

ENFORCEMENT IN UNITED STATES COURTS OF THE  
UNITED NATIONS COUNCIL FOR NAMIBIA'S DECREE ON  
NATURAL RESOURCES\*

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Under the international legal system, enforcement does not necessarily follow authoritative decision. In contrast with the structure of national legal systems, international decision-making processes typically do not take place within a system that offers institutionalized assurance of bringing about compliance. Uncertain enforcement of international decisions reduces the incentive to comply in particular cases. Possible failure of enforcement moreover undermines expectations of effectiveness and authority which are fundamental aspects of any regime of law. On the international plane enforcement action may imply the resort to coercive measures of a possibly violent nature. It may therefore entail the threat of an armed confrontation between enforcer, or enforcement agency, and the party against whom the international decision is to be made effective. The choice of the proper enforcement strategy will thus depend on a balanced assessment of the probability of effectiveness and the maintenance of peace associated with the particular alternative courses of action available in a given situation.<sup>1</sup>

One strategy open to the implementation of international decisions is the recourse to national courts.<sup>2</sup> Recent action by

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1. W. Reisman, Nullity and Revision 637-51, 655-7, 660-70 (1971), Reisman, "Sanctions and Enforcement," in The Future of the International Legal Order (vol.3) 273,300-35 (C.Black and R. Falk eds. 1971). The general theoretical framework was outlined in McDougal, Lasswell & Reisman, "The World Constitutive Process of Authoritative Decision," 19 J. Legal Ed. 253, 403 (1967). On the problem of compliance, see Higgins, "Compliance with United Nations Decisions on Peace and Security and Human Rights Questions," in The Effectiveness of International Decisions 32 (S. Schwebel ed. 1971); Schachter, "Towards a Theory of International Obligation," *ibid.* 9.

2. W. Reisman, Nullity and Revision 802-35 (1971); E. Nantwi, The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law 143-5 (1966); Lauterpacht, "Implementation of Decisions of International Organizations through National Courts," in The Effectiveness of International Decisions 57 (S. Schwebel ed. 1971).

the United Nations Council for Namibia directly raises the possibility of using national courts as enforcement agencies.

The territory of Namibia, formerly known as South West Africa,<sup>3</sup> has remained under the control of the Republic of South Africa despite various decisions by United Nations organs asserting the illegality of South Africa's continued presence in Namibia.<sup>4</sup> In 1974, the Council for Namibia, the United Nations agency responsible for that territory, passed the Decree on the Natural Resources of Namibia.<sup>5</sup> According to this Decree, title to any natural resource taken from Namibia without the consent of the Council is not valid, and resources taken without consent from the territory are subject to forfeiture to the Council. The Decree is thus aimed at indirectly terminating South African control over Namibia by denying the Republic essential attributes of its economic control over the territory.

The stakes in the Namibia controversy are high. The issue of continued foreign domination over Namibia has to be seen in the context of flagrant violations of basic human rights that have occurred under the South African regime. Attempts to implement apartheid in Namibia are only an extreme example.<sup>6</sup>

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3. The United Nations changed the name to conform with the usage current among liberation groups. G.A.Res. 2372, 22 U.N. GAOR Supp. 16A, at 1, U.N. Doc. A/6176/Add.1 (1968).

4. See TAN 73-80 *infra*.

5. Decree on the Natural Resources of Namibia; Addendum to the Report of the United Nations Council for Namibia, 29 U.N. GAOR Supp. 24A, at 27-8, U.N. Doc. A/9624/Add. 1 (1975) [hereinafter cited as Natural Resources Decree, text in Appendix]. The Decree was endorsed in G.A.Res. 3295, 29 U.N. GAOR Supp. 31, at 106, U.N. Doc. A/9631 (1975). See TAN 242-4 *infra*.

6. General Assembly and Security Council resolutions dealing with Namibia have rested on findings of human rights deprivations and a threat to internal and world peace. See e.g., G.A.Res. 3295, 29 U.N. GAOR Supp. 31, at 106, U.N. Doc. A/9631 (1974); G.A.Res. 2372, 22 U.N. GAOR Supp. 16A, at 1, U.N. Doc. A/6716/Add.1 (1968); G.A.Res. 2145, 21 U.N. GAOR Supp. 16, at 2, U.N. Doc. A/6316 (1966); S.C. Res. 282, 25 U.N. SCOR 1549th meeting (1970); S.C. Res. 276, 25 U.N. SCOR, 1529th meeting (1970); S.C. Res. 264, 24 U.N. SCOR, 1465th meeting (1969). The Reports of the United Nations Council for Namibia specify human rights violations and violence in the territory. 22 U.N. GAOR, Annexes, Agenda Item No. 64, U.N. Doc. A/6897 and A/7088 (1967); 23 U.N. GAOR, Annexes, Agenda Item No. 64, U.N. Doc. A/7338 (1968); "Report of the United Nations Council for Namibia," 24 U.N. GAOR Supp. 24, at 20-5, U.N. Doc. A/7624/Rev.1 (1970); *id.*, 25 U.N. GAOR Supp. 24, at 33-5, U.N. Doc. A/8024 (1970); *id.*, 26 U.N.

Implementation of the Council's Decree in national courts consequently also represents a strategy that aims at the realization of the enjoyment of, and respect for, fundamental human rights in Namibia, as well as of the principle of self-determination.

Deprivations of basic human rights have long been a principal and legitimate concern of international law. The United Nations since its inception has recognized the primacy of human rights in the contemporary world.<sup>7</sup> The U.N.

GAOR Supp. 24, at 15-31, 45-87, U.N. Doc. A/8424 (1971); *Id.*, 27 U.N. GAOR Supp. 24, at 3-17, 49-50, U.N. Doc. A/8724 (1972); *Id.*, 28 U.N. GAOR Supp. 24, at 6-28, U.N. Doc. A/9024 (1974); *Id.*, 29 U.N. GAOR Supp. 24, at 2-29 (vol. I), 11-16 (vol. II), U.N. Doc. A/9624 (1975). These issues have been explored in hearings before the United States Congress. "Hearings on Critical Developments in Namibia Before the Subcomm. on Africa of the House Comm. on Foreign Affairs," 93d Cong., 2d Sess. (1974), [hereinafter cited as "Hearings on Critical Developments in Namibia"]; "Hearings on Human Rights in Africa" before the Subcomm. on International Organization and Movements of the House Comm. on Foreign Affairs, 93rd Cong., 2d Sess. (1974) [hereinafter cited as "Hearings on Human Rights in Africa"]. For further documentation, see Anti-Apartheid Movement, Racism and Apartheid in Southern Africa 142-5 (1974); International Congress on South West Africa, South West Africa: Travesty of Trust (R. Segal & R. First eds. 1967); L. Lazar, Namibia 26-33 (1971); A. Lowenstein, Brutal Mandate (1962); L. Sohn & T. Buergenthal, International Protection of Human Rights 415-18, 423-30, 441-59, 496-504 (1973); J. Wellington, South West Africa and its Human Issues 270-422 (1967); Rogers, "Namibia: Economic and Other Aspects," in 2 The UN-OAU Conference on Southern Africa 117 (O. Stokke & C. Widstrand eds. 1973); Namibia News (a periodical published in London by the South West African People's Organization of Namibia - SWAPO); see generally T. Dugard, The South West Africa/Namibia Dispute (1973).

7. For a summary of significant United Nations activities in this area, see H. Lauterpacht, International Law and Human Rights 145-312, 394-434 (1968); A. Robertson, Human Rights in the World 23-50, 80-110 (1972); L. Sohn & T. Buergenthal, supra note 6, at 505-997; 13 Whiteman, Digest of International Law 610-79 (1968). A more comprehensive analysis of the human rights program, with special attention to its implications for the United States can be found in McDougal & Leighton, "The Rights of Man in the World Community: Constitutional Illusions versus Rational Action," in Studies in World Public Order 335-50, 356-72, 392-403 (1960); McDougal & Bebr, "Human Rights in the United Nations," 58 Am.J.Int'l L. 603 (1964).

Charter,<sup>8</sup> the Universal Declaration of Human Rights,<sup>9</sup> and various other resolutions<sup>10</sup> reflect and clarify widely held basic values. Regional organizations have issued similar statements.<sup>11</sup> International adjudications,<sup>12</sup> expressions of states,<sup>13</sup> and

8. E.g., U.N. Charter preamble, art. 1, para. 3, art. 13, para. 1(b), arts. 55, 56, 62, 68, 73, 76.

9. G.A.Res. 217, U.N. Doc. A/810 at 71 (1948).

10. See e.g., "International Covenant on Economic Social and Cultural Rights" and "International Covenant on Civil and Political Rights," G.A.Res. 2200, 21 U.N. GAOR Supp. 16, at 49, 53, U.N. Doc. A/6316 (1966); "Declaration on the Elimination of All Forms of Racial Discrimination," G.A.Res. 1904, 18 U.N. GAOR Supp. 15, at 35, U.N. Doc. A/5515 (1963); "Declaration on the Granting of Independence to Colonial Countries and Peoples," G.A.Res. 1514 (XV); 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960). For an enumeration of other covenants and multi-lateral treaties indicating United Nations concern with human rights, see 13 Whiteman, Digest of international Law 673-4 (1968).

11. See e.g., European "Convention for the Protection of Human Rights and Fundamental Freedoms," 213 U.N.T.S. 221 (1953); "Charter of the Organization of American States," 2 U.S.T. 2394, 119 U.N.T.S. 3 (1951). On regional protection, see I. Brownlie, Principles of Public International Law 557-8 (2d ed. 1973); A. Robertson, supra note 7, at 51-79, 111-161; L. Sohn & T. Buergenthal, supra note 6, at 999-1374, 5 Whiteman, Digest of International Law 230-6 (1965).

12. See Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa on Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 57 [hereafter cited as Namibia Opinion]; cf. Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), [1970] I.C.J. 3. The protection of human rights in international adjudication is not limited to cases before the International Court of Justice or its predecessor. A discussion of relevant tribunals and cases is in I. Brownlie, supra, note 11 at 558.

13. For example, United States policy statements concerning Namibia have frequently emphasized American concern regarding human rights deprivations. See TAN 82-3 infra.

scholarly commentary<sup>14</sup> support the emerging law of human rights as prescriptions that envision a wider sharing of political, economic and social values by all persons.<sup>15</sup>

Within the abstract and broad range of human rights goals,<sup>16</sup> certain demands have particular relevance to the post-war decolonization process. Foremost among these ranks the right of self-determination which in the specific anti-colonial context,<sup>17</sup> has gained worldwide acceptance partially as a result of the increased awareness of human rights.

Finally, enforcement of the Council's Decree may well serve the interests of international peace and security. South African domination of Namibia undoubtedly constitutes a threat to the maintenance of world peace,<sup>18</sup> in that the denial of human rights by any state clearly creates the potential for internal turmoil.<sup>19</sup>

Within the context of contemporary expectations and intercommunication, such deprivations could pose a threat to international peace.<sup>20</sup> Resistance to South African control exists within Namibia, and has often been violent.<sup>21</sup> The remarkably uniform worldwide opposition to the current situation in

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14. See e.g., McDougal, "Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies," 14 Va.J.Int'l L. 387 (1974) (hereinafter cited as McDougal, "Principles of Content and Procedure") (see App. I for an enumeration of human rights claims); McDougal, Lasswell & Chen, "Human Rights and World Public Order: A Framework For Policy Oriented Inquiry," 63 Am.J.Int'l L. 237 (1969).

15. McDougal, "Principles of Content and Procedure" 398.

16. On the necessarily abstract and comprehensive nature of human rights claims, see *id.* at 390; see also I. Brownlie, *supra* note 11, at 553-4.

17. I. Brownlie, *supra* note 11, at 575-8; Note, "The United Nations, Self-Determination and the Namibia Opinions," 82 Yale L.J. 533, 535-43 (1973) (hereinafter cited as Note, "Self-Determination and the Namibia Opinions").

18. See generally, Howe, "War in Southern Africa," 48 Foreign Affairs 150 (1969).

19. See e.g., G. Myrdal, An American Dilemma 558-69 (1944).

20. For example, the United Nations established the connection between alleged "internal" deprivations of human rights and a threat to international peace when it imposed sanctions against Rhodesia. The propriety of international action against human rights deprivations was analyzed in McDougal & Reisman, "Rhodesia and the United Nations: The Lawfulness of International Concern," 62 Am.J.Int'l L. 1,5-13 (1968).

21. See sources cited note 6 *supra*.

Namibia expressed in the United Nations and elsewhere,<sup>22</sup> the existence of groups and individuals seeking to change that situation,<sup>23</sup> and the relative intransigence of South Africa have created an atmosphere in which major military operations potentially endangering world peace have become entirely conceivable.

This essay explores the possibility of enforcing the Decree on the Natural Resources of Namibia through litigation in United States courts. The obvious primary issues involved are the legal status of the territory of Namibia and of the Council for Namibia, and the United States policy toward Namibia. The courts must determine whether the Council for Namibia or an appropriate substitute can be a plaintiff. What will have to be discussed here at some detail, is the American act of state doctrine which could serve as a complete defense against inquiry into the validity of the title to resources removed under authorization from the South African administration. Finally, assuming a proper plaintiff and the inapplicability of the act of state doctrine, a court would presumably require some guidance in ruling on the merits of the case. The desirability and effectiveness of litigation based on the Council for Namibia's claims are consequently evaluated in accordance with the goals of minimum order and human rights.

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22. For example, only Portugal and South Africa opposed the General Assembly resolution terminating legitimate South African control over Namibia. France, Malawi, and the United Kingdom abstained. G.A.Res. 2145, 21 U.N. GAOR Supp. 16, at 2, U.N. Doc. A/6316 (1966).

23. See, "Report of the United Nations Council for Namibia," 24 U.N. GAOR Supp. 24, at 3-17, 26-32, U.N. Doc. A/7624/Rev.1 (1970); *Id.*, 25 U.N. GAOR Supp. 24, at 1-32, 40-9, U.N. Doc. A/8024 (1970); *Id.*, 26 U.N. GAOR Supp. 24, at 1-14, 22, 32-42, 49-87, U.N. Doc. A/8424 (1971); *Id.*, 27 U.N. GAOR Supp. 24, at 3-9, 18-44, 51-52 (Vol. 1), 1-61 (Vol. 11), U.N. Doc. A/8724 (1972); *Id.*, 28 U.N. GAOR Supp. 24, at 6-13, 29-83, 106-117, U.N. Doc. A/9024 (1974); *Id.*, 29 U.N. GAOR Supp. 24, at 2-16, 30-60 (Vol. 1), 1-10, 17-38 (Vol. 11), U.N. Doc. A/9624 (1975). The preceding reports contain the best compilation of recent action by all agencies of the United Nations, member states, liberation groups operating within and outside of the territory, and other entities. An examination of the reports would illustrate the range of activities. See also, "The Liberation of Namibia," in 1 The UN-OAU Conference on Southern Africa 117-24 (O. Stokke & C. Widstrand eds. 1973).

