents representation in the Union Parliament.

The General Assembly and the Union Parliament reached no accord. Hence, in 1949, the General Assembly asked the International Court of Justice (ICJ) for an advisory opinion on the legal status of the territory.<sup>10</sup> The Court wrote that although there was no legal means of compelling South Africa to submit the territory to trusteeship, the Union could not unilaterally alter the territory's status without the General Assembly's concurrence. Thus, the mandate principles continued to apply to the territory while the supervision of its administration devolved upon the United Nations as the successor to the League.<sup>11</sup>

Various General Assembly resolutions urging submission to trusteeship proved ineffective. In 1954<sup>12</sup> and 1955<sup>13</sup> the General Assembly again called upon the Court for guidance on its supervisory powers. South Africa refused to accept any of the Court's opinions insofar as they restricted its administration of the territory. The General Assembly established a Committee to negotiate with South Africa on the matter but South Africa refused to cooperate.

In 1957, the General Assembly established another committee to consider possible legal actions available to members. The committee issued a report which was highly critical of the South African administration of the territory. The report also recommended that member states invoke Article 7 of the mandate agreement to enforce South Africa's obligation to promote the well being and development of the territory's indigenous inhabitants. According to the terms of Article 7, South Africa had agreed in advance to litigate in the International Court any unresolvable dispute referred to the Court involving the interpretation or application of the mandate agreement.<sup>14</sup>

In 1960, two former League members, Liberia and Ethiopia, responded to a request from the General Assembly for a qualified state to bring suit against South Africa under Article 7. The complaint argued that South Africa had not complied with its obligation under the mandate agreement and called upon the Court to grant appropriate relief.<sup>15</sup> In 1962, the International Court ruled that the plaintiffs were legally entitled to pursue their claim.<sup>16</sup> Some of the judges including Spender of Australia and

Fitzmaurice of Britain, however, dissented. These two issued a joint opinion.

Four years later, the Court, instead of deciding the case on its merits, issued a decision on what it termed an "antecedent matter."<sup>17</sup> It held that the plaintiffs had no standing to bring suit. The 1962 joint dissenting opinion of the conservative Australian and British judges became the 1966 majority opinion by the tie-breaking vote of the Australian who, as Judge President voted twice. This occurred because of the absence of three liberal judges from so called Third World countries. The need for Spender's tie-breaking vote arose from the death of Judge Badawi of Egypt and the absence of Judge Bustamante of Peru both of whom had both voted in favor of the plaintiffs in 1962. In the 1966 case, Judge Spender, without the consent of the rest of the Court, also disqualified Judge Zafrulah Khan of Pakistan on the ground that the plaintiffs had asked him to be their judge ad hoc even though he had not accepted the invitation.<sup>18</sup>

South Africa greeted the decision with jubilation. Indeed, celebrations began in that country immediately before the Court delivered its judgment. The United Nations response to the decision was to revoke the mandate in General Assembly Resolution 2145 (XXI). It did so based upon its determination that South Africa's conduct amounted to a repudiation of the mandate agreement. The General Assembly directed South Africa to end its occupation of the territory and appointed an ad hoc committee to recommend measures for its administration. In the spring of 1967, the United Nations set up an eleven member Council for Namibia under a Commissioner for Namibia to administer the territory while preparing it for independence under the new constitution which was to be drafted with popular participation.<sup>19</sup> However, South Africa made it impossible for the Council to assume its duties in the territory.

Instead of withdrawing from the territory, South Africa intensified its efforts at annexation, following the recommendations of the Odendaal Plan.<sup>20</sup> This Plan, which was drafted in 1962 -63 while the South West Africa cases were pending before the International Court of Justice, was designed to turn the territory into a fifth province of South Africa. For example, South Africa rescinded the limited home rule it had granted to South West African whites in 1925; it extended to the area its homeland policy according to which Africans were divided into ethnic groups designated by the state ethnographer and relegated to lands which were supposedly their tribal domain; and it increased its policy and military forces in the territory in an attempt to crush opposition to its rule from SWAPO which was founded

in 1960 to oppose South African domination.<sup>21</sup>

### **The Rise of SWAPO**

Once great numbers of the Herero people met with disaster in the wake of a 1904 extermination order by a German General, many fled to Botswana, where they became the first South West African exiles. Eager to return to their homeland, in 1947 they enlisted the help of an English clergyman the Rev. Michael Scott to mass evidence from their compatriots left behind and present it to the United Nations in an effort to convince that body that South Africa's desires to incorporate the territory were contrary to the wishes of the indigenous inhabitants.<sup>22</sup> At the same time, the seeds of political discontent were flowering among workers inside the country who opposed the inferior status to which their South African masters relegated them.<sup>23</sup> Their activities led to the formation in the 1950s of the Ovamboland People's Congress, later renamed the Ovambo People's Organization (OPO). In December, 1959, a peaceful protest in Windhoek, the territory's capital, against the forced removal of some Africans to a segregated township met with violence from the authorities, leaving twelve dead and forty five wounded.<sup>24</sup> The government then imprisoned or banished many of the organizers. Some, however, including young railway worker Sam Nujoma, escaped across the border in the second wave of exiles.

In 1960, Nujoma and many of his compatriots clustered in Dar es Salaam which was then the nearest capital of an independent African state. Thereafter some of them appeared in New York where they petitioned the United Nations on behalf of those in their homeland. The exiles formed two groups, OPO, renamed SWAPO in 1960 with Nujoma as president and non-aligned in orientation, and the South West African National Union (SWANU), which had been founded in 1959 and reportedly had Maoist sympathies. In those heady days when anti-colonial fervor was sweeping much of the world, both groups received international recognition, particularly from the newly-independent states.

The year 1964 brought a shift in SWAPO's fortunes. The Liberation Committee of the recently-formed Organization of African Unity (OAU) inquired as to whether each of the groups was willing to engage in the armed struggle against South African domination. SWAPO indicated that it was prepared to do so but SWANU refused with the result that the OAU thereafter backed SWAPO exclusively.<sup>25</sup> SWANU, which continues to exist, then became a minor player in the struggle for independence. SWAPO

meanwhile, proceeded to grow in stature in the eyes of the international community. The 1965 General Conference of the SWAPO Executive Committee, held in Dar es Salaam, was partly responsible for this because it took steps to increase links with SWAPO compatriots in the country and to adopt a program for the most efficacious way of managing foreign financial contributions to its struggle.<sup>26</sup> In 1966, after the ICJ's unsatisfactory decision in the case brought by Liberia and Ethiopia against South Africa, the People's Liberation Army of Namibia (PLAN), SWAPO's military wing, began the armed struggle.<sup>27</sup> As one SWAPO leader put it, "(w)e could secure our freedom only by fighting for it."<sup>28</sup> PLAN's activities met with swift and violent repression from the South Africans but tales of South African atrocities only increased the sympathy for SWAPO among the members of the international community.

### **The Mandate Terminated and SWAPO's Struggle Transformed**

In 1968, at SWAPO's request, the General Assembly changed the name of the territory from South West Africa to Namibia. Then, in 1969, the Security Council issued an ultimatum to South Africa demanding its withdrawal from the territory on October 4 of that year. The resolution noted that South Africa had committed "aggressive encroachment on the authority of the U.N., a violation of the territorial integrity and a denial of the political sovereignty of the people of Namibia."<sup>29</sup> Still South Africa remained.

In 1970, the Security Council asked the International Court of Justice for an advisory opinion on the proper conduct of states in regard to the territory.<sup>30</sup> In its fourth advisory opinion relating to South West Africa/Namibia, the Court whose composition had changed since 1966, wrote that South Africa should withdraw its administration from the territory. Other states - members and non-members of the United Nations - should treat South Africa's administration of the territory as illegal and refuse to recognize any actions taken by the South Africans for the territory. Moreover, the Court noted that to "establish...and enforce distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the (U.N.) Charter."<sup>31</sup>

In light of this opinion, the United Nations tried yet again to end South Africa's illegal occupation of the territory. From 1971 to 1973 the Security Council passed several resolutions



calling upon states to take various actions to bring pressure on South Africa. In 1972, the Security Council sent the Secretary-General on a mission to the territory but Namibia came no closer to independence.

Meanwhile, the General Assembly concerned itself with actions it could take outside the territory. In 1971, it established the Fund for Namibia to assist refugees from the territory. Then, in 1973, it recognized SWAPO as the "authentic" representative of the Namibian people.<sup>32</sup> In 1974, it authorized a yearly sum for the maintenance of a SWAPO office in New York. Two years later, it called SWAPO "the sole and authentic representative of the Namibian people" and gave it observer status at the United Nations.<sup>33</sup> This recognition of the legal status of a liberation movement reflected developments in the new international legal order of the last half of the twentieth century in which the right of self determination had become entrenched in the *jus cogens*, basic, fundamental, imperative or overriding rules of international law, peremptory norms "which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent norm of contrary effect."<sup>34</sup>

In 1974, Portuguese rule in Mozambique and Angola collapsed, transforming SWAPO's struggle against South African domination. Psychologically, this raised hopes of independence among Namibians. Militarily, it enabled PLAN to operate along Namibia's northern border with Angola. As SWAPO's military fortunes grew, so did its political standing both within and without the territory. Numerically, SWAPO experienced a dramatic surge in membership in the first few months following Angolan independence when some 20,000 Namibians, the third major wave of exiles, crossed the border. Many of them made their way to Health and Education Centers which SWAPO had, by then established in Angola and Zambia. These centers, which included schools, clinics, and training in craft-making, won SWAPO further respect in international circles. In all, some 80,000 exiled Namibians were thought to be in these SWAPO centers, a significant proportion of the total estimated Namibian population of 1.3 to 1.5 million. Still others went to Europe, the United States, Commonwealth countries, and elsewhere as students on United Nations or other scholarships. SWAPO's official presence around the world also expanded. A European office opened in the United Kingdom in 1969 and it oversaw relations with France, West Germany, Sweden, Romania, Yugoslavia, and East Germany.<sup>35</sup> It was followed by offices in New Delhi and Melbourne. Even as SWAPO's numbers in exile grew, the group continued to strengthen its ties within the country

where it received much support from the churches.

In spite of its international recognition as the official representative of the Namibian people and its widespread internal support, never, however, did SWAPO declare itself a government-in-exile. Recognizing Namibia's unique international legal status as a ward of the United Nations, SWAPO accepted the Council for Namibia's role as the internationally-recognized government of Namibia until independence could occur. Accordingly, working closely with the Council in many spheres, SWAPO contented itself with observer status in various international fora where the Council took actions on Namibia's behalf.<sup>36</sup>

### **International Initiatives: The 1970s and 1980s**

Throughout the 1970s and 1980s, the United Nations persisted in pressing for Namibian independence and in taking actions meant to safeguard the rights of the Namibian people until emancipation arrived. In 1974, for example, the United Nations General Assembly which had just appointed its first full-time Commissioner for Namibia took various actions. It created the United Nations Institute for Namibia to give young Namibians the skills required to enable them to administer their country after independence.<sup>37</sup> The General Assembly also issued a decree aimed at protecting Namibia's interests by making it unlawful for companies to exploit or export any of Namibia's natural resources without the authorization of the Council for Namibia. In addition, the decree provided for the seizure of the resources involved in case of contravention of its terms and empowered the government of a future independent Namibia to sue offenders for damages.<sup>38</sup>

Also, in 1974, the Security Council passed Resolution 366 which demanded that South Africa leave Namibia and threatened economic sanctions if that country did not comply. However, in exchange for the agreement of the western nations, the wording of the sanctions clause - weaker than in the draft version - failed to conform to the required formula under Chapter VII of the United Nations Charter. South Africa ignored the resolution. In response, the majority of the Security Council voted in favor of an arms embargo against South Africa. The three western permanent members of the Council - the United States, the United Kingdom, and France - vetoed the measure. This was the first of what became known as the triple veto on Namibian issues.

In mid-1975, South Africa sent troops to seize the Calueque power station on the Cunene River, which forms the border between Namibia and Angola, as well as strategic areas in

the vicinity. Within a few months it was negotiating with then United States Secretary of State Henry Kissinger to send troops north in collaboration with the pro-South African UNITA (National Union for the Total Independence of Angola) movement led by Jonas Savimbi. At the same time, another Angolan faction the FNLA (National Front for the Liberation of Angola) aided by the C.I.A. was to attack yet another Angola faction, the MPLA (Popular Movement for the Liberation of Angola), from the Zairean border. The invading South Africans reached just to the south of the Angolan capital of Luanda but MPLA forces backed by Cuban troops sent in at the MPLA's request drove the South Africans back into Namibia.<sup>39</sup>

At that time, the Security Council drafted a plan to remove South Africa from Namibia and to install a representative Namibian government. Lengthy negotiations ensued. In January, 1976, the Security Council adopted Resolution 395. This resolution provided that: 1) South Africa should abandon Namibia at once and that the United Nations should temporarily administer the area; 2) the United Nations should have ample time to prepare Namibia for an election in which all Namibians would freely determine their own future; 3) an election should be held on a Namibia-wide basis "under United Nations supervision and control"; and 4) in the period before South Africa transferred power to the United Nations that country should abolish homelands and all discriminatory and repressive laws, release all political prisoners, permit all exiles to return safely, and grant full human rights to all. The resolution assumed that those Namibians elected in the United Nations-controlled election would draft a constitution under which Namibia would become independent. The resolution listed August 31 as the deadline for South Africa's compliance.<sup>40</sup>

South Africa did not acquiesce and another triple veto saved it from a comprehensive arms embargo. Indeed, during the period from the end of Portuguese rule in Angola, South Africa increased repression in Namibia. It stringently enforced and expanded upon its homeland policy while at the same time offering to negotiate with United Nations officials. As the strength of the MPLA grew in Angola, South Africa resurrected an earlier plan to create a greater Ovamboland which was to include Ovambos from both sides of Namibia's northern border with Angola and function, with a pro South African leader, as a buffer state between Namibia and Angola. The plan failed.