## I. The United Nations and Namibia

## A. The Legal Status of Namibia

South Africa took control over South West Africa from Germany during World War I.<sup>24</sup> After the war the victorious Allies decided that South West Africa would be governed under a League of Nations Mandate with South Africa designated as the Mandatory power. By accepting the Mandate, South Africa became the legitimate government of the territory, limited by certain obligations inherent in the Mandate System.<sup>25</sup> The League took the position that while the Mandate territories were unable to govern themselves, ". . . the well-being and development of such peoples form[ed] a sacred trust of civilization. . . ."26 The Mandatories were to undertake this responsibility ". . . on behalf of the League."<sup>27</sup> By prohibiting the annexation of Mandate territories,<sup>28</sup> requiring periodic reports to the League,<sup>29</sup> and emphasizing the sacred trust concept, the Mandate System established the supervisory role of the League.<sup>30</sup> The League did supervise South Africa's somewhat unsatisfactory administration

24. R. Imishue, South West Africa - An International Problem 1-2 (1965); J. Wellington, supra note 6, at 255; Bley, "Genesis: From Conquest to Mandate," in South West Africa: Travesty of Trust 35 (R. Segal & R. First eds. 1967).

25. On the establishment of the South West African Mandate, see R. Imishue, supra note 24, at 2-19; J. Wellington, supra note 6, at 256-69; Louis, "The Origins of the Sacred Trust," in South West Africa: Travesty of Trust 54 (R. Segal & R. First eds. 1967); Mondlane, "From Mandates to Trusts," in South West Africa: Travesty of Trust 267-75 (R. Segal & R. First 1967). On the Mandate system, see L. Sohn & T. Buergenthal, supra note 6, at 337-73; 1 Whiteman, Digest of International Law 598-731 (1963). The text of the Mandate for South West Africa is reprinted in "Terms of League of Nations Mandates," U.N. Doc. A/70, No. 10 (1946).

26. League of Nations Covenant, art. 22, para. 1.

27. Id., para. 2.

28. Advisory Opinion on International Status of South West Africa, [1950] I.C.J. 128, 131-2.

29. This duty was specified in Article 6 of the South West Africa Mandate.

30. Note, "Self-Determination and the Namibia Opinions," 535-8.

of South West Africa until 1940.<sup>31</sup>

Much of the legal controversy over South West Africa after World War II can be traced to ambiguities surrounding the transition from the League to the United Nations.<sup>32</sup> The fundamental source of contention has been the role of the United Nations in the administration of the former Mandates. Although the League supervision clearly ended, the termination of the League and the establishment of the Trusteeship System left unresolved several issues: the survival of the Mandates after the League, the obligation to enter into trusteeship agreements, and the exercise of United Nations supervisory powers over the Mandates.<sup>33</sup> The International Court of Justice dealt with these questions in a series of advisory opinions concerning South West Africa.<sup>34</sup> The International Court ruled that the Mandate survived the League and that South Africa's obligations under the Mandate remained in force. Furthermore, all of the supervisory functions of the League were to be exercised by the United Nations. The international status of the territory could not be modified without the consent of the United Nations.<sup>35</sup> Although the International Court indicated that League actions should serve as a model future supervisor,<sup>36</sup> it nevertheless found that the United Nations was not limited to the exact procedures<sup>37</sup> and practices<sup>38</sup> of the League. In any event

31. R. Imishue, supra note 24, at 7-19; E. Landis, Namibia: The Beginnings of Disengagement 3 (1970); J. Wellington, supra note 6, at 270-319.

32. See League of Nations Off. J., spec. supp. 194, at 58 (1946).

33. R. Imishue, supra note 24, at 20-33. A. Obozuwa, The Namibian Question 54-92 (1973).

34. The interpretation of the International Court opinions was suggested by Note, "Self-Determination and the Namibia Opinions" 536-8, 546-8.

35. Advisory Opinion on the International Status of South West Africa [1950] I.C.J. 128, 143-4.

36. Id. at 138. The 1950 opinion also confirmed the jurisdiction of the International Court to hear disputes concerning the interpretation of the Mandate. Id. at 143. This power was granted to the Permanent Court of International Justice under Article 7 of the Mandate for South West Africa.

37. Advisory Opinion on South West Africa - Voting Procedure, [1955] I.C.J. 67, 76-8.

38. Advisory Opinion on the Admissibility of Hearings of Petitioners by the Committee on South West Africa, [1956] I.C.J. 23, 29-32.



the opinions clearly established United Nations authority to supervise South African administration of the Mandate.<sup>39</sup>

General dissatisfaction with South African control among the world community existed in the background of these first three advisory opinions.<sup>40</sup> In 1960 Ethiopia and Liberia in their capacity as former members of the League brought contentious suits in the International Court which directly raised the issue of South Africa's performance of its obligations under the Mandate and failure to accept United Nations supervision. Although the International Court decided that it could hear the merits of the dispute,<sup>41</sup> it subsequently held that Ethiopia and Liberia lacked the standing necessary to raise the issue,<sup>42</sup> because the right to supervise the Mandates belonged to the League, not to its members.<sup>43</sup>

Responding to the International Court's failure to render a decision on the performance of the Mandate obligations,<sup>44</sup> the United Nations took a series of steps designed to end South African control over Namibia.<sup>45</sup> The General Assembly adopted reso-

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39. Note, "Self-Determination and the Namibia Opinion," 536, 546.

40. See e.g., Namibia Opinion 43-5; Written Statement of the Secretary General, 1 Namibia Opinion, I.C.J. Pleadings 92-9 (1970); R. Imishue, supra note 24, at 28-63; A. Obozuwa, supra note 33, at 93-101.

41. South West Africa Cases Preliminary Objections, [1962] I.C.J. 319, 347.

42. South West Africa Cases, Second Phase, Judgment, [1966] I.C.J. 4, 28-9, 347.

43. Id. at 28-9.

44. Note, "Self-Determination and the Namibia Opinion," 554; see A. Obozuwa, supra note 33, at 129-47. E. Landis, "South West Africa Cases: Remand to the United Nations," 52 Cornell L.Q. 628 (1967).

45. The territory was renamed by the United Nations, G.A.Res. 2372, 22 U.N. GAOR Supp. 16A, at 1, U.N. Doc. A/6176/Add.1 (1968). A detailed discussion of United Nations activity concerning Namibia after the 1966 advisory opinion is beyond the scope of this essay. For the most complete summary, see Review of the Proceedings of the General Assembly and of the Security Council relating to the Termination of the Mandate for Namibia and Subsequent Action (submitted to the International Court of Justice on Behalf of the Secretary-General of the United Nations), 1 Namibia Opinion, I.C.J. Pleadings 123-202 (1970). See also Dossier transmitted by the Secretary-General of the United Nations, 1 Namibia Opinion, I.C.J. Pleadings 9-24 (1970) (this list of documents indicates the full range of United Nations activity after the 1966 opinion).

lution 2145(XXI) in 1966,<sup>46</sup> which declared that South Africa had failed to fulfill its obligations under the Mandate, and had disavowed the Mandate.<sup>47</sup> Accordingly, the General Assembly decided:

. . . that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, and that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations;

. . . that in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa.<sup>48</sup>

South Africa did not accept the termination of the Mandate under resolution 2145 (XXI). Indeed, South Africa continued to solidify its control over the territory and suppress human rights contrary to the wishes of the United Nations. The Security Council responded with a series of resolutions condemning the South African administration.<sup>49</sup> In Resolution 276 it:

Declare[d] that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid.

Call[ed] upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with

46. G.A.Res. 2145, 21 U.N. GAOR Supp. 16, at 2, U.N. Doc. A/6316 (1966). For the history of Res. 2145, see Review of the Proceedings, supra note 45, at 123-46.

47. G.A.Res. 2145, 21 U.N. GAOR Supp. 16, at 2, ¶ 3, U.N. Doc. A/6316 (1966).

48. Id. ¶ 4, 5. For a discussion of the legal issues raised by the termination, see A. Obozuwa, supra note 33, at 1-53.

49. S.C.Res. 245, 246, 23 U.N.SCOR, 1397th meeting 1, 2 (1968); S.C.Res. 264, 24 U.N.SCOR, 1465th meeting 1 (1969); S.C. Res. 269, 24 U.N.SCOR, 1497th meeting 2 (1969); S.C.Res. 276, 25 U.N.SCOR, 1529th meeting 1 (1970); S.C.Res. 282, 25 U.N.SCOR, 1549th meeting (1970); S.C.Res. 283, 284, 25 U.N.SCOR, 1550th meeting (1970); see Review of the Proceedings, supra note 45, at 160-201.

the Government of South Africa which are inconsistent with . . . this resolution.<sup>50</sup>

The Security Council subsequently requested an advisory opinion from the International Court on ". . . the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970). . . ." <sup>51</sup>

The 1971 advisory opinion affirmed the authority of the United Nations over Namibia.<sup>52</sup> In its judgment, the International Court confirmed the legality of the General Assembly resolution terminating the Mandate. According to the International Court:

. . . the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory.<sup>53</sup>

United Nations authority over Namibia was held to encompass resolutions binding on member states:

. . . States 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 dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.<sup>54</sup>

The opinion went beyond mere acceptance of the United Nations resolutions, and provided a justification for the revocation.

50. S.C.Res. 276, 25 U.N. SCOR, 1529th meeting 1 (1970).

51. S.C.Res. 284, 25 U.N. SCOR, 1550th meeting 4 (1970).

52. Namibia Opinion 32. The Namibia opinion has been discussed in A. Obozuwa, *supra* note 33, at 209-28; Gordon, "Old Orthodoxies amid New Experiences: The South West Africa (Namibia) Litigation and the Uncertain Jurisprudence of the International Court of Justice," 1 *Denver J. Int'l L. & Policy* 65, 79-91 (1971); Zuidwijk, "The International Court and South West Africa: Latest Phase," 3 *Ga. J. Int'l & Comp. L.* 323 (1973); "S.W. Africa Opinion of the I.C.J.: A Symposium," 11 *Colum. J. Transnat'l L.* 1, 193 (1972).

53. Namibia Opinion 58.

54. *Id.* The International Court also held that non-members were under the same obligation.

The International Court's argument developed a connection between obligations under the Mandate and modern conceptions of self-determination, especially as articulated in the General Assembly.<sup>55</sup> Fundamentally, United Nations authority to terminate the Mandate derives from the nearly universal consensus in support of the right to self-determination.<sup>56</sup>

The Namibia opinion dealt with the competence of specific United Nations organs to issue binding resolutions. While recognizing that it did not possess the power of judicial review regarding actions of the United Nations, the International Court construed the Security Council's responsibility for maintaining peace and security quite broadly.<sup>57</sup> The powers of the Council are limited only by ". . . the fundamental principles and purposes found in Chapter I of the Charter."<sup>58</sup> In the exercise of such powers, the Council can expect compliance by members of the United Nations, even if the resolutions were not passed in response to a threat to international peace and security.<sup>59</sup> The authority to bind members to a particular course of action, however, does not reside only in the Security Council. Although primarily entrusted with the power to pass recommendations, the General Assembly can adopt, ". . . in specific cases within the framework of its competence, resolutions which make determination or have operative effect."<sup>60</sup> The International Court took the position that Res. 2145 (XXI) was within that sphere of competence.<sup>61</sup>

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55. *Id.* at 28-32; see, "Declaration on the Granting of Independence to Colonial Countries and Peoples," GA Res. 1514 (XV); 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960).

56. Note, "Self-Determination and the Namibia Opinion," 545, 550-4, provided an excellent discussion of this point.

57. Namibia Opinion 57; Advisory Opinion on Certain Expenses of the United Nations [1962] I.C.J. 151, 168; see Gordon, *supra* note 52, at 83.

58. Namibia Opinion 52; Lissitzyn, "International Law and the Advisory Opinion on Namibia," 11 Colum. J. Transnat'l L. 50, 63 (1972).

59. Namibia Opinion 52.

60. Namibia Opinion 50; Contra, id. 107 (dissenting op., Fitzmaurice); see Certain Expenses of the United Nations, [1962] I.C.J. 151, 162-3. This summary of the International Court's rulings on the competence of the United Nations organs relied on Note, "Self-Determination and the Namibia Opinions," 548-50.

61. Namibia Opinion 50.

B. The Council for Namibia and the Decree on Natural Resources

After terminating the Mandate in 1966, the United Nations confronted the problem of implementation. Resolution 2145 (XXI) created an Ad Hoc Committee for South West Africa. The Ad Hoc Committee was to recommend practical means administering the territory to achieve the goal of self-determination.<sup>62</sup> At the Fifth Special Session, the General Assembly considered the report of the Ad Hoc Committee<sup>63</sup> and adopted Res. 2248 (s-v).<sup>64</sup> With the exception of Portugal, all states participating in the debates agreed that implementing Res. 2145 (XXI) was the purpose of the special session.<sup>65</sup> Resolution 2248 (s-v) established a United Nations Council for South West Africa, later renamed the Council for Namibia,<sup>66</sup> to be composed of eleven member states.<sup>67</sup> The General Assembly gave the Council power:

- (a) To administer South West Africa until independence, with the maximum possible participation of the people of the Territory;
- (b) To promulgate such laws, decrees and administrative regulation as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage;
- . . .
- (d) To take all the necessary measures for the maintenance of law and order in the Territory;

62. G.A.Res. 2145, 21 U.N. GAOR Supp. 16, at 2, ¶ 6, U.N. Doc. A/6316 (1966).

63. For a summary of the Ad Hoc Committee debates and proposals, see Review of the Proceedings, supra note 45, at 147-9. There were disagreements on the means of terminating South African control over Namibia, but no disagreement as to the validity of Res. 2145 (XXI). Id. 149.

64. G.A.Res. 2248 (s-v), 5th Sp. Sess. U.N. GAOR Supp. 1, at 1, U.N. Doc. A/6657 (1967).

65. Review of the Proceedings, supra note 45, at 157.

66. G.A. Res. 2372, 22 U.N. GAOR Supp. 16A, at 1, U.N. Doc. A/6716/Add.1 (1968).

67. The Council now contains eighteen members. The current members are listed in 2 "Report of the United Nations Council for Namibia," 29 U.N. GAOR Supp. 16, at 1, U.N. Doc. A/9624 (1975).