In 1977 there was the formation of the so-called Western Contact Group under the leadership of the self-declared pro-African administration of United States President Jimmy Carter.

The Contact Group consisted of the three permanent western members of the Security Council as well as Canada and West Germany then newly-elected non-permanent members of the Council. Reacting to South Africa's failed Turnhalle Conference in Windhoek which was to have established a pro-South African-backed "Internal Parties", the five took it upon themselves to devise an "internationally acceptable solution" to the Namibian problem.

In the midst of negotiations with the Contact Group concerning a possible settlement of the Namibian issue and an agreement for elections in the territory, the South African regime, anticipating the establishment of an independent Namibia, endeavored to solidify its position in the area. It appointed an Administrator-General for Namibia and vested plenary legislative and administrative power in him.<sup>41</sup> This action installed a "local" official of co equal status with any United Nations official who might oversee United Nations sponsored elections in Namibia.<sup>42</sup>

In addition, South Africa persisted with internal elections in December, 1978. Widely boycotted by SWAPO supporters, the elections were won by the Democratic Turnhalle Alliance (DTA), a pro-South African party formed after the Turnhalle conference failed. The DTA formed an interim government which remained subordinate to the South West African administrator who had actual authority for the territory. The weak interim government collapsed in 1983 but it was resurrected in 1985 when it became a major player in another South African sponsored government, the Transitional Government of National Unity.

Ever since South Africa flouted the United Nations independence plan in 1978, the international body had been unable to induce South Africa to come to the bargaining table once more. Still South Africa continued to indicate a willingness to negotiate in what is best construed as a propaganda ploy to divert international attention from focussing on internal South African matters. Thus, in January, 1986, when South African President P.W. Both announced a willingness to negotiate on Namibian issues, he offered an August date for South African withdrawal from Namibia.<sup>43</sup> This withdrawal was conditioned upon the exit of some 30,000 Cuban troops from Angola. The troops were there at the invitation of the Angolan government and assisted it in its struggle against the South African and United States backed guerilla forces of UNITA. The South African precondition for its departure from Namibia, known as linkage, was first insisted upon by United States Assistant Secretary of State for African Affairs Chester Crocker in 1981 and was adopted unanimously

by the South Africans.<sup>44</sup>

In light of the linkage issue, the South African overture appears to have been disingenuous for at the time the speech was made, the Reagan Administration was courting Jonas Savimbi, the UNITA leader as an anti communist hero and offering him assistance in his efforts to overthrow the Angolan government. Such circumstances, of course made it impossible for the Angolans to entertain any thought of removing the Cubans and precluded the possibility that negotiations regarding Namibian independence would occur.

Meanwhile, the international press and the international community, perhaps tired of the failure of so many past attempts, merely yawned. The deadline came and went without any developments. By that time, the international community was preoccupied with ending white minority rule in South Africa where growing black unrest and corresponding state repression had become a cause celebre among the international media. The Namibian issue thus disappeared from the cynosure. Its absence was not to be for long.

By 1988 South Africa had entered a quieter phase. A nation-wide state of emergency declared in June 1986 and annually renewed had resulted, at least temporarily, in the quashing of black protest. Stringent censorship laws and the expulsion of many foreign journalists had succeeded in removing news of violent confrontation from the world's newspapers, radio broadcasts, and television screens. Nevertheless, by then the South African Economy was in shambles. Its military presence in Namibia and Angola was proving extremely costly both in human and monetary terms and a disastrous battle at Cuito Cuanavale in Angola at which a larger number of white South Africans died had put South African military superiority in doubt. At home, continued military involvement was particularly unpopular with young white men who, by law, are bound to serve for two years in the South African armed forces.<sup>45</sup> The cost of running Namibia became a drain on the South African budget.

In the international sphere, the superpowers were keen to reach some accord in southern Africa. In the age of *glasnost* and *perestroika*, Soviet President Mikhail Gorbachev was bent on ending his country's involvement in various regional conflicts around the world. Crocker of the United States was particularly keen to win a major policy victory in the area, his only one in nearly seven years. Angola, devastated by years of civil war wished to normalize relations with the United States and have a measure of stability. Cuba, too, had been sending signals to Washington indicating a desire for at least some thaw in rela-

tions.

The coalescence of these factors resulted in United States-brokered talks beginning in July 1988 among Cuba, Angola, and South Africa which eventually resulted in a timetable for withdrawal of Cuban troops from Angola acceptable to South Africa, and paved the way for the implementation of Security Council Resolution 435 of 1978, the U.N. plan for Namibian independence. Not formally included in the talks was the Soviet Union which had observer status but which, represented by senior diplomat, Deputy Foreign Minister Anatoly Adamishin, no doubt brought much pressure to bear on its Cuban and Angolan clients. Also absent was SWAPO which South Africa continued to refuse to recognize as having any special claim to represent the Namibian people.

Finally, on December 22, 1988, an agreement was signed in New York providing for the implementation of the U.N. plan for U.N.-supervised elections leading to Namibian independence.<sup>46</sup> Under the agreement, the process was to begin on April 1, 1989 with the arrival of the United Nations Transitional Assistance group in Namibia. Elections for a Constituent Assembly which would draft a constitution were scheduled for November 1 with independence to follow early in 1990. Walvis Bay, Namibia's only port, was excluded from the independence plan, thus throwing open the door to continued South African military and economic domination of Namibia.<sup>47</sup>

The independence process did not begin smoothly; there were confrontations between SWAPO forces and South African troops which created an international brouhaha and saw South Africa threaten to withdraw from the agreement. Other difficulties soon emerged including the use of violence and various intimidatory tactics by the South Africans who wished to diminish support for SWAPO.<sup>48</sup> South Africa also took an interest in the activities of the various political parties which numbered more than thirty. By mid summer 1989, under a condition of the independence agreement, South Africa had granted amnesty to the exiles and large numbers of SWAPO members, many of whom had been out of the country for nearly thirty years, were back in Namibia or on their way home. Observers believed that despite the South African animosity toward SWAPO, the group would garner the largest share of votes in the November 1 elections, thus assuring itself a place as a major actor in shaping the future of an independent Namibia.