(e) To transfer all powers to the people of the Territory upon the declaration of independence.<sup>68</sup>

The resolution directed the Security Council ". . . to take all appropriate measures to enable the United Nations Council for [Namibia] to discharge the functions and responsibilities entrusted to it by the General Assembly."<sup>69</sup>

In the 1971 Namibia opinion, the International Court did not discuss Res. 2248 (s-v) or the status of the Council for Namibia. Indeed, the opinion provided little guidance on the issue of United Nations governance of Namibia.<sup>70</sup> Instead, the International Court, rested its opinion on General Assembly Res. 2145 (XXI) and Security Council Res. 276. In both of those Resolutions, the United Nations claimed direct responsibility for the administration of Namibia.<sup>71</sup>

Although the Council for Namibia had been active since its creation in 1967,<sup>72</sup> the 1974 Decree on the Natural Resources of Namibia was the first legislative effort by the Council.<sup>73</sup> In the Decree, the Council claimed ownership over the natural resources of Namibia. The Decree begins by forbidding any exploration, extraction, or export of Namibian resources without the permission of the Council.<sup>74</sup> The Council then declares that any "permission, concession or licence . . . whensoever granted by any person or entity . . . is null, void and of no force or effect,"<sup>75</sup> specifically aiming this section at the South African Administration. The Decree apparently would void agreements

68. G.A. Res. 2248 (s-v), 5th Sp. Sess. U.N. GAOR Supp. 1, at 1, pt. II, ¶ 1, U.N. Doc. A/6657 (1967).

69. *Id.* pt. IV, ¶ 5.

70. Lissitzyn, *supra* note 58, at 71; Rovine, "The World Court Opinion on Namibia," 11 *Colum. J. Transnat'l L.* 203, 234-5 (1972). For a discussion of the issues, see A. Obozuwa, *supra* note 33, at 147-64. See generally E. Landis, "The Status of Namibia at International Law," 5-6, November 1971 (paper presented at 14th Annual Meeting, African Studies Association).

71. G.A. Res. 2145, 21 U.N. GAOR Supp. 16, at 2, ¶ 5, U.N. Doc. A/6316 (1966); S.C. Res. 276, 25 U.N. SCOR, 1529th meeting 1, preamble, ¶ 6 (1970).

72. See note 23 *supra*.

73. The Decree was so characterized by the UN Commissioner for Namibia. *N.Y. Times*, Sept. 29, 1974, at 10, col. 4.

74. Natural Resources Decree ¶ 1.

75. *Id.* ¶ 2.

concerning natural resources concluded prior to the termination of the Mandate. The third provision of the Decree prohibits the removal of any natural resource from Namibia without the consent of the Council.<sup>76</sup> The Decree furthermore provides that resources taken from Namibia without permission are subject to seizure and forfeiture for the benefit of the Council.<sup>77</sup> The Council also claims that the means of transporting such natural resources are to be forfeited.<sup>78</sup> The Council would hold the forfeited goods in trust for the people of Namibia.<sup>79</sup> Finally, the Decree provides that any person or entity which violates the preceding rules ". . . may be held liable for damages by the future Government of an independent Namibia."<sup>80</sup>

The United Nations Council for Namibia does not have the power directly to enforce claims to control natural resources. The Decree suggests the possibility of enforcement through litigation in the courts of United Nations member states. The Council could monitor shipments of Namibian resources into the member country and with arrival, could enter the appropriate court and assert that any title to the resources derived from the South African administration was invalid, naming itself as the rightful owner, and requesting the property be turned over to the Council.<sup>81</sup>

The remainder of this essay deals with problems in the enforcement of the Decree in United States federal courts. Since United States policy toward the Namibia controversy is significant in the analysis of the issues, that policy must be explicated.

## II. United States Policy toward Namibia

The United States has frequently expressed disapproval of South Africa's denial of the right of self-determination and human rights in Namibia,<sup>82</sup> and has made diplomatic attempts to

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76. Id. ¶ 3.

77. Id. ¶ 4.

78. Id. ¶ 5.

79. Id. ¶ 4,5.

80. Id. ¶ 6.

81. Lauterpacht, supra note 2, at 63-4, suggested this course of action even before passage of the Decree.

82. See, e.g., Davis, "Department Summarizes U.S. Policy Toward Namibia," 73 Dept. State Bull. 36 (1975); Moynihan, U.S. Supports U.N. Resolution on Situation in Namibia 74 Dept. State Bull. 243 (1976); Newsom, "The United Nations, the United States, and Africa," 63 Dept. State Bull., 719, 720 (1970); White, "Self-

alter the situation.<sup>83</sup> United States policy has generally been in accordance with the efforts of the United Nations. Resolution 2145 (XXI) terminating the Mandate of South Africa was supported by the United States.<sup>84</sup> American representatives argued against South Africa in proceedings before the International Court of Justice.<sup>85</sup> The President and Secretary of State have explicitly stated that the United States accepted the holding of the International Court in the 1971 Namibia opinion.<sup>86</sup>

In accordance with the 1971 advisory opinion, a key element of American policy is non-recognition of the South African administration over Namibia. Commenting on that opinion, a senior official stated:

Determination for Namibia Urged by United States," 73 Dept. State Bull. 715-7 (1975); Yost, "The U.S. Stake in an Effective United Nations," 62 Dept. State Bull. 705, 708 (1970).

83. For a report on several of the most recent efforts, see Davis, supra note 82, at 38-9; Moynihan, supra note 82 at 244; "Hearings Before the Subcommittee on Africa of the House Committee on Foreign Affairs," 93d Cong., 2d Sess., 19-20 (1974) (testimony of Ass't Sec. of State for African Affairs Easum).

84. Nabrut, "Statement in favor of Res. 2145," 55 Dept. State Bull. 870-2 (1966); see also Bennett, "U.S. Discusses Situation in Namibia," 70 Dept. State Bull. 104, 105 (1974).

85. Written Statement of the Government of the United States of America, 1 Namibia Opinion, I.C.J. Pleadings 843 (1970); Oral Statement of the United States, 2 Namibia Opinion, I.C.J. Pleadings 497 (1970).

For excerpts from United States arguments relating to South West Africa litigation before the I.C.J. preceding the Namibia decision, see 1 Whiteman, Digest of International Law 715-20, 726-7, 730 (1963). The United States appeared as an intervening party in the advisory proceedings. On intervention before the I.C.J. in advisory matters, see S. Rosenne, The International Court of Justice 245-8 (1957).

86. Nixon, "U.S. Foreign Policy for the 1970's: The Emerging Structure of Peace," 66 Dept. State Bull. 311, 366 (1972); Rogers, "A Legacy of Peace: Our Responsibility to Future Generations," 65 Dept. State Bull. 437, 439 (1971).



This decision obliges all states to avoid acts that would imply recognition of the legitimacy of South Africa's administration of the territory. The U.S. government carefully avoids any such action.<sup>87</sup>

The United States does not recognize any right of South Africa to administer the territory.<sup>88</sup> American officials have frequently characterized the South African presence as an "illegal occupation."<sup>89</sup> In testimony before a Congressional committee, an assistant Secretary of State asserted that the ". . . South African Government does not have sovereignty over South-West Africa."<sup>90</sup> Along with the policy of non-recognition, the United States has supported and "fully recognized" United Nations responsibility for Namibia.<sup>91</sup>

A second aspect of United States policy has been to discourage American investment in Namibia. The level of United States investment in Namibia is comparatively low. Official estimates indicate a total commitment of \$45-50 million, or less than two percent of all American investment in Africa.<sup>92</sup> Foreign investment is significant in Namibia, but other nations are more deeply involved.<sup>93</sup> Since 1970 the United States

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87. Easum, "South Africa Five Years after the Lusaka Manifesto," 71 Dept. State Bull. 838, 842 (1974).

88. Newsom, supra note 82, at 722.

89. See e.g. Davis, supra note 82, at 39; Scali, "U.S. Deplores Continued Occupation of Namibia by South Africa," 72 Dept. State Bull. 161, 162 (1975), Scali, Statement [in U.N. Security Council], 71 Dept. State Bull. 775 (1974); see also Davis, "Department Discusses Situation in South Africa and Namibia," 73 Dept. State Bull. 269-70 (1975).

90. "Hearings Before the Subcomm. on Africa of the House Comm. on Foreign Affairs," 91st Cong., 2d Sess. 179 (1970) (testimony of David D. Newsom, Ass't Sec. of State for African Affairs).

91. "United States Makes Contributions to U.N. Fund for Namibia," 71 Dept. State Bull. 593 (1974) (source of quoted phrase); Newsom, "Southern Africa: Constant Themes in U.S. Policy," 67 Dept. State Bull. 119, 121 (1972); Newsom, supra note 82, at 722.

92. "Hearings Before the Subcomm. on Africa of the House Comm. on Foreign Affairs," 91st Cong., 2d Sess. 176 (1970) (testimony of David D. Newsom); but see "Hearings on Critical Developments in Namibia," 137-73 (United Council of Churches, "Tsumeb - A Profile of United States Contributions to Underdevelopment in Namibia").

93. For an extensive guide to foreign companies with investment in Namibia, see 2 "Report of the United Nations

government has attempted to maintain this minimum involvement, mainly through a three point program:

1. The United States will henceforth officially discourage investment by U.S. nationals in Namibia.
2. Export-Import Bank credit guarantees will not be made available for trade with Namibia.
3. U.S. nationals who invest in Namibia on the basis of rights acquired through the South African Government since adoption of General Assembly Resolution 2145 (October 27, 1966) will not receive U.S. Government assistance in protection of such investment against claims of a future lawful government of Namibia.<sup>94</sup>

This program was undertaken as one means for applying pressure to alter South African policy toward Namibia.<sup>95</sup> American objectives also include creating a situation in which a future lawful government would not oppose United States investment.<sup>96</sup> The United States also encourages American companies operating in Namibia to conform with Universal Declaration of Human Rights in their employment policies.<sup>97</sup> Furthermore, the Securities and Exchange Commission has raised the possibility that the securities acts could require disclosure of activities by United States corporations in Namibia which are not in conformity with official policy.<sup>98</sup>

Council for Namibia," 29 U.N. GAOR Supp. 24, at 39-75, U.N. Doc. A/9624 (1975). The major American investors are Newmont Mining Co. and American Metal Climax, Inc. which are major shareholders in Tsumeb Corporation, a Namibian mining company.

94. Yost, "The U.S. Stake in an Effective United Nations," 62 Dept. State Bull. 705, 709 (1970); "Hearings Before the Subcomm. on Africa of the House Comm. on Foreign Affairs," 91st Cong., 2d Sess. 156-60 (1970) (testimony of David D. Newsom). The procedures to implement the policy were described in *id.* 178.

95. Yost, *supra* note 94, at 709.

96. Davis, *supra* note 82, at 37.

97. *Id.*

98. "Hearings Before the Subcomm. on Africa of the House Comm. on Foreign Affairs," 93rd Cong., 2d Sess. 52-3 (1974); see also *id.* 46-9, 52-7, 64-80.

The United States investment policy reflects a commitment to using non-coercive means to terminate South African control over Namibia. For that reason the United States has also opposed the use of sanctions under Chapter VII of the United Nations Charter by the Security Council.<sup>99</sup> The United States has specifically rejected the use of economic sanctions against South Africa, which might bring about a confrontation. The United States position was that the sanctions would require the use of force to be effective, and that ineffective sanctions would be counterproductive.<sup>100</sup>

Although the United States accepted United Nations responsibility for Namibia, it has not supported the Council for Namibia.<sup>101</sup> The neutral stance toward the Council can be traced to the desire to avoid coercive steps and a preference for what the United States believed was practical. The United States abstained on Res. 2248 (s-v) which established the Council.<sup>102</sup> There was no objection to the aims of that resolution, but the United States ". . . believed the stated function of the Council, such as traveling to Namibia to take over the South African Government, were beyond the U.N.'s available means to achieve."<sup>103</sup> The United States has accordingly construed Res. 2248 (s-v) to mean that the administrative powers granted to the Council can be exercised only after the Council enters Namibia.<sup>104</sup>

The United States response to the Decree on the Natural Resources reflected a limited view of the Council's powers. In explaining why the government did not endorse the Decree, the Assistant Secretary of State for African Affairs noted that the exercise of administrative powers by the Council was

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99. See, e.g., Buffum, "Department Discusses Situation in South Africa and Namibia," 73 Dept. State Bull. 269, 273 (1975); Davis, supra note 82, at 37; Mazewski, "U.S. Gives Views on Question of Namibia," 64 Dept. State Bull. 101-2 (1971); White, supra note 82 at 716.

100. Newsom, "A Look at African Issues at the United Nations," 65 Dept. State Bull. 373, 376 (1971); Yost, supra note 94, at 709.

101. See "Hearings Before the Subcomm. on Africa of the House Comm. on Foreign Affairs," 93d Cong., 2d Sess. 1-2 (1974) (remarks of Rep. Diggs).

102. Goldberg, Statement [regarding Namibia and Res. 2248 (s-v)], 56 Dept. State Bull. 888-94 (1967).

103. Davis, supra note 82, at 38.

104. Id.

limited by South Africa's effective control of the territory.<sup>105</sup> Nevertheless, that official stated:

The Department of State takes the position that enforcement jurisdiction regarding this decree rests not with the executive branch but rather with the courts and parties involved . . . .[W]e cannot judge what position the courts would take should the Council seek legal recourse to enforce the decree.<sup>106</sup>

The State Department thus did not express a position on the claims embodied in the Decree or even on the desirability of judicial enforcement.<sup>107</sup> The Department indicated that if the Decree were to be enforced the Council should direct its attention to the judicial system.

### III. The Council for Namibia as a Plaintiff

In order to enforce its Decree through judicial means, the Council for Namibia must bring suit against parties in possession of Namibian resources. United States courts are not, however, open to all possible plaintiffs. This section explores two theories which could justify the Council's status as a litigant.

#### A. A United Nations Agency

The Council of Namibia could enter United States courts as a United Nations agency. The United Nations Charter provides that in each member state, the organizations should have ". . . such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."<sup>108</sup> In accordance with the obligation under the Charter, a United States statute permits the United Nations to sue in federal courts:

International organizations shall, to the extent consistent with the instrument creating them, possess the capacity

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105. *Id.*

106. *Id.* 37-8.

107. The General Assembly endorsed the Decree in Res. 3295, 29 U.N. GAOR Supp. 31, at 106, U.N. Doc. A/9631 (1974). The United States abstained on that resolution. However, the United States position was not necessarily against the decree. The United States opposed the suggestion of Chapter VII sanctions in the resolution. 29 U.N. GAOR, Fourth Committee 236, U.N. Doc. A/C.4/SR.2078-2131 (1974); Davis, *supra* note 82, at 37, 38; TAN 242-4 *infra*.

108. U.N. Charter, art. 104.

to institute legal proceedings.<sup>109</sup>

Furthermore federal courts might have jurisdiction to entertain such suits since the United Nations Charter is a treaty to which the United States is a party.<sup>110</sup>

Although United Nations agencies have instituted suits as plaintiffs,<sup>111</sup> the courts indicated that there were limitations on the capacity. In ratifying the United Nations Charter provision on legal capacity, the Congress evidently envisioned suits involving simple contract and tort claims.<sup>112</sup> The courts have interpreted the permission to sue liberally in such cases.<sup>113</sup> The Balfour, Guthrie & Co. v. United States case which involved the breach of a contract to ship milk, enumerated factors which might preclude resort to the courts.<sup>114</sup> One of the plaintiffs was the United Nations International Children's Emergency Fund. The court believed that this type of claim was proper under the United Nations Charter and United States statutes. There were no political overtones. The foreign affairs of the United States could not be embarrassed by a judgment. Finally, such a claim could normally be judicially settled.<sup>115</sup> The opinion thus implied that the Court would be less receptive to entertaining a suit which was politically sensitive. A similar reluctance was also expressed in a recent case involving the immunity of an international organization from suit. The court in the latter case commented that "[w]here delicate, complex issues of international economic policy are involved, jurisdiction should be denied."<sup>116</sup> The

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109. International Organizations Immunities Act, 22 U.S.C.A. §288a (a)(iii)(1964); See Note, "The Status of International Organization Under The Law of the United States," 71 Harvard L. Rev. 1300, 1301-7 (1958).