### **Namibia and the Problem of Succession of States**

## **The Nature of the Problem**

Any new government that comes to power in Namibia, whether it is dominated by SWAPO or not, will be beset by myriad economic, social, and legal problems. It will inherit an economy in shambles. Namibia relies on the export of raw materials to a greater extent than perhaps any other country in the world.<sup>49</sup> In addition, its mineral wealth and major source of income has been exploited by multinational corporations concerned only with financial gain in violation of a United Nations decree prohibiting such practices.<sup>50</sup> Namibia's fishing industry has collapsed through over-exploitation and its only port, Walvis Bay, the center of the fishing industry and the place through which ninety percent of Namibia's exports pass will remain in South African hands after Namibian independence.<sup>51</sup> In social terms, the legacy of German and then South African occupation has been disastrous. The people, particularly in the north, where the majority of the population lives, have been ravaged by the effects of more than twenty years' war of liberation waged by SWAPO against the occupying South African forces. Governmental services such as health care and education remain woefully inadequate.<sup>52</sup>

On the legal front, the new Namibian government will be confronted with the problem of succession of states, i.e. "the legal consequences of a change of sovereignty over territory."<sup>53</sup> In this case, a question arises as to which of the rights and obligations of the "predecessor state" pass to the "successor state." Of particular relevance is the issue of which obligations regarding treaties and private property a freely-elected Namibian government will assume upon independence. These become crucial decisions especially in a state confronted with dismal economic realities which, undoubtedly, will actively seek foreign investment and aid in an effort to develop.

The dilemma facing the new Namibian government is the same as that described by former President Julius Nyerere of Tanzania who said, in 1961, when the independence of his country was imminent:

The Government is naturally anxious that the emergence of Tanganyika as an independent State should in general cause as little disruption as possible to the relations which previously existed between foreign States and Tanganyika. At the same time, the Government must be vigilant to ensure that where international law does not require it, Tanganyika shall not in the future be bound by pre-independence commitments which

are no longer compatible with their new status and interest.<sup>54</sup>

Before the issues of succession raised by Nyerere can be addressed, however, it is imperative to examine the nature of the predecessor state from which will pass the rights and obligations that the new Namibian government will assume.

### **The Issue of Sovereignty**

As indicated above, once Germany lost World War I, German South-West Africa became a Class C mandate under the League of Nations system and the Union of South Africa, now the Republic of South Africa, administered the mandated territory on behalf of the British Empire.<sup>55</sup> Although, this transfer of power ended German sovereignty over the area, it did not mean that sovereignty was vested in the League of Nations. The League was an international organization with certain international rights and duties. Its nature was, however, *sui generis*, in the international law of the day. It possessed none of the attributes of statehood, namely a permanent population, a defined territory, a government, and the capacity to enter into relations with other States.<sup>56</sup> Accordingly, sovereignty over Namibia did not vest in the League, which, instead, had supervisory power over mandates.

Sovereignty over South West Africa also did not vest in South Africa despite the expressed intention of South Africa to the contrary. From the start, South Africa treated the mandate as a veiled annexation. It continually took actions that asserted South African sovereignty over the territory. The Permanent Mandates Commission repeatedly rejected any act of suggestion that a mandatory had sovereignty over a mandated territory. For example, when the preamble to the 1926 Portuguese-South African treaty delimiting the boundary between South West Africa and Angola provided that "the Government of the Union of South Africa, subject to the terms of the said mandate, possesses sovereignty over the territory of South West Africa lately under the sovereignty of Germany."<sup>57</sup> the Commission objected. In a report to the League Council it indicated that

(u)nder the circumstances, the Commission doubts whether such an expression as "possesses sovereignty," used in the preamble to the above-mentioned Agreement, even when limited by such a phrase as that used in the above-quoted passage, can be held to define correctly, having regard to the terms of the Covenant, the relations



existing between the mandatory power and the territory placed under its mandate.<sup>58</sup>

Subsequently, in 1927 and 1930, the Council passed resolutions stipulating that mandatory powers did not have sovereignty over their mandates.

It would seem, then, that by default, sovereignty over South West Africa vested in the people themselves. This was not the case. In international practice, League of Nations mandates and later, in the early post World War II years, trust territories under the United Nations, were dependent territories and in terms of succession of states, they received the same treatment as colonies. Accordingly, they had no sovereignty before independence. Sovereignty over South West Africa, therefore, remained in suspension. This view was expressed by Lord McNair in his separate opinion in the International Court of Justice's 1950 advisory opinion on the legal status of the territory. He wrote that "sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the territory obtain recognition as an independent state, as has already happened in the case of some of the Mandates, sovereignty will revive and vest in the new state."<sup>59</sup>

Following this view, it would appear that a new Namibia will begin its life as a new state, a tabula rasa in international relations. However, it is more appropriate to argue that because of its peculiar international legal status prior to independence, the Council for Namibia must be deemed to be the predecessor state for some purposes.

### **The Council for Namibia as Predecessor State**

In October, 1966, after being rebuffed by the International Court of Justice in a case brought by Liberia and Ethiopia, two former League members, alleging that South Africa had not complied with its obligations under the mandate agreement and calling upon the Court to grant appropriate relief,<sup>60</sup> the General Assembly terminated the South African mandate over Namibia.<sup>61</sup> In 1969, the Security Council approved of the General Assembly's decision.<sup>62</sup> Meanwhile, in 1967, the General Assembly had created the United Nations Council for South West Africa, later renamed Namibia, composed of eleven member states and authorized it to: 1) administer South West Africa until independence with the maximum participation of the inhabitants; 2) promulgate legislation required for the administration of the Territory until a legislative assembly could be elected on the basis of universal adult suffrage; 3) take immediate measures, in consultation with the inhabitants, to establish a constitutional

assembly with the object of drawing up a constitutional assembly with the object of drawing up a constitution; 4) maintain law and order; and 5) transfer all powers to the people of the territory following the declaration of independence.<sup>63</sup>

While South African intransigence over the issue of Namibian independence has prohibited the Council from assuming its responsibilities inside Namibia, it has represented Namibia in an number of international organizations and in relations with various states. The Council enjoys a dual status as both an organ of the United Nations and as the legal administering authority for Namibia. It does so in accordance with relevant General Assembly resolutions and other United Nations pronouncements. Most important of these is a General Assembly resolution of 1977 which specified the Council's tasks "as an organ of the United Nations" and "as the legal Administering Authority for Namibia."<sup>64</sup> That it remains subordinate to United Nations authority is indicated by the annual reports which it submits to the General Assembly regarding its activities and in which it requests General Assembly approval for its future endeavors.<sup>65</sup>

While the Council for Namibia, like the League of Nations, does not meet the requirements for statehood and therefore does not meet the criteria for membership in many international organizations, it has participated on behalf of Namibia as an observer without the right to vote in many such organizations. Examples include the United Nations Educational, Scientific and Cultural Organization (UNESCO); the International Labor Organization (ILO); the World Health Organization (WHO); and the Food and Agriculture Organization (FAO).

Again, because of Namibia's peculiar international status, the Council for Namibia is not the only organization that has represented Namibian interests in international bodies. This function also has been performed by SWAPO which various United Nations<sup>66</sup> and Organization of African Unity<sup>67</sup> resolutions have described as "the sole and authentic" representative of the "Namibian people." The role of SWAPO has not, however, caused difficulties in the international arena as a result of various General Assembly resolutions which call upon international organizations and conferences to permit the participation of both the Council for Namibia and SWAPO "when the rights and interests of Namibia are involved."<sup>68</sup> The Council's authority also seems to be superior to that of SWAPO both in terms of international practice and by SWAPO's own admission. For example, while both organizations have participated in the proceedings of organizations such as UNESCO, FAO, WHO, and

the ILO, in 1978 the ILO admitted Namibia as a full member represented by the Council; accordingly, SWAPO did not participate as a separate entity during the next annual ILO conference but instead some of its members were part of the Council's delegation.