110. 28 U.S.C. §1331 (1973); International Refugee Organ. v. Republic S.S. Corp., 189 F.2d 858, 861 (4th Cir. 1951) (dicta).

111. International Refugee Organ. v. Republic S.S. Corp., 189 F.2d 858 (4th Cir. 1951) (breach of contract); Balfour, Guthrie & Co. v. United States, 90 F. Supp. 831 (N.D. Calif. 1950) (breach of contract).

112. International Refugee Organ. v. Republic S.S. Corp., 189 F.2d 858, 860 (4th Cir. 1951).

113. Id. 861.

114. 90 F. Supp. 831 (N.D. Calif. 1950).

115. Id. 833-4.

116. Lutcher S.A. Celulose E Papel Candoi v. Inter-Amer. Dev. Bank, 253 F. Supp. 568, 570 (D.C. 1966), aff'd, 382 F.2d 454 (D.C. Cir. 1967).

Council for Namibia could nevertheless argue that enforcement of the Decree through the judicial process is necessary to fulfill the functions and purposes of the United Nations.<sup>117</sup>

In the case of Diggs v. Shultz the Court of Appeals in the District of Columbia considered issues raised by United Nations action.<sup>118</sup> The case involved sanctions against Southern Rhodesia. In 1966 the Security Council directed members to impose a trade embargo against Southern Rhodesia. The United States complied through an executive order, but in 1971 Congress overrode the embargo. In Diggs v. Shultz the plaintiffs sued for declaratory and injunctive relief against the importation into the United States of materials covered by the embargo. The court held that the Congressional action precluded enforcement of the embargo even though it nullified a United States treaty commitment under the United Nations Charter.<sup>119</sup> The implication was that the plaintiffs had a justiciable controversy with the federal government. The case may thus suggest a willingness to entertain international controversies,<sup>120</sup> although there are features which distinguish that litigation from possible future suits by the Council. While the basis for the suit in Diggs v. Shultz originated in the United Nations, the plaintiffs' claim itself related to a domestic executive order. The case was therefore not an attempt to enforce United Nations legislation directly. The plaintiffs in Diggs v. Shultz were, moreover, not international organizations whose access may depend on statute. It seems nevertheless that the requirements for standing to sue met by those plaintiffs would also be met by the Council in a suit to enforce the Decree.<sup>121</sup> In any event, litigation in the Council's capacity as a United Nations

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117. See generally Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 173, 178-9.

118. 470 F.2d 461 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973).

119. Id. 465-6.

120. Note especially id. 465.

121. The requirements are: (1) personal interest in order to insure an adversary presentation of the issues, (2) that the plaintiff be in the zone of interests sought to be protected by the law in question [the court cited a Security Council resolution to establish the zone of interest, which suggests that a suit based only on United Nations resolutions might be viable], (3) that there be a "logical nexus between the status asserted and the claim sought to be adjudicated." Id. 464, see 9 Texas Int'l L.J. 114 (1974).

agency would be unprecedented, and might be subjected to resistance on the part of the courts.

#### B. A Government of Namibia

An alternative theory to justify access to United States courts derives from a characterization of the Council as the government of Namibia. The right of a foreign government to sue in the courts depends on recognition by the United States.<sup>122</sup> If a foreign state has been recognized by the United States, it is allowed to appear in the courts as a plaintiff,<sup>123</sup> and the judicial power of the United States extends to such suits.<sup>124</sup> According to the Supreme Court, comity between nations is the basis of the privilege.<sup>125</sup> Governments which have not been recognized will be denied access to the courts.<sup>126</sup> The denial of access reflects the courts' unwillingness to come into conflict with the executive branch by judicially "recognizing" an unrecognized government.<sup>127</sup> The assumption is that by allowing suit by an unrecognized government, the courts would be in conflict with American foreign policy.

Although the rule precluding suit by a non-recognized foreign government has been criticized,<sup>128</sup> there has been no

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122. For general discussion of recognition policies and the consequences of recognition, see I. Brownlie, *supra* note 11, at 89-108; M. Kaplan & N. Katzenbach, The Political Foundations of International Law, 109-34 (1961); Blix, "Contemporary Aspects of Recognition," 130 Recueil des Cours 587 (1971).

123. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-9 (1964); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134, 137 (1938); *The Sapphire*, 78 U.S. (11 Wall.) 164, 167 (1870); *P & E Shipping Corp. v. Banco Para El Comercio Exterior de Cuba*, 307 F.2d 415 (1st Cir. 1962).

124. U.S. Const. Art. III, §2.

125. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-9 (1964).

126. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 409 (1964); *The Rogdai*, 278 F. 294 (N.D. Cal. 1920); *The Penza*, 277 F. 91 (E.D.N.Y. 1921); *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1923); Adler, "The Unrecognized Government in the Courts of the United States," 5 Va. J. Int'l L. 36, 39-42 (1964).

127. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410-1 (1964).

128. The Supreme Court provided a list of critical materials at *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 411 n.12 (1964). For a later discussion which also criticizes

contrary precedent.<sup>129</sup> In Banco Nacional de Cuba v. Sabbatino, the Supreme Court indicated that it did not have to rule on the issue of an unrecognized government as plaintiff. The Court merely raised the issue of access.<sup>130</sup> An intermediate level New York court permitted a suit based on a claim assigned to the plaintiff (a United States citizen) by the unrecognized East German government in Upright v. Mercury Business Machines.<sup>131</sup> Although the opinion indicated a willingness to depart from a rigid analysis of the effects of non-recognition in terms of personal rights, the court explicitly retained the rule that the plaintiff cannot be an unrecognized government.<sup>132</sup> The Upright result, which permits an assignee to stand in the place of a government, was no more artificial than the Amtorg Trading Corporation v. United States case.<sup>133</sup> The plaintiff in Amtorg was a New York corporation, wholly owned by the unrecognized Russian government, which would have been barred from suing.<sup>134</sup> Finally, lawyers for the unrecognized People's

the doctrine, see Adler, supra note 126 at 40-2; 12 Colum. J. Transnat'l L. 155 (1973). The response has not been entirely critical. Restatement (second) of the Foreign Relations Law of the United States §107, comment e at 339 [hereinafter cited as Restatement], does not require a state to grant access to an unrecognized government.

129. In the unreported case of United States of Mexico v. Viamonte y Fernandez (Sup. Ct., Essex Co., Mass. 1923), the plaintiff was the unrecognized government of Mexico. The Department of State indicated to the court that the United States recognized the state of Mexico. H. Briggs, The Law of Nations 154-6 (1952). The distinction between recognition of a state and of a government is of doubtful significance.

130. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 411 n.12 (1964).

131. 13 App. Div. 36, 213 N.Y.S.2d 417 (1st Dept. 1961), reversing, 26 Misc.2d 1069, 207 N.Y.S.2d 85 (Sup. Ct. 1960) (no appeal taken). The case was discussed in Lubman, "The Unrecognized Government in American Courts: Upright v. Mercury Business Machines," 62 Colum. L. Rev. 275, 280, 294-7 (1962).

132. Upright v. Mercury Business Machines, 13 App. Div. 36, 213 N.Y.S.2d 417 (1st Dept. 1961), reversing, 26 Misc.2d 1069, 207 N.Y.S.2d 85 (Sup. Ct. 1960).

133. 71 F.2d 524 (C.C.P.A. 1934).

134. Id. 529. The Upright and Amtorg cases seem to be absurd invitations to evasion of the rule against suits by an unrecognized government. The Council of Namibia presumably could utilize the Upright rule by selling its claim to natural



Republic of China were allowed to intervene in Bank of China v. Wells Fargo Bank & Union Trust Co.<sup>135</sup> The issue in that case was ownership of funds deposited by the Bank of China before the domination of the mainland by the People's Republic. There were two successors to the Bank that claimed the funds. While the court eventually awarded the deposits to the Nationalist claimants, since that government was recognized by the United States, the non-recognition of the People's Republic did not preclude the intervention.<sup>136</sup> However, the plaintiff in the case was not the unrecognized government. Even the limited access afforded by the Bank of China case was denied to an East German museum recently in a New York federal court.<sup>137</sup>

The decisions to recognize particular governments and the formulation of guiding policies are entirely a matter for

resources to a third party for value. On the other hand, the Council could establish an intermediary incorporated in the U.S. as in Amtorg. If these alternatives proved to be effective, the Council would be able to partially achieve its objectives. However, the courts probably would not be receptive to fake transactions designed only to circumvent the rule. Indeed, the Upright court explicitly indicated that the plaintiff was a bona fide purchaser for value. Furthermore, the court in Amtorg suggested that the result might be limited to the unique statutory proceedings. 71 F.2d at 528. Intermediaries have been used to gain access to tribunals in international practice. Since participation in many arenas of international decision is limited to states, individuals and groups have presented claims through states. The substitution of a third party for a party in interest to overcome rules limiting access has been described as the principle of mutability. W. Reisman, Nullity and Revision 90-1, 351 (1971). An attempt by the Council to utilize Upright or Amtorg would present the reverse of the usual application of the principle - a state's claim would be pressed before a tribunal by a non-state entity.

Probably the greatest barrier to extension of the Upright or Amtorg cases to the Namibia litigation is the fact that the prior cases touched lightly on issues of American foreign policy. The potential for conflict with the Executive Branch is significant, and probably would inhibit the courts. See 7 Vand. J. Transnat'l L. 213, 217-8 (1973).

<sup>135.</sup> 104 F. Supp. 59 (N.D. Cal. 1952), modified, 209 F.2d 467 (9th Cir. 1953). For earlier opinions in the case, see 92 F.Supp. 920 (N.D. Cal. 1950), appeal dismissed, 190 F.2d 1010 (9th Cir. 1951).

<sup>136.</sup> 104 F.Supp. at 66.

<sup>137.</sup> Federal Republic of Germany v. Elicofon, 358 F.

the executive branch.<sup>138</sup> United States courts accept recognition decisions by the executive branch as conclusive.<sup>139</sup> Although no particular modes of recognition are prescribed, the intention to recognize must be clear.<sup>140</sup> Recognition may be express or implied, but recognition can be implied only from acts which unequivocally indicate the necessary intent.<sup>141</sup>

A review of United States policy toward the Council for Namibia does not reveal an intent to recognize the Council as the government of Namibia. The United States abstained from the resolution creating the Council, and has taken the position that the administrative powers granted to the Council can be exercised only after it gains access to the territory. American investment policy has included references to a future lawful government of Namibia, even though the Council has concurrently existed. In accepting the Namibia opinion and United Nations responsibility for the territory, the United States did not necessarily recognize the international organization as a government.<sup>142</sup> Consequently, the rule precluding suit by an un-

Supp. 747 (E.D.N.Y. 1970, 1972), aff'd per curiam 478 F.2d 231 (2d Cir. 1973), cert. denied 415 U.S. 931 (1974). The district court reaffirmed the rule against suits by unrecognized governments in light of the Sabbatino opinion. 12 Colum. J. Transnat'l L. 155 (1973). The Elcofon decision may indicate a retreat from the Upright approach, since the denial of the East German corporation's motion to intervene was based on the link to the unrecognized government without further analysis of whether only personal rights were involved or whether the policy of non-recognition would be defeated by allowing the lawsuit to continue. 7 Vand. J. Transnat'l L. 213, 217-8, 222-3 (1973).

138. United States v. Pink, 315 U.S. 203, 229 (1942); National Union Fire Ins. Co. v. Republic of China, 254 F.2d 177, 186 (4th Cir. 1958), cert. denied, 358 U.S. 823 (1958); Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000, 1002-3 (D.C. Cir. 1951), cert. denied 342 U.S. 816 (1951); The Maret, 145 F.2d 431, 440 (3d Cir. 1944).

139. Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938).

140. 2 Whiteman, Digest of International Law 48-68 (1963); see Restatement §104.

141. 2 Whiteman, Digest of International Law 48 (1963); Restatement §104, comments b, c, illustration 3, 4; see Restatement §§105-6.

142. TAN 101-4 supra. The issuance of travel documents to exiled Namibians by the United States does not constitute recognition. Restatement §104, comment c. Indeed, the issuance of such documents at the same time that the Council issues travel

recognized government would apply to the Council for Namibia. That is, characterization of the Council as a government<sup>143</sup> will not provide access to the courts unless United States policy changes.<sup>144</sup>

#### IV. Act of State

In a suit instituted by the Council of Namibia against parties in possession of Namibian resources, the validity of the defendant's title to the resources would be a central issue. To establish a valid title, the defendant probably would rely on rights derived from the South African administration. The basis of the right to possession might include licenses, concessions, or other agreements.<sup>145</sup> Reliance on rights ultimately acquired from the South African administration could constitute a complete defense provided that the American act of state doctrine applies.

The act of state doctrine precludes United States courts from examining the validity of the acts of a foreign government in certain circumstances.<sup>146</sup> The contours of the act of state rule were discussed in Banco Nacional de Cuba v. Sabbatino.<sup>147</sup>

documents is a further indication of non-recognition. Furthermore, United States contributions to the United Nations Fund for Namibia have not been construed by the State Department as an act of recognition. See Davis, supra note 82, at 38.

<sup>143.</sup> Since the issue is access to United States courts, it is not necessary to determine whether the Council has been (or could be) construed as a government by the United Nations or other member states. On the problem of whether the United Nations could assume the role of a government, see I. Brownlie, supra note 11, at 175-9, 664-6.

<sup>144.</sup> For alternatives to current United States policy, see TAN 275-86 infra.

<sup>145.</sup> See "Report of the United Nations Council for Namibia," 28 U.N. GAOR Supp. 24 at 14-27, U.N. Doc. A/9024 (1974); L. Lazar, supra note 6, at 18-20, 74-97. The Report and Lazar's book provide an overview of the Namibian economy, and indicate the importance of the South African administration in creating the framework for foreign investment.

<sup>146.</sup> An introductory discussion can be found in Annot., 12 A.L.R. Fed. 707 (1972). Early statements of the doctrine were Underhill v. Hernandez, 168 U.S. 250 (1897); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Company, Ltd., 246 U.S. 304 (1918).

<sup>147.</sup> 376 U.S. 398 (1964).