That SWAPO accepts the Council's superiority as far as succession of states is concerned was made apparent at the 1977/78 United Nations Conference on Succession of States in Respect of Treaties. The SWAPO representative emphasized that "South Africa could not, therefore, be regarded as a predecessor State of Namibia... Only the United Nations Council for Namibia could claim the right to assume responsibility for the territory's treaty relations with other interested states."<sup>69</sup> The Council for Namibia's view was in accord on this point. Its representative stated that because the United Nations had, pursuant to the appropriate General Assembly resolutions, "assumed direct responsibility for the territory of Namibia. That country was therefore a *sui generis* case, in that its predecessor... would be the United Nations itself. The delegation of the United Nations Council for Namibia therefore, hoped that the special case of Namibia would be taken into account."<sup>70</sup>

Indeed, the Conference members recognized that the Council for Namibia had long acted as guardian of the interests of the Namibian people while South Africa, in violation of international law, had continued to occupy and impose upon Namibia its apartheid system, already designated a "crime against humanity" by the members of the international community.<sup>71</sup> The Conference then resolved that "South Africa is not the predecessor State of the future independent State of Namibia."<sup>72</sup>

Having thus concluded that the Council for Namibia, although not a state itself, must, for limited purposes, be seen as the predecessor state of a newly-independent Namibia, there remains the question as to what this implies insofar as the obligations of the new government are concerned. As indicated, state succession has effects on rights and obligations in the broad areas of treaties and private rights.

## **The Obligations of a New Government**

### **1. Treaties**

Modern treaty law is governed by the Vienna Convention on the Law of Treaties of 1978 to which the Council for Namibia is a signatory.<sup>73</sup> Expressly applicable to a state succession which has occurred only after the entry into force of the Convention, it is a product of the entrenchment of the right of self-determina-

tion in the international jurisprudential corpus in the post-World War II era.<sup>74</sup> Accordingly, it adopts the *tabula rasa* or clean slate doctrine which does not involve rejection of the continuity of treaties but implies that the newly-independent state is entitled to choose which treaties concluded by its predecessor will be regarded as continuing and which will be considered as terminated.

Under the Vienna Convention, a newly-independent state is not "bound to maintain in force, or become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect to the territory to which the succession relates."<sup>75</sup> A newly-independent state is therefore free to choose whether or not to become a party to a multilateral treaty. It may establish its status as a contracting state to a multilateral treaty which is not in force and, if it does exercise those rights, it enjoys all the rights regarding reservations enjoyed by the predecessor state. On the other hand, a newly-independent state succeeds to a bilateral treaty only with the express or implicit agreement of the other state party, the effect being to constitute direct treaty relations which are independent of the fate of treaty relations with the predecessor state.

The members of the international community recognized the necessity of applying the *tabula rasa* doctrine to an independent Namibia at the United Nations Conference on Succession of States in respect of Treaties of 1977 and 1978,<sup>76</sup> as well as during the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts of 1983.<sup>77</sup> It was the view of the representative of the Council for Namibia that the Council

noted with satisfaction that the International Law Commission had adopted the "clean-slate" principle in accordance with which the newly-independent State had the right to decide whether or not it wished to remain a party to a treaty concluded by the predecessor State. That principle safeguarded the legitimate interest of newly independent States and enabled them to reject colonial heritages which might prejudice their economy and the well-being of their inhabitants. It thus helped to safeguard the interest and natural resources of Namibia...The Council considered that, in the case of Namibia, failure to apply the "clean-slate" principle would impose an intolerable burden on the territory once it had become independent.<sup>78</sup>

The western powers echoed this view. The British representative said, for example, that his government "hoped that

Namibia, on attaining independence, would be allowed to benefit from the application of the "clean-slate" doctrine.<sup>79</sup> As the Director of the United Nations Institute for Namibia put it at the opening session of the 1984 Seminar on State Succession to Rights and Obligations and Law in Namibia, "any recommendations on state succession to rights and obligations should aim at assisting an independent Namibia to embark on a social, political and economic reconstruction programme and exercise the territorial rights and the right to exploit its wealth unfettered by past colonial or any other claims."<sup>80</sup>

Since, as has been demonstrated, South Africa, because of its internationally illegal conduct in connection with Namibia cannot and should not be seen to be the predecessor state of an independent Namibia, any South African treaties, which also made themselves applicable to Namibia, must not be viewed as proper objects for succession of states. The result is different in the case of treaties entered into by the Council for Namibia which, for this purpose, must be regarded as the predecessor state. These treaties, most of which are multilateral, such as the International Convention on the Elimination of all Forms of Racial Discrimination,<sup>81</sup> the International Convention on the Suppression and Punishment of the Crime of Apartheid,<sup>82</sup> the United Nations Convention on the Law of the Sea,<sup>83</sup> the Geneva Conventions on the Laws of War,<sup>84</sup> and the Vienna Convention on the Law of Treaties<sup>85</sup> are proper objects for state succession. A new Namibian government may wish to maintain these treaties in force because they were entered into by a body which acted as a guardian of the interests of the Namibian people and which, in addition, received further credibility regarding its dealings by the active participation of SWAPO which enjoys wide support in Namibia; indeed, both actively participated in the negotiations for many of these treaties.

## **ii. Private Rights**

In addition to treaties, state succession also impacts upon private rights. Whether an independent Namibia will have to honor the rights of foreign nationals, particularly foreign corporations in that country, should be a matter of grave concern. At present the Namibian economy is controlled by South African corporations and multinational enterprises. For example, a 1985 United Nations study revealed that four multinational corporations "account for about 95 percent of the territory's mineral production and exports and hold approximately 89 percent of its mineral assets."<sup>86</sup> Such companies operate in Namibia in violation of international law.

In its 1971 Advisory Opinion on Namibia, the International Court of Justice took the position that

State members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia and to refrain from any acts and in particular any dealing with the government of South Africa implying recognition of the legality of or leading support or assistance to such presence and administration.<sup>87</sup>

Also in this vein, in 1974, the Council for Namibia, acting as the legal representative of Namibia promulgated, and the General Assembly later endorsed, Decree No. 1 for the Protection of the Natural Resources of Namibia. Relevant sections provided that

1) No person or entity, whether a body corporate or unincorporated may search for, prospect for, explore for, take extract, mine, process, refine, use, sell, export or distribute any natural resource whether animal or mineral, situated or found to be situated within the territorial limits of Namibia without the consent and permission of the United Nations Council for Namibia or any person authorized to act on its behalf for the purpose of giving such permission or such consent;

2) Any permission, concession or license for all or any of the purposes specified in paragraph 1 above whensoever granted by any person or entity, including any body purporting to act under the authority of the Government of the Republic of South Africa or the "Administration of South West Africa" or their predecessors, is null, void and of no force or effect.<sup>88</sup>

Although the Council hoped to preserve Namibia's wealth for the benefit of the Namibian people, the multinational corporations ignored the decree. Instead, a 1986 report by a South West African Commission of Inquiry known as the Thirion Commission Report after the Commission's chairman Mr. Justice Thirion, revealed that the multinationals, fearful of the prospect that Namibia would one day become independent, had adopted methods geared toward extracting the most from the mines in the

short term without regard for the mines' longevity.<sup>89</sup> Given the reality of over-exploitation coupled with the fact that since 1966, when the General Assembly revoked South Africa's mandate over Namibia, all such dealings have been illegal, it would appear logical that an independent Namibia would wish to apply the clean slate doctrine with regard to its dealings with private concerns. Here, however, there is much international law to the contrary although it must be pointed out that this law was made by western states desirous of protecting the business interests of their nationals.

When a new state comes into being, the private property rights of those living or doing business there do not necessarily lapse. In terms of the actions a successor state can take, there is a distinction between the rights of nationals of the new state and of foreign nationals. As far as nationals of the new state are concerned, the government may freely appropriate their property, subject perhaps only to constraints placed upon it by international human rights treaties which it may have chosen to succeed to or to become party to. The rule is different in the case of foreign nationals. There, the new state must undertake the expropriation for a public purpose and must give appropriate compensation. As the Permanent Court of International Justice suggested in 1923, "Private rights acquired under existing law do not cease on a change of sovereignty."<sup>90</sup>

While such rules remain in the international legal corpus, most of the so-called Third World countries do not accept them. Although they often recognize that these western rules are appropriate with regard to investments made in the post-independence era, they insist that for the period prior to independence when they were unable to protect their interests, any agreements entered into by the predecessor state were exploitive and unequal. While this reasoning seems particularly logical in the case of Namibia where the predecessor state, the Council, with the weight of international law behind it, recognized as illegal the South African approved Namibian investments of multinational corporations, an argument can be made for Namibia's adherence to the western rules.

With its economy so heavily dependent upon extraction, an independent Namibia will undoubtedly seek to diversify its economy and encourage the development of local manufacturing. Presumably such manufacturing could be established with the help of foreign investors, bearing in mind that it behooves the new government to establish a sound investment policy. Such a policy should ensure that each enterprise has a certain percentage of Namibian participation and also require

that firms establish social welfare programs in areas such as education, health, and career development for employees and their families. This will not occur if, by nationalizing the currently operating multinational corporations, the new Namibian government succeeds in alienating foreign investors.

At the same time, it is also true that those multinationals responsible for the depletion of Namibian resources should be made to make reparations for their misdeeds. In this case, negotiations conducted with the utmost diplomacy may succeed in securing an infusion of currency and know how not only from the multinationals themselves but also from the governments of their home countries which may be unwilling to be branded as crude exploiters in various international fora. For a new Namibian government faced with overwhelming economic and social problems, cooperation and not confrontation may be the wisest path.

### **Conclusion**

The question of Namibian independence has long attracted the attention of the international community. After two decades of wrangling with South Africa over its occupation of Namibia, the General Assembly, in 1966, revoked South Africa's mandate over the territory. South Africa, however, still remained. Meanwhile, SWAPO, which after some years of fruitless peaceful protests had begun the armed struggle in an effort to dislodge South Africa, garnered an increasing amount of international support. It eventually gained U.N. recognition as the official representative of the Namibian people but stopped short of declaring itself a government-in-exile. Rather, it has remained a would-be-government working closely with the U.N. Council for Namibia which the international body recognizes as Namibia's legal administering authority. In this capacity, the Council has entered into many international agreements on behalf of Namibia.

In mid-1989, as Namibia appears to be on the verge of becoming independent, it behooves those concerned with the legal obligations of the future polity to consider the problem of succession of states, particularly with regard to international treaties and private rights. Analysis reveals that South Africa, because of its years of occupation in contravention of international law, is not the predecessor state of an independent Namibia. Rather, that distinction goes to the Council for Namibia which, although not a state according to traditional legal requirements, has enjoyed a unique legal status. Hence, a new Namibian government, whether controlled by SWAPO or not, may wish



to maintain in force any treaties entered into by the Council. At the same time, the new government would do well to honor the rights of foreign nationals in Namibia such as those engaged in the exploitation of natural resources even though these activities have been illegal since 1966. If the new government fails to give adequate compensation in instances where it expropriates the property of these foreign nationals for public purposes, it will, no doubt, discourage the very foreign investment it will hope to attract to diversify Namibia's economy.

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### FOOTNOTES

<sup>1</sup>Proclamation, taking possession of the Port and Settlement of Walfisch Bay, Mar. 12, 1878, 69 *BRITISH AND FOREIGN STATE PAPERS* 1178.

<sup>2</sup>Proc. No. 184 of 1884.

<sup>3</sup>JON BRIDGMAN, *THE REVOLT OF THE HEREROS* (Berkeley: University of California Press 1981).

<sup>4</sup>South West Africa Mandate Agreement, Dec. 17, 1920, at art. 2, reprinted in JOHN DUGARD (ed.), *THE SOUTH WEST AFRICA/ NAMIBIA DISPUTE* 72 (Berkeley: University of California Press 1973).

<sup>5</sup>For a discussion of the League's structure, see CHARLES FENWICK, *INTERNATIONAL LAW 128-38* (New York: The Century Co. 1924).

<sup>6</sup>On the significance of Walvis Bay, see generally LYNN BERAT, *WALVIS BAY: DECOLONIZATION AND INTERNATIONAL LAW* (New Haven: Yale University Press 1990).

<sup>7</sup>*Id.* at ch. 7.

<sup>8</sup>U.N. GAOR Res. 65 65 (I), Dec. 14, 1946.

<sup>9</sup>U.N. Doc. A/334 (1946).

<sup>10</sup>U.N. GAOR Res. 338 (IV), Dec. 4, 1949.

<sup>11</sup>International Status of South West Africa, Advisory Opinion, (1950) I.C.J. Reports 128. See generally, Kahn, *The International Court's Advisory Opinion on the International Status of South West Africa*, 4 *INT'L & COMP. L. Q.* 78 (1951). For criticism, see Hudson, *The Twenty-Ninth Year of the World Court*, 45 *AM. J. INT'L L.* 12 (1951); Nisot, *The Advisory Opinion of the International Court of Justice on the International Status of South West Africa*, 68 *S.AFR. L.J.* 274 (1951)

<sup>12</sup>South West Africa Voting Procedure Case (Advisory Opinion), (1955) I.C.J. Reports 67. In 1954 the General Assembly adopted a special rule on the voting procedure to be used by the General Assembly in deciding upon questions relating to reports and petitions concerning South West Africa. According to this rule, the Assembly's decisions on the questions referred to were to be regarded as important questions within the meaning of art. 18 (2) of the Charter, i.e. as being subject to a requirement for a two thirds majority, whereas for the mandates system, the Council of the League of Nations was governed by a requirement for unanimity. By resolution 904 (IX) of November 23, 1954, the General Assembly asked whether the rule corresponded to a correct interpretation of the Advisory Opinion given in 1950. The Court advised (unanimously) in the affirmative because the rule comported with the Court's statement in the 1950 Opinion that " the degree of supervision to be exercised by the General Assembly should not ... exceed that which applied under the Mandates system, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations." *Id.* at 68. See generally Jennings, *The International Court's Advisory Opinion on the Voting Procedure on Questions Concerning South West Africa*, 42 *TRANSACTIONS OF THE GROTIUS SOCIETY* 85 (1957); Hudson, *The Thirty-Fourth Year of the World Court*, 50 *AM. J. INT'L L.* 5 (1956); JAN VERZIJL, 2 *THE JURISPRUDENCE OF THE WORLD COURT* 218 (Leyden: A.W. Sijthoff 1966).