The case involved the nationalization of a cargo of sugar by the Cuban government within that country. Cuba did not provide compensation to the American owners of the sugar. The former owners brought suit to claim the proceeds from the sale of the sugar in the United States. The Supreme Court declined to rule on the nationalization laws:

. . . we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.<sup>148</sup>

Although the doctrine prohibited the Court from ruling on the legality of the foreign act of state, the Court did not dismiss the case.<sup>149</sup> On the contrary, the Court decided the case on the merits after attributing an irrebuttable presumption of legality to the foreign act.<sup>150</sup>

Application of the act of state doctrine has not been limited to controversies involving expropriation as in the Sabbatino case.<sup>151</sup> Acts of state can include any public or governmental act, even though most of the cases had to do with confiscations.<sup>152</sup> A concession agreement between an investor

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<sup>148.</sup> Id. 428.

<sup>149.</sup> Thus, the act of state doctrine cannot be explained in terms of "political questions", since dismissal would then be the proper disposition. Baker v. Carr, 369 U.S. 186 (1962). Contra, First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 787-8 (1972) (Brennan, J., dissenting).

<sup>150.</sup> 376 U.S. at 439. Cf. id. 470-2 (White, J., dissenting).

<sup>151.</sup> Interamerican Refining Corporation v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1299 (Del. 1970). Cf. 16 Harv. Int'l L.J. 456, 466 (1975) (suggest that the Sabbatino formulation is limited to expropriations). The formulation of the act of state doctrine in the Restatement §41 was not limited to expropriations.

<sup>152.</sup> Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 363 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965); Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962); stay denied, 314 F.2d 649 (5th Cir. 1963), cert. denied, Jimenez v. Hixon, 373

and a foreign government covering mining rights within the country would be an act of state.<sup>153</sup> Courts have decided that various other types of economic regulation constitute acts of state.<sup>154</sup>

The act of state doctrine has been the subject of extensive criticism.<sup>155</sup> Both within the courts and among the commentators disagreement has persisted concerning the theoretical justifications and proper scope of the doctrine.<sup>156</sup> The Sabbatino formulation of the rule diminishes the role of the judicial branch in the conduct of foreign affairs and eliminates the contribution of national courts to the development of international law. By immunizing possible violations of international law, the opinion can encourage disorder and deny relief to harmed parties.<sup>157</sup> Nevertheless, the act of

U.S. 914 (1963); Banco de Espana v. Federal Reserve Bank, 114 F.2d 438, 444 (2d Cir. 1940); Restatement §41, comment d.

153. Interamerican Refinery Corporation v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (Del. 1970).

154. French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704 (1968); Wells Fargo & Co., Express S.A. v. Tribolet, 46 Ariz. 311, 50 P.2d 878 (1935); see Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527 (S.D.N.Y. 1972), modified sub nom. Menendez v. Saks and Company, 485 F.2d 1355 (2d Cir. 1973), cert. granted sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 416 U.S. 981 (1974); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 899 (S.D.N.Y. 1968), aff'd, 433 F.2d 686 (2d Cir. 1970); cert. denied, 403 U.S. 905 (1971).

United States courts will not, however, enforce foreign penal or revenue laws. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 413-4 (1964). This rule is consistent with the act of state doctrine in that the courts do not inquire into the validity of such laws. Restatement §41, comment 1.

155. A bibliography would not be useful in this essay. The quantity of the literature was noted in Lowenfeld, "Act of State and Department of State: First National City Bank v. Banco Nacional de Cuba," 66 Am. J. Int'l L. 795, 798-9 (1972).

156. For disagreement among judges, see First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

157. McDougal, "Act of State in Policy Perspective: The International Law of an International Economy," in Private Investors Abroad - Structures and Safeguards 327, 337-42 (V. Cameron ed. 1966).

state doctrine remains part of American jurisprudence.<sup>158</sup> Congress and the courts have developed certain "exceptions" to the doctrine.<sup>159</sup> Several of the qualifications to the doctrine are relevant to the possible litigation by the Council for Namibia.<sup>160</sup>

If the act of state doctrine does not apply in a particular situation, the party contesting the act will not necessarily prevail. In the absence of the doctrine, the courts need not abstain from a ruling on the merits of the foreign act. The court would rely in formulating its decision on applicable conflict of laws rules and the appropriate deference to acts of another state.<sup>161</sup> Thus, even if the Council for Namibia per-

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<sup>158</sup>. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). In this case only Justice Powell expressed doubt as to the wisdom of Sabbatino. The act of state doctrine remained in the Restatement §41. However, the Supreme Court requested argument on whether Sabbatino should be reconsidered in the Alfred Dunhill of London, Inc. v. Republic of Cuba case. 15 Int'l Legal Materials 155 (1976). The briefs on that point are summarized ibid. 155-68.

<sup>159</sup>. See 49 Wash. L. Rev. 213, 223 (1973).

<sup>160</sup>. Two exceptions are not relevant to a suit by the Council for Namibia. In response to the Sabbatino decision, Congress created an exception to the doctrine in cases involving a taking or confiscation contrary to international law. The enactment was known as the Hickenlooper Amendment to the Foreign Assistance Act, 22 U.S.C. §2370(e)(2). The Hickenlooper Amendment was held constitutional. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), aff'd, 383 F.2d 166 (2d Cir. 1967), cert. denied 390 U.S. 956 (1968). The text and the legislative history indicate that the amendment was not intended to cover situations such as presented by the Council. See Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394, 399-402 (2d Cir. 1970). The other exception covers situations in which there is a treaty or agreement which clearly specifies controlling rules of law. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). The only treaty which could apply in the Council litigation is the U.N. Charter. It is doubtful that a court would find the Charter sufficiently unambiguous, or of the type of treaty envisioned by Sabbatino.

<sup>161</sup>. See H. Steiner & D. Vagts, Transnational Legal Problems 585-9 (1968).

suades a court to disregard the act of state doctrine, it must still demonstrate the illegality of the South African acts.

#### A. Executive Authorization

One of the justifications for the act of state doctrine is the belief that judicial inquiry into such acts could embarrass the executive branch in the conduct of foreign policy.<sup>162</sup> In situations where the executive branch expressed no objection, the courts have proceeded to a ruling on the merits of the foreign law.<sup>163</sup> This limitation on the act of state doctrine originated in the Bernstein litigation.<sup>164</sup> The litigation involved property which had been forcibly taken from Bernstein by the Nazi Government while he was a German citizen in Germany. After leaving Germany, Bernstein sued the subsequent purchaser who had notice of the taking for the value of his property. The Second Circuit Court of Appeals twice refused to rule on the validity of the Nazi seizures due to the act of state doctrine.<sup>165</sup> The court indicated that it would hear the case on the merits if the executive branch indicated no objection.<sup>166</sup> The State Department then issued a press release, which stated that the executive policy was to remove any restraint from inquiry into the legality of Nazi seizures of identifiable property.<sup>167</sup> In response to the expression of executive policy, the court ordered a trial on the merits of Bernstein's claim.<sup>168</sup>

The current status of the Bernstein exception is some-

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162. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-8, 431-3 (1964); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762-8 (1972).

163. Restatement §41, comment h.

164. Summarized in H. Steiner & D. Vagts, supra note 161, at 606-10.

165. Bernstein v. Van Heyghen Freres, S.A., 163 F.2d 246 (2d Cir. 1947), cert. denied, 332 U.S. 772 (1947); Bernstein v. N.V., Nederlandsche-Amerikaansche Stoomvaart Maatschappij, 173 F.2d 71 (2d Cir. 1949).

166. Bernstein v. Van Heyghen Freres, S.A., 163 F.2d 246, 252 (2d Cir. 1947).

167. State Department Press Release No. 296 (April 27, 1949), quoted in Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954).

168. Id. Bernstein eventually settled his claim. H. Steiner & D. Vagts, supra note 161, at 610.

what unclear. Few courts have followed Bernstein or even cited the cases.<sup>169</sup> The Supreme Court did not have cause to rule on the Bernstein cases in Sabbatino, since the Court held that the executive branch favored abstention in that case.<sup>170</sup> The Sabbatino Court did state that a reverse Bernstein rule in which the act of state doctrine would not apply unless the State Department requested abstention would be "unwarranted."<sup>171</sup> That opinion also noted that the Nazi regime was not in existence at the time of the Bernstein litigation.<sup>172</sup> The Justices discussed the exception in First National City Bank v. Banco Nacional de Cuba.<sup>173</sup> The case grew out of the Cuban expropriation without compensation of the American bank's property in Cuba. The Cuban national bank instituted suit for excess collateral held by the American bank to secure a loan. The latter bank filed a counterclaim for the excess funds on the theory that the expropriation was illegal and that it deserved compensation. A majority on the Supreme Court permitted the counterclaim, but three different justifications were presented. Justice Rehnquist relied on a letter from the State Department which took the position that the act of state doctrine should not apply to bar a counterclaim limited to the claim of the Cuban agency.<sup>174</sup> Since there was no possibility of disrupting the con-

169. The subsequent use of the Bernstein cases was discussed in Banco Nacional de Cuba v. First National City Bank, 442 F.2d 530, 535 (2d Cir. 1971); Andrews, "Act of State -- Executive Determination," 35 Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht 41, 43-5 (1975).

170. 376 U.S. at 419-20.

171. Id. 436 (the Court's reference to Bernstein clearly indicated that the exception was not "deemed valid" in Sabbatino).

172. Id. 428.

173. 406 U.S. 759 (1972). For commentary, see Andrews, supra note 169, at 45-9; Leigh, "The Supreme Court and the Sabbatino Watchers: First National City Bank v. Banco Nacional de Cuba," 13 Va. J. Int'l L. 33 (1972); Lowenfeld, supra note 155, passim; 3 Denver J. Int'l L. & Policy 117 (1973); 14 Harvard Int'l L.J. 131 (1973); Note, "Executive Suggestion and Act of State Cases: Implications of the Stevenson Letter in the Citibank Case," 12 Harv. Int'l L.J. 557 (1971); 49 Wash. L. Rev. 213 (1973).

174. The letter was reprinted in the lower court opinion. Banco Nacional de Cuba v. First National City Bank, 442 F.2d 530, 536-8 (2d Cir. 1971).



duct of foreign affairs by the Executive, the basis of the doctrine was removed. Justice Rehnquist expressly approved the Bernstein exception.<sup>175</sup> Justice Douglas believed that the counterclaim was not subject to the act of state doctrine in any event.<sup>176</sup> In the opinion of Justice Powell, the Sabbatino case was wrongly decided and the courts had an obligation to hear such cases.<sup>177</sup> According to Justice Douglas the Bernstein rule did not apply to the case. While Justice Powell did not explicitly reject the Bernstein exception, he clearly disapproved of such deference to the Executive. In the dissent, Justice Brennan rejected the exception.<sup>178</sup> Thus, only three Justices endorsed Bernstein, and six Justices expressed a hostile attitude to that case.

Although the First National City opinions did little to clarify the act of state doctrine or meet the objections of the critics,<sup>179</sup> the case suggested an active role for the State Department.<sup>180</sup> The State Department has never rejected the Bernstein exception,<sup>181</sup> and will intervene in appropriate circumstances.<sup>182</sup> In a suit to enforce the Natural Resources Decree, the Council for Namibia could request a Bernstein letter if the act of state issue arises. The State Department response would be made after an evaluation of the issues

175. 406 U.S. at 768.

176. Id. 770-3. Douglas argued that when a foreign sovereign enters United States courts as a plaintiff, it becomes subject to fair counterclaims of the defendant. His opinion relied on National City Bank v. Republic of China, 348 U.S. 356 (1955).

177. 406 U.S. at 774-6.

178. Id. 776-7, 785-93.

179. 3 Denver J. Int'l L. & Policy 117, 119-26 (1973); 14 Harvard Int'l L.J. 131, 141-4 (1973); 49 Wash. L. Rev. 213, 215 (1973).

180. Lowenfeld, supra note 155, at 803.

181. Banco Nacional de Cuba v. First National City Bank, 442 F.2d 530, 536-8 (2d Cir. 1971) (letter from the State Department Legal Advisor); Brief for the United States as Amicus Curiae at Appendix, Alfred Dunhill of London, Inc. v. Republic of Cuba, cert. granted 416 U.S. 981 (1974) (letter from State Department Legal Advisor), 15 Int'l Legal Materials 164-6 (1976).

182. See Rovine, "Contemporary Practice of the U.S. Relating to International Law," 68 Am. J. Int'l L. 309, 309-11 (1974) (excerpt from letter by State Department Acting Legal Advisor).

raised by the Council in the context of previous applications of the Bernstein exception.<sup>183</sup>

State Department policy in act of state cases provides a basis for a Bernstein letter in the Council for Namibia litigation. In addition to the Berstein and First National City letters, the Department has twice declined to insist on act of state protection for nationalization decrees in suits by former owners of property. In certain situations, an act of Congress directs courts to adjudicate cases involving foreign nationalization unless the Department directs otherwise.<sup>184</sup> In the first exercise of that power, the State Department permitted a judgment on the merits in the Sabbatino case after remand to the district court.<sup>185</sup> The Department has issued a policy statement on the recent Libyan confiscation of American oil interests in which it indicated no opposition to suits to reclaim the nationalized oil.<sup>186</sup> A common theme in the Department's response has been opposition to acts which were deemed to be violations of international law.<sup>187</sup> Indeed, the State Department Legal Advisor recently noted that the trend in executive decisions has been to allow adjudication of alleged violation of international law.<sup>188</sup> The Legal Advisor further-

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183. For a discussion of various approaches to the decision, see Lowenfeld, supra note 155, at 806-14.

184. The Department statement is not exactly comparable to the letters in the earlier cases, since the Hickenlooper Amendment applies. See note 160 supra. The Hickenlooper Amendment essentially created a reverse Bernstein exception--the act of state doctrine does not apply unless the Department requires the application of the rule. The Department has expressed no policy on different treatment for the two situations. See Lowenfeld, supra note 155, at 804-5.

185. Banco Nacional de Cuba v. Farr, 272 F.Supp. 836 (S.D.N.Y. 1965), aff'd, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968).

186. Statement by the Department of State on its policy concerning "Hot" Libyan Oil, 13 Int'l Legal Materials 767 (1974) (transmitted to Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations on May 8, 1974).

187. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954); Libyan Hot Oil Statement, supra note 186, at 771, 774, 776, 779.

188. United States Amicus Brief (Dunhill), supra note 181, at 165 (1976).

more expressed no hostility to adjudication of all claims based on violations of international law:

In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in Sabbatino so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.<sup>189</sup>

In the Libyan oil controversy, the refusal to insist on application of the act of state doctrine was expressly an attempt to discourage illegal foreign acts.<sup>190</sup> The fundamental object of a suit by the Council is the termination of an illegal situation. According to the United Nations and the International Court, South Africa's administration of Namibia is in violation of international law.<sup>191</sup> In the First National City letter, the Department called attention to the fact that any waiver of the doctrine must not damage United States foreign policy interests.<sup>192</sup> The United States has accepted the Namibia opinion, and does not recognize the right of South Africa to administer Namibia. Investors have been on notice that rights acquired from South Africa after 1966 will not receive protection from the United States. Indeed, the State Department discourages American investment in Namibia. Expressions of United States policy toward Namibia would not pose an insurmountable barrier to State Department intervention.<sup>193</sup> The objects of the Cuban and Libyan nationalizations were United States corporations. By contrast, Bernstein was not even a resident of the United States at the time his property was taken, although he later resided in the country. United States

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189. Id. 166. It is worth noting that this is a reversal of the position taken by the Department in the Sabbatino case. 376 U.S. at 419-20.