<sup>13</sup>Admissibility of Hearings of Petitioners by the Committee on South West Africa (Advisory Opinion), (1956) I.C.J. Reports 23. In 1955, the General Assembly, which in 1953 had established a Committee for South West Africa, requested an advisory opinion on the question of whether it was consistent with the Advisory Opinion given by the International Court in 1950 for the Committee to grant oral hearings to petitioners on matters relating to South West Africa. The Court advised (8-5) that it would not be inconsistent with the 1950 Opinion for the General Assembly to authorize a procedure for the grant of oral hearings by the Committee to petitioners who had already submitted written petitions, provided that the Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of South West Africa. Although oral hearings had not been granted to the petitioners during the League period, the League Council could have authorized that course had it wished, and the General Assembly in performing its supervisory functions in respect of the mandate had the same authority as the council. See generally

Hudson, *The Thirty-Fifth Year of the World Court*, 51 AM. J. INT'L Afrika van die Algemene Vergadering van die Verenigde Volke mondelinge vertoe en getuienis aanhoor?, 21 TYDSKRIF VIR HENDENDAAGSE ROMEINS-HOLLANDSE REG 176 (1958).

<sup>14</sup>Report of the committee on South West Africa, U.N. GAOR, 12th Sess., Suppl. No. A (A/3625).

<sup>15</sup>South West Africa Cases, Preliminary Objections, (1962) I.C.J. Reports 319 at 322.

<sup>16</sup>*Id.* at 328 et seq. Academic comment was largely favorable. See generally Ballinger, *The International Court of Justice and The South West Africa Cases*, 81 S. AFR. L.J. 35 (1964); Gross, *The South West African Cases: On the Threshold of Decision*, 3 COL. J. TRANSNT'L L. 19 (1964); Verzijl, *International Court of Justice: South West Africa and Northern Cameroons Cases (Preliminary Objections)*, 11 NETH. INT'L L. REV. 1 (1964); *Symposium on the South West Africa Cases*, 4 COL. J. TRANSNT'L L. 47 (1965).

<sup>17</sup>South West Africa Cases, Second Phase (1966) I.C.J. Reports 6. See generally MILTON KATZ, *THE RELEVANCE OF INTERNATIONAL ADJUDICATION* 87-99 (Cambridge: Harvard University Press 1968); Green, *South West Africa and the World Court*, 22 INT'L J. 39 (1966-67); Verzijl, *The South West Africa Cases (Second Phase)*, 3 INT'L REL. 87, 95-96 (1966); Falk, *The South West Africa Cases: An Appraisal*, 21 INT'L ORGANIZATION 1, 11-13 (1967).

<sup>18</sup>Article 24 of the Statute of the Court required the Court to meet to decide upon the disqualification of Judge Khan. However, no public record of such a meeting exists. Consequently, legal scholars have queried whether the proper procedure was followed and whether the reason given for Khan's disqualification was valid. See Reisman, *Revision of the South West Africa Cases*, 7 VA. J. INT'L L. 1, 55-58 (1966); Higgins, *The International Court and South West Africa: The Implications of the Judgment*, 42 INT'L AFFAIRS 573, 587-88 (1966); Cheng, *The 1966 South-West Africa Judgment of the World Court*, CURR. LEG. PROBS. 181, 196-99 (1967).

<sup>19</sup>U.N. GAOR Res. 2248 [AS-V] (1967).

<sup>20</sup>Report of the Commission of Enquiry into South West African Affairs, 1962-63, RP 12/1964.

<sup>21</sup>There is no adequate history of SWAPO. See generally M. HORRELL, *SOUTH-WEST AFRICA* 81 (South African Institute of Race Relations 1967); J. DUGARD, *supra* note 4, at 216.

<sup>22</sup>J. DUGARD, *supra* note 4, at 109-11, 198, 202-04, 207. See generally M SCOTT, *A TIME TO SPEAK* (1958).

<sup>23</sup>See generally VINNIA NDADI, *BREAKING CONTRACT* (Richmond, British Columbia: LSM Press 1974).

<sup>24</sup>JOHN YA-OTTO, *BATTLEFRONT NAMIBIA 49-54* (Westport, Connecticut: Lawrence Hill 1981).

<sup>25</sup>Peter Katjaviv, *The Rise of Namibian Nationalism and Its International Dimensions*, D. Phil. Thesis, Oxford University (1986) at 165.

<sup>26</sup>*Id.* at 164.

<sup>27</sup>See supra notes 15-19 and accompanying text.

<sup>28</sup>Andimba Toivo Ja Toivo, Statement, Supreme Court, Republic of South Africa, Pretoria, Jan. 26, 1968.

<sup>29</sup>U.N. SCOR Res. 264 (1969).

<sup>30</sup>U.N. SCOR Res. 284 (1970).

<sup>31</sup>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Reports 16. See generally Dugard, *The Opinion on South West Africa ('Namibia'): The Teleologists Triumph*, 88 S. AFR. L.J. 463 (1971).

<sup>32</sup>U.N. GAOR Res. 3111 (1973).

<sup>33</sup>U.N. GAOR Res. (1976).

<sup>34</sup>IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW 499-500* (Oxford: Clarendon Press 1973).

<sup>35</sup>Interview with former SWAPO United Kingdom representative Peter Katjavivi, New Haven, CT, Fall, 1988.

<sup>36</sup>See infra Part II.

<sup>37</sup>See, e.g., United Nations Institute for Namibia, *Namibia: Perspectives for National Reconstruction and Development* (1986).

<sup>38</sup>United Nations Council for Namibia, Decree No. 1 (1974). The General Assembly subsequently adopted the decree. See infra note 88 and accompanying text.

<sup>39</sup>On Angola, see generally, JOHN MARCUM, *THE ANGOLAN REVOLUTION* (2 vols.) (Cambridge, Massachusetts: M.I.T. Press 1969, 1978); WILLIAM MINTER, *KING SOLOMON'S MINES REVISITED: WESTERN INTERESTS AND THE BURDENED HISTORY OF SOUTHERN AFRICA* (New York: Basic Books 1987).

<sup>40</sup>U.N. SCOR Res. 385 (1976).