190. Libyan Hot Oil Statement, supra note 186, at 781-2.

191. TAN 44-61 supra. On the illegality of the specific South African acts at issue, see TAN 231-68 infra.

192. Banco Nacional de Cuba v. First National City Bank, 442 F.2d 530, 536-8 (2d Cir. 1971).

193. TAN 84-100 supra.

opposition to Germany in World War II, as well as the fact that at the time of the Bernstein litigation the Nazi regime was no longer in existence are other possibly relevant details. In the case of Cuba and Libya, on the other hand, the very same governments whose actions gave rise to the issue of the act of state were in power at the time of litigation. All four situations involved forceable and discriminatory confiscations of property. In this respect the Namibian situation is different. Nevertheless the State Department has not adopted a restrictive view of the exception. In the First National City letter, the Department took the position that the exception was not limited to the particular facts of the Bernstein case.<sup>194</sup> Almost certainly, the First National City letter was not intended to limit the exception to a particular type of counterclaim.<sup>195</sup>

The formulation of State Department policy on litigation to enforce the Council of Namibia's Decree will require a broader contextual analysis than is possible in this essay. If past decisions are any indication, the Department's decision will rest in part on the international law issues raised by the Council and the objectives of United States policy.<sup>196</sup> The case for State Department intervention is strong due to the international consensus in opposition to South African administration of Namibia.<sup>197</sup> The State Department's early response to the Natural Resources Decree, suggested a willingness to allow the courts to rule on the merits of the claims arising in connection with concessions granted after the termination of the mandate.<sup>198</sup>

### B. Extraterritoriality

The act of state doctrine does not preclude judicial decisions concerning the validity of acts intended to affect property outside a state's territory. This limitation on the doctrine was part of the Sabbatino holding,<sup>199</sup> and has been

194. Banco Nacional de Cuba v. First National City Bank, 442 F.2d 530, 536-8 (2d Cir. 1971).

195. Lowenfeld, supra note 155, at 806-7. For alternative discussion of the precedents, see Banco Nacional de Cuba v. First National City Bank, 442 F.2d 530, 534-5 (2d Cir. 1971); 49 Wash. L. Rev. 213, 216-9 (1973). Justice Brennan would restrict the Bernstein exception to the facts of that case. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 788 n.12 (1972) (dissenting opinion).

196. Contra, Lowenfeld, supra note 155, at 810-4.

197. TAN 22, 55-6 supra.

198. TAN 106.

199. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

followed in numerous cases.<sup>200</sup> In Republic of Iraq v. First National City Bank, the revolutionary government of Iraq attempted to claim property owned by the deposed King.<sup>201</sup> The government had issued decrees confiscating all of the former King's property. At the time of the decrees, the King held cash and stock in an American bank. Since the property was not in Iraq, the act of state doctrine did not apply. The court thus could examine the legality and enforceability of the decrees in light of United States laws and policy. The Iraqi government did not prevail.<sup>202</sup> Hungarian confiscation decrees which purportedly reached property in the United States were not immune from judicial review in Zwack v. Kraus Bros. & Co.<sup>203</sup> In a series of cases, courts ruled on the validity of nationalization decrees by Soviet governments of Estonia and Latvia as they affected ships outside the territory of the two states.<sup>204</sup> Courts have also examined acts which took place

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200. See Annot., 12 A.L.R. Fed. 707, 765-75 (1972).

201. 353 F.2d 47 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966).

202. Id. 51. The State Department noted that a Bernstein letter was not necessary because of the extraterritorial reach of the decrees. Id. 51 n.5.

203. 237 F.2d 255 (2d Cir. 1956). Other cases in which a foreign law attempts to reach property in the United States are summarized in 6 Whiteman, Digest of International Law 54-66 (1968). See e.g., Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 899 (S.D.N.Y. 1968), mod. on other grounds, 433 F.2d 686 (2d Cir. 1970), cert. denied, 403 U.S. 905 (1971); F. Palicio y Compania, S.A. v. Brush, 256 F. Supp. 481, 487-92 (S.D.N.Y. 1966), aff'd, 375 F.2d 1011 (2d Cir. 1967), cert. denied 389 U.S. 830 (1967); see also Oliva v. Pan-American Life Insurance Company, 448 F.2d 217, 220 (5th Cir. 1971) (contract); Pan-American Life Insurance Company v. Blanco, 362 F.2d 167 (5th Cir. 1966) (contract).

204. Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000 (D.C. Cir. 1951), cert. denied, 342 U.S. 816 (1951); The Maret, 145 F.2d 413 (3d Cir. 1944); Latvian State Cargo & Passenger S.S. Line v. United States, 116 F. Supp. 717, 126 Ct. Cl. 802 (1953); Estonian State Cargo & Passenger S.S. Line v. United States 116 F. Supp. 447, 126 Ct. Cl. 809 (1953); see A/S Merilaid & Co. v. Chase Nat. Bank, 189 Misc. 285, 71 N.Y.S.2d 377 (Sup. Ct., N.Y. Co. 1947); but see The Denney, 127 F.2d 404 (3d Cir. 1942).

outside of the state's territory.<sup>205</sup> The interests allegedly affected by a foreign law need not be within the United States in order to overcome the act of state doctrine. If the property was in a third state at the time of the act, American courts need not apply the doctrine.<sup>206</sup>

The extraterritoriality exception to the act of state doctrine could apply to enforcement litigation by the Council for Namibia. Parties in possession of natural resources held in violation of the Council's Decree would rely on acts of the South African administration affecting interests in Namibia to establish their rights to the property.<sup>207</sup> That argument assumes that Namibia is part of South Africa's territory. If Namibia were an undisputed colony or Mandate Territory, the extraterritoriality exception would not apply.<sup>208</sup> However, the status of Namibia is at issue. According to resolutions of the United Nations and the International Court of Justice advisory opinion, South Africa's presence is illegal. South Africa has no right to the territory or to its administration. In essence, Namibia is not South African territory.<sup>209</sup> The United States has adopted the same position.<sup>210</sup> The South African

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205. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 254, 363 (2d Cir. 1964), cert. denied 381 U.S. 934 (1964); *Menzel v. List*, 49 Misc.2d 300, 311, 267 N.Y.S.2d 804 (Sup. Ct., N.Y. Co. 1966), aff'd, 28 App. Div. 2d 516, 279 N.Y.S.2d 608 (1st Dept. 1967); Restatement §43, comment c.

206. Restatement §43, comment b.

207. See *Interamerican Refining Corporation v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (Del. 1970); cf. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 900-11 (S.D.N.Y. 1968); *Naamloze Vennootschap Suikenfabriek "Wono-Aseh" v. Chase Nat. Bank*, 111 F. Supp. 833 (S.D.N.Y. 1953).

208. *Naamloze Vennootschap Suikenfabriek "Wono-Aseh" v. Chase Nat. Bank*, 111 F. Supp. 833 (S.D.N.Y. 1953) (Colonial government); *The Janko (The Norsktank)*, 54 F. Supp. 241 (E.D.N.Y. 1944) (colonial government). Research indicated no cases dealing with the acts of a mandatory power. It would be unreasonable to treat Mandatory or Trusteeship powers less favorably than colonial powers in this respect.

209. TAN 44-56. The principle of non-annexation was part of the Mandate system. See TAN 28.

210. TAN 82-91.

presence in Namibia has been described by American officials as an "illegal occupation."<sup>211</sup> A court which accepted the United Nations, International Court, and United States position would not be constrained by the act of state doctrine in the context of events arising after the termination of the mandate. The problem with this line of analysis is that the extraterritoriality cases have generally involved acts which attempted to reach property in territory over which the acting state had no control.<sup>212</sup> While the presence of de facto control distinguishes the Namibia situation, it does not resolve the issue against the Council. United States courts have frequently reviewed the validity of acts committed by a state while in illegal occupation of territory.<sup>213</sup> De facto control is thus not sufficient to overcome the extraterritoriality exception.

The application of the extraterritoriality exception to the Namibian controversy illustrates the decisive importance of international law issues. A court could not rule on the application of the act of state doctrine without a prior determination of the status of Namibia.<sup>214</sup> Litigation by the Council for Namibia would be one case in which the court would inevitably review acts of South Africa.

### C. Recognition

The Sabbatino holding acknowledged a third limitation on the act of state doctrine. The Court required the acting state to be "extant and recognized" by the United States.<sup>215</sup> The

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211. TAN 89-90.

212. An exception is Menzel v. List, 49 Misc.2d 300, 311, 267 N.Y.S.2d 804 (Sup. Ct., N.Y. Co. 1966) (Nazi occupation of Belgium).

213. The Supreme Court reviewed acts of the Confederacy and the Confederate state government in a series of cases after the Civil War. See e.g. Texas v. White, 74 U.S. (7 Wall.) 700, 733 (1868); Williams v. Bruffy, 96 U.S. 176 (1877). See TAN 256-60 infra. For other cases and commentary, see 6 Whiteman, Digest of International Law 76-88 (1968).

214. Justice White made a similar observation in his dissent in Sabbatino. He noted that the Court had to rely on international law in its finding that the expropriated sugar was within Cuba. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 454-5 (1964).

215. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). Restatement 542. See Adler, supra note 129, at 42-51.

courts have applied this exception in situations where the acting state was not recognized at the time of trial or at the time of the act in question.<sup>216</sup> The Supreme Court reviewed enactments of the Confederacy and the Confederate state governments in a series of cases after the Civil War.<sup>217</sup> The Confederate regime was obviously not recognized by the United States. Failure to recognize the incorporation of Estonia and Latvia into the Union of Soviet Socialist Republics was a factor in allowing courts to inquire into the validity of nationalization decrees.<sup>218</sup> Russian laws were examined in American courts prior to recognition.<sup>219</sup> The fact that courts have enforced the acts of unrecognized governments in some cases does not contravene the rule. Even in such cases, the courts examine the foreign acts in accordance with normal conflict of law rules.<sup>220</sup> The decision to apply the act of state doctrine must be distinguished from a decision on the merits of a foreign act.<sup>221</sup>

Application of the unrecognized regime exception to the act of state doctrine in a suit instituted by the Council for Namibia raises a significant issue. The problem involves determining the effect of the American non-recognition policy toward the South African administration. The United States does not recognize South Africa as the legitimate government of Namibia.<sup>222</sup> The statements of American policy

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216. If recognition takes place between the time of the act and the time of the trial, the doctrine would apply. See e.g. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *United States v. Belmont*, 301 U.S. 324 (1937). Restatement §42 (b).

217. See e.g. *Williams v. Bruffy*, 96 U.S. 176 (1878); *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868); *Lubman*, supra note 131, at 292-3; cf. *The Nueva Anna*, 19 U.S. (6 Wheat.) 193 (1821) (involving the unrecognized Mexican government).

218. Cases cited note 204 supra. The cases can also be explained by the extraterritoriality exception.

219. See e.g. *Petrogradsky M.K. Bank v. National City Bank*, 253 N.Y. 23 (1930); *James & Co. v. Second Russian Ins. Co.*, 239 N.Y. 248 (1925); *Sokoloff v. National City Bank*, 239 N.Y. 158 (1924).

220. See *The Denny*, 127 F.2d 404 (3d Cir. 1942); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 900 (S.D.N.Y. 1968); *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933).

221. Restatement §42, comment d, §113, comments a,b.

222. TAN 87-91.



toward Namibia are similar to prior expressions of non-recognition that have guided courts,<sup>223</sup> but the Namibia situation is unique because it apparently involves the withdrawal of recognition.<sup>224</sup> Although there is some authority for the proposition that recognition cannot be withdrawn,<sup>225</sup> the State Department Acting Legal Advisor recently testified that withdrawal was possible through official statements or other modes.<sup>226</sup> Because the withdrawal of recognition (as opposed to breaking diplomatic relations) has been quite rare, there is an absence of precedent concerning the effect of such a policy.<sup>227</sup> Since recognition policy fundamentally reflects the executive branch's assessment of the foreign policy interests of the United States,<sup>228</sup> the resolution of this issue depends

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223. *Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F.2d 1000, 1003 (D.C. Cir. 1951); *The Maret*, 145 F.2d 431, 438 (3d Cir. 1944).

224. Presumably the United States recognized the South African authority under the Mandate. Another unique aspect is the fact that the withdrawal does not apply to South Africa, but only to the administration of Namibia.

225. 2 Whiteman, Digest of International Law 27 (1963); Restatement §96, reporter's note 1.

226. "Hearings on S. Res. 205 Before the Senate Comm. on Foreign Relations," 91st Cong. 1st Sess. 13-5 (1969) (testimony of George H. Aldrich) [hereinafter cited as "Hearings on S. Res. 205"]; Restatement §96.

227. Only two comparable examples of non-recognition were discovered. In 1915 the United States refused to recognize an agreement between China and Japan which might have impaired United States China policy. Telegram from the Secretary of State to Ambassador in Japan, [1915] 15 Foreign Rel. U.S. 146 (1924). The United States also refused to recognize the Japanese annexation of Manchuria in 1931. 6 Dept. State Press Releases 41-2 (1932). These examples were discussed in "Hearings on S. Res. 205" 44 (statement of Dr. Stephen Pan). See generally H. Briggs, supra note 129, at 132; Blix, supra note 122, at 656-65.

228. "Hearings on S. Res. 205" 8-12 (testimony of George H. Aldrich). The Restatement takes the position that withdrawal of recognition can take place only if a state no longer meets certain minimum requirements for recognition. The requirements include a defined territory and population, effective control, and the capacity to engage in foreign relations. Restatement §96(1), §100. Withdrawal is invalid if no successor government is recognized. Id. §96 (2)(a), illustration 4. Furthermore, premature recognition is a viola-

on whether the executive is willing to accept the consequences which normally flow from non-recognition. A reasonable interpretation of American policy would characterize the South African administration of Namibia as an unrecognized regime.<sup>229</sup> United States courts could thus review acts of the South African administration, at least from the date the United Nations terminated the Mandate.<sup>230</sup>

#### V. The Status of South African Administrative Acts

The previous sections dealt with two obstacles to a judgment on the merits in litigation to enforce the Council of Namibia's Decree on Natural Resources.<sup>231</sup> Assuming the Council gains access to a court and evades the act of state doctrine, the title to Namibian resources imported into the United States remains at issue. The court must decide whether concessions, licenses, or similar types of economic agreements granted by the South African administration should be enforced in the United States. In rendering its decision, the court would draw

tion of international law. *Id.* §99 (2). Although these rules are overly formal, there is support in United States recognition practice. 2 Whiteman, Digest of International Law 68-119 (1963).

229. United States presentation before the International Court in the Namibia case indicated a willingness to treat the South African administration as an unrecognized regime. Written Statement of the Government of the United States of America, 1 Namibia Opinion, I.C.J. Pleadings 883 (1970); Oral Statement of the United States, 2 Namibia Opinion, I.C.J. Pleadings 502-3 (1970). See TAN 87-8 supra.

230. In two cases, courts permitted review where the acting state was recognized at the time of the act, but not at the time of the trial. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954); Menzel v. List, 49 Misc. 2d 300, 267 N.Y.S. 2d 804 (Sup. Ct., N.Y. Co. 1966). These cases suggest that entitlements dating from before 1966 might be open to challenge. However, the result in Bernstein was entirely due to the State Department letter. In both cases the Nazi regime was no longer in existence. Extension of the exception to the reverse of the rule stated in note 216 supra seems unlikely.

231. That is, a judgment based on a determination of the legality of rights derived from South Africa.

upon all relevant sources of law,<sup>232</sup> recognizing international law as part of United States law.<sup>233</sup>

According to the International Court of Justice, states have an obligation to bring about an end to the illegal South African administration of Namibia.<sup>234</sup> The political organs of the United Nations determine the specific consequences of the obligation.<sup>235</sup> The International Court confined its discussion of the duty of non-recognition to the implications of Security Council Res. 276 (1970).<sup>236</sup> The International Court ruled that states must refrain from treaties in which South Africa acts on behalf of Namibia. Diplomatic and consular relations must be reordered so as to avoid recognition of South African control. The obligation to avoid situations which would imply recognition extends to economic relationships between the South African authorities and third states.<sup>237</sup> The majority opinion limited the duty of non-recognition where the effect would be to harm the interests of the inhabitants of Namibia:

. . . while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effect which can be ignored only to the detriment of the inhabitants of the Territory.<sup>238</sup>

232. See generally I.C.J. Stat. Art. 38; H. Steiner & D. Vagts, supra note 161, at 135-274; Hevener, "The 1971 South-West African Opinion - A New International Juridical Philosophy," 24 Int'l & Comp. L.Q. 791 (1975).

233. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423, 450-3 (1964); The Paquete Habana, 175 U.S. 677, 700 (1900); Hilton v. Guyot, 159 U.S. 113, 163 (1895). See H. Steiner & D. Vagts, supra note 161, at 426-46; see generally Morgenstern, "Recognition and Enforcement of Foreign Legislative and Judicial Acts Which are Contrary to International Law," 4 Int'l L.Q. 326 (1951).

234. Namibia Opinion 54; I. Brownlie, supra note 11, at 502-3.

235. Namibia Opinion 55.

236. Id. 55, 58; S.C. Res. 276, 25 U.N. SCOR, 1529th meeting ¶ 2,5 (1970).

237. Namibia Opinion 55-6.

238. Id. 56.

The opinion thus limited the duty of non-recognition to acts undertaken after the termination of the Mandate. The majority opinion did not deal with entitlements such as concessions or licenses concerning natural resources. Separate opinions in the Namibia case implied that the majority position would reach investments in Namibia.<sup>239</sup>

United Nations resolutions have further clarified the obligation imposed in the Namibia opinion. Security Council Res. 283 (1970) dealt prospectively with private investment in Namibia. The resolution called upon states to discourage future economic activity in Namibia and to terminate existing investments.<sup>240</sup> In Resolution 301 (1971), the Security Council took the additional step of declaring that all ". . . franchises, rights, titles or contracts relating to Namibia granted to individuals or companies by South Africa after the adoption of General Assembly resolution 2145 (XXI) are not subject to protection or espousal by their States against claims of a future lawful Government of Namibia."<sup>241</sup> Finally, General Assembly Res. 3295 (XXIX) requested member states ensure compliance with the Council for Namibia's Decree on Natural resources.<sup>242</sup>

According to United Nations resolutions, economic rights

239. Id. 97-8 (sep.op.Ammoun), 120 (sep.op.Padilla Nervo), 135-6 (sep.op.Petrén), 218-9 (sep.op.de Castro). Four judges indicated that the United Nations resolution may impose duties which go beyond the normal effects of non-recognition. Id. 134-7 (sep.op.Petrén); 148 (sep.op.Owyeama); 165 (sep.op.Dillard); 297 (diss.op.Fitzmaurice); I. Brownlie, supra note 11 at 503 n.3. The legal consequences are remarkably similar to economic sanctions. Id. 503 n.2; Rovine, supra note 70, at 232; see McDougal & Reisman, supra note 20, at 3. In that connection, note TAN 99-100 supra.

240. 25 U.N. SCOR, 1550th meeting 16 (1970). Although not discussed in the majority opinion, several judges in the Namibia case believed that Res. 283 required states not to recognize the validity of concessions granted by South Africa. Namibia Opinion 55, 120 (sep.op.Padilla Nervo), 134-7 (sep.op.Petrén).

241. 26 U.N. SCOR, 1598th meeting 7 (1971). The resolution is identical to United States policy. TAN 93 supra.

242. G.A. Res. 3295, 29 U.N. GAOR Supp. 31, at 106, U.N. Doc. A/9631 (1974).

derived from the South African administration since 1966 are invalid. Resolution 3295 (XXIX) does not necessarily affect interests created before the termination of the Mandate. That resolution approves the Council's Decree. The operative sections of the Decree are not explicitly restricted to interests created after 1966. However, the preface to the Decree takes note of resolutions 2145 (XXI) and 2248(s-v) as well as the Namibia opinion.<sup>243</sup> Since the prior resolutions and the advisory opinion do not invalidate acts of South Africa under the Mandate, the preface could be interpreted as a limit on the broader claims in the operative sections of the Decree. In any event, resolution 3295 (XXIX) does not explicitly reach beyond prior resolutions. The resolutions are particularly authoritative, since they deal with self-determination for Namibia. The International Court confirmed the competence of the United Nations to issue binding resolutions in this area.<sup>244</sup> Furthermore, the United States regards General Assembly resolutions as evidence of customary international law if they receive universal support and are observed by states.<sup>245</sup>

United States policy toward Namibia supports the conclusion that licenses or concessions granted by South Africa after termination of the Mandate are not valid. The United States has accepted the Namibia opinion. The executive branch has adopted a policy based on non-recognition, and has described the South African control of Namibia as an "illegal occupation."<sup>246</sup> In presentations before the International Court in the Namibia case, the United States argued that the duty of non-recognition should not extend to official acts concerning births, deaths or marriages. In such situations non-recognition could harm the inhabitants of Namibia. The test of invalidity is thus potential for harm to the residents of the territory.<sup>247</sup> The United States also voted for Security

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243. See Appendix, infra.

244. Note, "Self-Determination and the Namibia Opinions," 548-54; TAN 54-60.

245. 69 Am. J. Int'l L. 863 (1975) (letter from Stephen M. Schwebel, Dep. Legal Advisor, Department of State, to Marcus G. Raskin).

246. TAN 87-90 supra.

247. Written Statement of the United States of America, 1 Namibia Opinion, I.C.J. Pleadings 883 (1970); Oral Statement of the United States, 2 Namibia Opinion, I.C.J. Pleadings 503 (1970).

Council Resolutions 283 (1970) and 301 (1971).<sup>248</sup> General Assembly Res. 3295 (XXIX) did not receive United States support. United States opposition to Res. 3295 (XXIX) did not imply opposition to the Decree. The State Department has merely declined comment on the merits of the Decree.<sup>249</sup> The clearest indication yet of American policy on the legality of economic interests granted by South Africa has been presented in statements concerning American investment in Namibia. The United States announced that it would not assist in protecting American investments undertaken after the end of the Mandate against claims of a future government of Namibia.<sup>250</sup> This policy strongly implies the illegality of such investments.

An administrative act of South Africa in Namibia could be characterized as an act purportedly having extraterritorial effect or as the act of an unrecognized regime. United States courts have followed similar rules in both cases. The courts will enforce foreign acts affecting extraterritorial interests only if the result would be consistent with United States law and policy.<sup>251</sup> Several cases have indicated that the acts of an unrecognized regime will not be enforced.<sup>252</sup>

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248. Bennett, Statement, 65 Dep't State Bull. 609 (1971); Buffum, Statement, 63 Dep't State Bull. 284 (1970).

249. Davis, supra note 82, at 37-8; TAN 103-107 supra.

250. TAN 94-6.

251. Restatement §43 (2), comments e,f; see e.g. Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965); Zwack v. Kraus Bros. & Co., 237 F.2d 255 (2d Cir. 1956); Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000 (D.C. Cir. 1951); The Maret, 145 F.2d 431 (3d Cir. 1944); Menzel v. List, 49 Misc.2d 300, 267 N.Y.S. 2d 804 (Sup. Ct., N.Y. Co. 1966).

252. Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000 (D.C. Cir. 1951); The Maret, 145 F.2d 431 (3d Cir. 1944); Latvian State Cargo & Passenger S.S. Line v. United States, 116 F. Supp. 717, 126 Ct. Cl. 802 (1953); Estonian State Cargo & Passenger S.S. Line v. United States, 116 F. Supp. 447, 126 Ct. Cl. 809 (1953); see A/S Merilaid & Co. v. Chase Nat. Bank, 189 Misc. 285, 71 N.Y.S.2d 377 (Sup. Ct. N.Y. Co. 1947). In Adams v. Adams, [1970] 3 All E.R. 572, 583-5, the English Court of Appeals went so far as to refuse to recognize a divorce granted by a judge who took office in accordance with a decree of the unrecognized Rhodesian regime. The case is an extreme and unwarranted application of non-recognition doctrine.

These cases involved nationalization decrees by the unrecognized Estonian and Latvian governments. Non-recognition of the governments was not the only expression of policy that influenced the courts. The United States government refused to recognize the specific decrees at issue.<sup>253</sup> However, the extreme position enunciated in those cases has not been persuasive.<sup>254</sup> Courts have indicated a willingness to enforce acts of an unrecognized regime which essentially involve private transactions and are not contrary to United States public policy.<sup>255</sup> Thus, regardless of how a court characterizes the South African administration, licenses and concessions pertaining to Namibian natural resources would be open to attack on the grounds that they are public acts contrary to United States policy and international law.

The Supreme Court provided further guidance for determining the validity of acts done by illegal governments in cases dealing with the Confederacy.<sup>256</sup> The Court outlined its approach to de facto illegal governments in Texas v. White.<sup>257</sup> The case involved Texas laws designed to help finance the war against the United States. The Court held that the government was unlawful. However, not all acts of the government were invalid:

It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts

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253. This explanation still does not account for dicta in the cases. See Latvian State Cargo & Passenger S.S. Lines v. McGrath, 188 F.2d 1000, 1003 (D.C. Cir. 1951); The Maret, 145 F.2d 431, 442 (3d Cir. 1944).

254. See H. Briggs, supra note 129, at 168-70; Adler, supra note 125, at 46-51.

255. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 900 (S.D.N.Y. 1968); Sokoloff v. National City Bank, 239 N.Y. 158, 165 (1924); Upright v. Mercury Business Machines, 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1st Dept. 1961); see cases cited in notes 257, 260 infra; cf. M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 270, 186 N.E. 679 (1933). The cases are discussed in Lubman, supra note 131, passim; 12 Colum. J. Transnat'l L. 155, 158-61, 164-8 (1973). This rule presumes effective control. Restatement §113. Note that foreign concessions in Namibia would not fulfill the conditions of §113(b), although §113(a) would apply.

256. Lubman, supra note 131, at 292-3.

257. 74 U.S. (7 Wall.) 700 (1868).

sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.<sup>258</sup>

According to this rule, acts which were intimately related to the illegal character of the government or violated public policy<sup>259</sup> were invalid.<sup>260</sup> United States courts have followed similar rules in other cases involving occupation of territory during war.<sup>261</sup> In the case of Namibia, the termination of the South African Mandate resulted from the denial of human rights and the exploitation of the territory.<sup>262</sup> Entitlements granted to investors support the illegal South African administration and help to perpetuate the abuses of the Mandate.<sup>263</sup> Licenses and concessions are not merely means of regulating transactions between private parties. Such agreements directly involve South Africa in the economic life of Namibia, and that involvement is illegal. The agreements furthermore are not in conformity with United States public policy.<sup>264</sup>

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258. *Id.* 733.

259. *See* *Sokoloff v. National City Bank*, 239 N.Y. 158, 165 (1924).

260. *Keith v. Clark*, 97 U.S. 454 (1878); *Dewing v. Perdicaries*, 96 U.S. 193 (1877); *Williams v. Bruffy*, 96 U.S. 176 (1877); *United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99 (1875); *Sprott v. United States*, 87 U.S. (20 Wall.) 459 (1874); *Horn v. Lockhart*, 84 U.S. (17 Wall.) 540 (1873); *Hanauer v. Doane*, 79 U.S. (12 Wall.) 342 (1870); *Thorington v. Smith*, 75 U.S. (8 Wall.) 1 (1868); *but see* *Baldy v. Hunter*, 171 U.S. 388 (1898).

261. *See* 6 *Whiteman, Digest of International Law* 76-88 (1968).

262. TAN 6, 31 *supra*.

263. *See e.g.* "Report of the United Nations Council for Namibia," 28 U.N. GAOR Supp. 24, at 14, U.N. Doc. A/9024 (1974).

264. TAN 246-50.



## VI. The Status of Claims by the Council for Namibia

The preceding analysis focused on the legality of economic grants from South Africa. In order to gain possession of contested property, it is not sufficient to merely demonstrate the defects in another party's title. The Council would have to show that its right to the natural resources is superior. The bases of the Council's claims are, of course, the resolutions which have transferred responsibility for Namibia to the United Nations and have defined the powers of the Council.<sup>265</sup> In general, the reasons for finding South African concessions in Namibia illegal would also support the claims by the Council. However, while United States policy supports the conclusion that the concessions are illegal, American policy has not accepted the legislative or administrative competence of the Council in all situations.<sup>266</sup> The United States, when abstaining on Resolution 2248 (s-v) creating the Council, took the position that the Council should be limited to those functions the exercise of which were within its actual capacity.<sup>267</sup> Since enforcement of the Decree does not depend on control of the territory, this legislative act by the Council presumably does not constitute an example of an impractical allocation of competence.

Resolution 2248 (s-v) enumerated powers of the Council which were "to be discharged in the territory."<sup>268</sup> The United States has interpreted this phrase to delay the exercise of the administrative powers until the Council is in control of the territory.<sup>269</sup> Regarding the Decree the United States has not indicated whether the enactment of the Decree constitutes an exercise of such powers.<sup>270</sup>

The exact extent of the Council's competence to legislate for the territory may not be entirely free of some ambiguity. The General Assembly's approval of the Decree in Resolution 3295 (XXIX) supports the Council's claim to Responsibility for Namibian Territory.<sup>271</sup> While there were no

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265. TAN 48-69 supra; Lauterpacht, supra note 2, at 63-4.