<sup>41</sup>Proc. R180 (1977).

<sup>42</sup>The South African government also issued Proclamation R202 which took effect on September 1, 1977, the very day the Administrator-General assumed his duties. That proclamation transferred the administration of Walvis Bay to Cape Town from Windhoek from whence it had been administered for decades. The switch represented part of a South African strategy

to retain its influence over an independent Namibia through control of the Bay. See generally L. BERAT, supra note 6.

<sup>43</sup>Cape Times, Jan. 28, 1986.

<sup>44</sup>See W. MINTER, supra note 39 at 311.

<sup>45</sup>An increasing number of white males refused to perform military service. See generally Berat, *Conscientious Objection in South Africa: Governmental Paranoia and the Law of Conscription*, 22 VAND. J. TRANSN'L L. 127 (1989).

<sup>46</sup>New York Times, Dec. 23, 1988.

<sup>47</sup>See L. BERAT, supra note 6, at ch. 10.

<sup>48</sup>See e.g. Namibia Communications Centre, London, U.K., Press Release, April 13-June 4, 1989.

<sup>49</sup>See generally NAMIBIA: THE LAST COLONY 259-92 (Reginald Green, Marja Liiso Kiljunen, & Kimmo Kiljunen eds., Burnt Mill, Harlow, Essex: Longman 1981).

<sup>50</sup>See infra note 89 and accompanying text.

<sup>51</sup>See L. BERAT, supra note 6, at ch. 1.

<sup>52</sup>See generally NAMIBIA: THE LAST COLONY, supra note 49, at 268-73.

<sup>53</sup>MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 157 (LONDON: George Allen and Unwin 1982).

<sup>54</sup>TANGANYIKA, HOUSE OF ASSEMBLY DEBATED (HANSARD), TANGANYIKA NATIONAL ASSEMBLY OFFICIAL REPORT, 36th Sess., 6th Mtg., Nov. 30, 1961, at 10.

<sup>55</sup>See generally, L. BERAT, supra note 6, at ch 6. On the period of German rule, see HELMUT BLEY, SOUTH WEST AFRICA UNDER GERMAN RULE 1894-1914 (London: Helnemann 1971).

<sup>56</sup>The generally accepted criteria for statehood appear in article 1 of the Montevideo Convention on the Rights and Duties of States of 1933. It provided that "the state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." Convention on the Rights and Duties of States, done Dec 26, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19.

<sup>57</sup>T.S. No. 29; 123 BRITISH AND FOREIGN STATE PAPERS 590.

<sup>58</sup>Permanent Mandates Commission, Minutes of the Permanent Mandates Commission 182 (1926), Doc. C. 632 M. 248.

<sup>59</sup>International Status of South West Africa (Advisory Opinion), (1950) I.C.J. Reports at 150.

<sup>60</sup>South West Africa Cases, Second Phase, (1966) I.C.J. Reports 6. See generally Verzijl, *The South West Africa*

Cases (Second Phase), 3 INT'L RELS. 87, 95-96 (1966).

<sup>61</sup>U.N. GAOR Res. 2145 (XXI).

<sup>62</sup>U.N. SCOR Res. 284.

<sup>63</sup>U.N. GAOR Res. 2248 (S.V.).

<sup>64</sup>U.N. GAOR Res. A/RES/32/9<sup>F</sup>.

<sup>65</sup>See, e.g., Report of the United Nations Council for Namibia, Vol. 1, U.N. GAOR Official Records, 31st Sess., Suppl. No. 24 (A/31/24), at 79.

<sup>66</sup>See, e.g., U.N. GAOR Res. A/RES/31/146 (XXXI) at para. 2 and U.N. GAOR A/RES/32/39<sup>B</sup> at para. 10.

<sup>67</sup>See, e.g., ORGANISATION OF AFRICAN UNITY, COUNCIL OF MINISTERS RESOLUTIONS CM/RES. 629 (XXXI) at para. 3 and CM/PLEN/Dft. Res. 11 (XXXII), Preamble.

<sup>68</sup>See, e.g., U.N. GAOR Res. 3295 (XXIX) at para. 4.

<sup>69</sup>United Nations Conference on Succession of States in Respect of Treaties, A/CONF. 80/16, Add. 1 and 2, Apr./May 1977 and July/Aug. 1978 at vol. I, p. 96, para. 66 [hereinafter cited as U.N. Succession of States Conference].

<sup>70</sup>Id. at vol. I, p. 44, para. 55.

<sup>71</sup>Apartheid has been labelled a crime against humanity in the International Convention on the Suppression and Punishment of the Crime of Apartheid of Nov. 30, 1973, 13 I.L.M. 50 [hereinafter cited as International Apartheid Convention].

<sup>72</sup>U.N. Succession of States Conference, *supra* note 49, at vol. III, p. 177.

<sup>73</sup>Vienna Convention on the Law of Treaties, *in force* Jan. 23, 1980, T.S. 58 (1980) [hereinafter cited as Vienna Convention].

<sup>74</sup>On the entrenchment of the right of self-determination in the post-World War II era, see *L. BERAT*, *supra* note 6, at ch. 8.

<sup>75</sup>Vienna Convention, *supra* note 73, at art. 16.

<sup>76</sup>U.N. Succession of States Conference, *supra* note 69.

<sup>77</sup>United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, A/CONF. 117, Mar./Apr. 1983.

<sup>78</sup>U.N. Succession of States Conference, *supra* note 69, at Add. 1, pp. 41-42, paras. 64-67.

<sup>79</sup>Id. at p. 69, para. 30.

<sup>80</sup>United Nations Institute for Namibia, Proceedings of the Seminar on State Succession to Rights and Obligations and Law in Namibia, Nov. 27-29 (1984), at 2.

<sup>81</sup>Convention on the Elimination of all Forms of Racial Discrimination, 660 U.N.T.S. 195.

<sup>82</sup>International Apartheid Convention, *supra* note 71.

<sup>83</sup>United Nations Convention on the Law of the Sea, 21 I.L.M. 1261 (1982).

<sup>84</sup>Protocols to the 1949 Geneva Conventions on War, 16 I.L.M. 1391.

<sup>85</sup>Vienna Convention, *supra* note 73.

<sup>86</sup>U.N. Doc. A/AC. 109/826, May 7, 1985 at 12, paras. 54-56.

<sup>87</sup>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), (1971), I.C.J. Reports, 58.

<sup>88</sup>United Nations, Regional Symposium on International Efforts to Implement Decree No. 1 for the Protection of Natural Resources of Namibia, Geneva, Aug. 1984, Annex III at 73.

<sup>89</sup>South West Africa, Commission of Enquiry Report (Thirion Commission Report) (1986).

<sup>90</sup>German Settlers in Poland Cases, (1923) P.C.I.J. Ser. B, No. 6; see also German Interests in Polish Upper Silesia, (1926) P.C.I.J. Ser. A, No. 7; Chorzow Factory Case (1927-28) P.C.I.J. Ser. A, No. 17.