266. TAN 101-4 supra.

267. Davis, supra note 82, at 38.

268. 5th Sp. Sess. U.N. GAOR Supp. 1, at 1, U.N. Doc. A/6657 (1967).

269. Davis, supra note 82, at 38.

270. See 29 U.N. GAOR, Fourth Committee 236, U.N. Doc. A/C.4/SR.2078-2131 (1974).

271. 29 U.N. GAOR Supp. 31, at 106, U.N. Doc. A/9631 (1974).

votes against the resolution in the General Assembly or the Fourth Committee which submitted a draft to the main body, there were fifteen abstentions on the final vote and fourteen on the draft. The abstaining countries expressed doubt that the Council had the power to issue the Decree, either because it exceeded the powers granted by the General Assembly or because it lacked territorial sovereignty.<sup>272</sup> The United States delegate did not indicate such reservations in explaining her country's abstention.<sup>273</sup>

In the Decree on Natural Resources, the Council asserted claims with respect to three classes of property: natural resources acquired on the basis of concessions granted after the termination of the Mandate, natural resources associated with pre-termination concessions, and any vehicle, ship or container used in the transportation of disputed resources. Furthermore, it is asserted that parties that thwart the aims of the Decree might be liable for damages to a future government of Namibia.<sup>274</sup> Adjudication of the merits of claims to resources acquired under entitlements granted after the revocation of the Mandate should not present a major difficulty from the perspective of international law and American policy: the Council merely asserts the right to possess property held by the defendant on the basis of the illegal South African grant. The remaining claims apparently have little support in United Nations resolutions or United States policy statements.<sup>275</sup> Assuming the legality of the South African administration prior to the termination of the Mandate, the claim to resources from pre-termination concessions can be characterized as the expropriation of property without compensation. Such takings are deemed violations of international law and are certainly against United States policy.<sup>276</sup> Regardless of the status of the Council, this type of claim probably would not be enforced in United States courts. Moreover, the Council's claims regarding the means of transporting the resources and damages may run afoul of the established rule against the

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272. 29 U.N. GAOR, Fourth Committee 233-7, U.N. Doc. A/C.4/SR. 2078-2131 (1974).

273. *Id.* 236.

274. Natural Resources Decree ¶2,5,6.

275. But see G.A. Res. 3295, 29 U.N. GAOR Supp. 31, at 106, ¶ IV-7, U.N. Doc. A/9631 (1974).

276. See e.g., Banco Nacional de Cuba v. Farr, 272 F. Supp. 836 (S.D.N.Y. 1965); Libyan Hot Oil Statement, supra note 186 at 771, 774, 776, 779.

enforcement of foreign penal and revenue laws in United States courts.<sup>277</sup>

#### VII. Evaluation and Recommendations

The continued presence of South Africa in Namibia apparently presents the world community with the alternatives of peace or justice.<sup>278</sup> While significant obstacles exist, the strategy of seeking implementation of international prescriptions on Namibia by recourse to national courts, constitutes another option open to the world community. This alternative could decisively influence the course of events in which the requirements both of justice in Namibia and of the maintenance of international peace and security would be met.

The illegality of South Africa's administration has been clearly established. However, virtually universal recognition of this fact has not been able to bring about an end to the continued violation of human rights in this area and the denial of the right of self-determination to the inhabitants of the territory. The potential for violence and outside intervention has increased.<sup>279</sup> In this situation enforcement of the Council of Namibia's Decree on Natural Resources, even if limited to entitlement grants after termination of the mandate, provides a possible escape from the dilemma, since litigation could help

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277. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-4 (1964). The claim to the means of transportation can also be analyzed as an expropriation without compensation.

278. See Dugard, "Namibia (South West Africa): The Courts' Opinion, South Africa's Response, and Prospects for the Future," 11 *Colum. J. Transnat'l L.* 14, 46 (1972); Murphey, "Whither Now Namibia?," 6 *Cornell Int'l L.J.* 1, 36 (1972). For a survey of various alternatives, see A. Obozuwa, *supra* note 33, at 165-201.

279. Kaufman, "In South-West Africa the Big Question Is Whether Change Will Come in Time," *N.Y. Times*, Feb. 28, 1976, at 8, col. 3:

Since the involvement of Cubans and Russians in the Angolan war, the dominant question here [Namibia] has been not whether social and political change will come to this sparsely populated territory administered by South Africa, but how it can be effected before there is armed conflict.

Kaufman reported that the prospects for peaceful settlement were not good. See Kaufman, "South Africa Sees Hope of Angola Understanding," *id.*, Feb. 20, 1976, at 8, cols. 3-4.

to end the illegal occupation of Namibia by peaceful means. In any event, it would contribute to accelerating the termination of South African control over Namibia and possibly decreasing the extent of coercion that ultimately may be necessary to achieve this goal.

Law suits by the Council would require minimal involvement by other states, certainly less than would be required to make economic sanctions such as boycotts effective.<sup>280</sup> Extensive litigation could, of course, cause some disruption of international economic transactions. However, the probability that reasonable investors would perceive the risks of commitments in Namibia after termination of the Mandate should mitigate the detrimental effects. United States investment policy has made the risks even clearer. Furthermore, the widespread consensus regarding the illegality of South Africa's presence in Namibia reduces the possibility of inconsistent decisions by United States and foreign courts. Moreover, stability in expectations about the world economy would be better served by effective international law, i.e., by prescriptions whose enforcement is reasonably certain.<sup>281</sup> In sum, enforcement of the Decree in United States courts would be in conformity with the interests of the international community and the United States.

In order to facilitate litigation, the United States should clarify its policy toward the Council for Namibia.<sup>282</sup> The United States could extend at least limited recognition to the Council.<sup>283</sup> Recognition of the Council as the government of Namibia would, to be sure, constitute a departure

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280. Cf. TAN 99-100.

281. McDougal, *supra* note 157, at 335-9, 351-9; 12 *Harv. Int'l L.J.* 557, 565 (1971); see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

282. See generally "Hearings on Critical Developments in Namibia" 1-2, 21-4, 32-3; E. Landis, "Namibia the Beginnings of Disengagement" 2 *Studies in Race & Nations Center on Int'l Relations* 9-34 (1970); E. Landis, *American Responsibilities vis-a-vis Namibia*, Nov., 1971 (paper presented at 14th Annual Meeting, African Studies Association); but see Kennan, "Hazardous Courses in Southern Africa," 49 *Foreign Affairs* 218, 227-30 (1971).

283. This has been previously suggested in "Hearings on Critical Developments in Namibia" 23 (testimony of Elizabeth Landis).

from alleged prerequisites for recognition such as effective control over a territory and population.<sup>284</sup> But as practice has shown in the past, recognition decisions are not determined by rigid formalities sometimes claimed to be applicable to the relationship between recognizing and recognized governments prior to the act of recognition. For example, the United States currently recognizes three governments in exile (those of the Baltic states),<sup>285</sup> and during World War II extended limited recognition to the French Committee of National Liberation and the Netherlands and Belgium governments in exile.<sup>286</sup>

Recognition ultimately depends on the effect of the decision on American foreign policy interests.<sup>287</sup> In the case of Namibia, recognition of the Council could help to bring about a peaceful end to flagrant human rights violations. The decision to recognize would not run counter to the expressed goals of United States policy. Indeed, while a general policy of recognizing national liberation movements could be disruptive to United States interests, the Namibia situation is unique. United States policy that might frustrate the Council could in the long run result in the very damage to United States foreign interests--world peace and economic stability--which accounts for the reluctance to embrace a general recognition policy in favor of liberation movements.

Recognition of the Council would have two beneficial effects on litigation to enforce the Decree. First, it would ensure access to United States courts.<sup>288</sup> Second, the claims of the Council would be reinforced by recognition, especially if the United States takes a favorable position on the Decree.

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284. Restatement §§100-103, 2 Whiteman, Digest of International Law 68-119 (1963); cf. Lubman, supra note 131, passim. On the consequences of premature recognition, see Restatement §§96, 99.

285. "Hearings on S. Res. 205" at 21-2.

286. 2 Whiteman, Digest of International Law 129-30, 715-21 (1963).

287. "Hearings on S. Res. 205" at 8-10; Schwebel, "'Cognition' and the Peking Visit - Is Recognition of Governments Obsolete?" in N. Leech, C. Oliver & J. Sweeney, Cases and Materials on the International Legal System 817-20 (1973).

288. TAN 108-44 supra.

The State Department could presumably limit application of the Decree to concessions granted after the termination of the mandate.<sup>289</sup> A pertinent case in this context is the issuance by the Netherlands government in exile of a Decree that vested in that government title to property located in America and originally owned by residents of the occupied Netherlands. The Decree was intended to preserve the rights of these Dutch subjects during the war. The State Department specifically endorsed the enforcement of the Decree within the United States. Accordingly, courts gave effect to the Decree.<sup>290</sup> The nature of the Council for Namibia is similar to that of a government in exile. Recognition and enforcement of the decrees of such an entity would therefore not be unprecedented.

Enforcement of the Council's Decree entails the resolution of international law issues. The Sabbatino formulation of the act of state doctrine prevents examination of acts contrary to international law in cases where the doctrine applies. The Council can reasonably argue that the doctrine does not apply due to the extraterritoriality and unrecognized regime exceptions.<sup>291</sup> Although there are persuasive reasons allowing domestic courts to rule on violations of international law, the Supreme Court has not overruled Sabbatino.<sup>292</sup> Since the Council might not evade the doctrine by virtue of the two exceptions, the State Department should be willing to write a Bernstein letter. The justifications for a permissive position have been discussed previously.<sup>293</sup> The current State Department position is apparently receptive to litigation by the Council.<sup>294</sup>

The Council seeks to invalidate title to resources derived from South Africa and to be placed in possession.

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289. See Telegram from the Secretary of State to Ambassador in Japan, [1915] 15 Foreign Rel. U.S. 146 (1924); 2 Whiteman, Digest of International Law 132-3 (1963).

290. State of the Netherlands v. Federal Reserve Bank, 201 F.2d 455, 463 (2d Cir. 1953) (indicating that recognition of the government was sufficient); State of the Netherlands v. Federal Reserve Bank, 79 F. Supp. 966 (S.D.N.Y. 1948); Anderson v. N.V. Transandine Handelmaatschappij, 289 N.Y. 9, 43 N.E.2d 502 (1942).

291. TAN 199-214.

292. McDougal, supra note 157, passim.

293. TAN 180-98.

294. Oral Statement of the United States, 2 Namibia Opinion, I.C.J. Pleadings 503 (1970); Davis, supra note 82, at 37-8.

Lower court opinions in the Sabbatino litigation indicated that invalidation of title and specific restitution are available remedies when nationalizations violate international law.<sup>295</sup> Those remedies have been applied by foreign tribunals in similar situations.<sup>296</sup> The Namibia controversy does not involve nationalization or confiscation of property by South Africa. But remedies should not be limited to that particular type of violation of international law.<sup>297</sup>

The significance of successful litigation enforcing the Decree on Natural Resources would lie in demonstrating the viability of national courts as international enforcement agencies. In the Namibia controversy, national courts provide a means for giving effect to authoritative decisions of the United Nations without resort to violence. Thus, adoption of this enforcement strategy will reinforce the international legal system and thereby promote world peace.

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295. N. Leech, C. Oliver & J. Sweeney, supra note 280, at 442-3.

296. Anglo-Iranian Oil Co., Ltd. v. Jaffrate (the "Rose Mary"), [1953] I.L.R. 316 (Sup. Ct. Aden 1953); see Bank of Indonesia v. Senembah Maatschappij and Twentsche Bank, 30 I.L.R. 28 (Ct. of Appeals, Amsterdam 1959); Confiscation of Property of Sudeten Germans Case, [1948] Ann. Dig. 24 (Amtsgericht of Dingolfing, Germany 1948); Société Potasas Ibericas v. Block, [1938-40] Ann. Dig. 150 (Ct. of Cassation, France 1939); Moulin v. Volatron, [1935-37] Ann. Dig. 191 (Commercial Tribunal of Marseilles, France 1937); The "Ropit", [1927-28] Ann. Dig. 67 (Ct. of Cassation, France 1928).

297. Cf. Schwebel, "Speculations on Specific Performance of a Contract Between a State and a Foreign National," in Rights and Duties of Private Investors Abroad 201 (1965).

## APPENDIX

Source: Addendum to the Report of the United Nations Council for Namibia, 29 U.N. GAOR Supp. 24A, at 27-8, U.N. Doc. A/9624/Add. 1 (1975)

Decree on the Natural Resources of Namibia

Conscious of its responsibility to protect the natural resources of the people of Namibia and of ensuring that these natural resources are not exploited to the detriment of Namibia, its people or environmental assets, the United Nations Council for Namibia enacts the following decree:

## DECREE

The United Nations Council for Namibia,

Recognizing that, in the terms of General Assembly resolution 2145 (XXI) of 27 October 1966, the Territory of Namibia (formerly South West Africa) is the direct responsibility of the United Nations,

Accepting that this responsibility includes the obligation to support the right of the people of Namibia to achieve self-government and independence in accordance with General Assembly resolution 1514 (XV) of 14 December 1960,

Reaffirming that the Government of the Republic of South Africa is in illegal possession of the Territory of Namibia,

Furthering the decision of the General Assembly in resolution 1803(XVII) of 14 December 1962, which declared the right of peoples and nations to permanent sovereignty over their natural wealth and resources,

Noting that the Government of the Republic of South Africa has usurped and interfered with these rights,

Desirous of securing for the people of Namibia adequate protection of the natural wealth and resources of the Territory which is rightfully theirs,

Recalling the advisory opinion of the International Court of Justice of 21 June 1971,



Acting in terms of the powers conferred on it by the General Assembly under resolution 2248(S-V), of 19 May 1967, and all other relevant resolutions and decisions regarding Namibia,

Decrees 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 licence for all or any of the purpose 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;

3. No animal resource, mineral, or other natural resource produced in or emanating from the Territory of Namibia may be taken from the said Territory by any means whatsoever to any place whatsoever outside the territorial limits of Namibia by any person or body, whether corporate or unincorporated, without the consent and permission of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council;

4. Any animal, mineral or other natural resource produced in or emanating from the Territory of Namibia, which shall be taken from the said Territory without the consent and written authority of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council, may be seized and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

5. Any vehicle, ship or container found to be carrying animal, mineral or other natural resources produced in or emanating from the Territory of Namibia shall also be subject to seizure and forfeiture by or on behalf of the United Na-

tions Council for Namibia or of any person authorized to act on behalf of the said Council and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

6. Any person, entity or corporation which contravenes the present decree in respect of Namibia may be held liable for damages by the future Government of an independent Namibia;

7. For the purposes of paragraphs 1 to 5 above and in order to give effect to this decree, the United Nations Council for Namibia hereby authorizes the United Nations Commissioner for Namibia, in accordance with General Assembly resolution 2248 (S-V), to take the necessary steps after consultations with the President.