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THE STATUS OF NAMIBIA AT INTERNATIONAL LAW

by

Elizabeth Landis
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A lawyer trained in today's prevailing school of jurisprudence has only one answer to this question: It has no status.

Namibia is one of those odd bits and pieces--and not such a small one at that--of the terrestrial surface that have bothered jurists, scholars, and statesmen over the years. (Another territory raising analogous problems today is the Gaza Strip. For obvious reasons I am limiting my remarks to Namibia.)

It may be asked how there can possibly be any question about Namibia's status at international law when Africanists come to conventions to discuss Namibia; when the UN annually debates days or weeks concerning the Territory; when the International Court has handed down four Advisory Opinions and one preliminary and one final judgment in a contentious case concerning it; when the South African government spends millions of rand to defend its borders; and when Freedom Fighters die or rot in prison for it.

The answer lies in the peculiar situation of Namibia, as interpreted in the light of the positivist school of jurisprudence, in which most of today's lawyers have been indoctrinated,[1] even--or perhaps, especially--those who have not taken any formal studies in legal theory.

Let us start to analyze the situation in--unfortunately grossly oversimplified--positivist terms.

(1) Namibia is not a sovereign state.

Positivism might be called, in the language of the day, the school of hard-nosed legal realism. It rejects the older natural law theory of a general law of "right reason" applicable to all mankind for an analysis that separates morality (the unenforcible "shoulds" of political life) from law (those rules the sovereign enforces in the area to which the sovereign's power extends). According to positivist theory a state is sovereign only when it is not subject to any (foreign) superior authority. Loose constructionists have included among sovereign states Canada, Australia, New Zealand, and South Africa before the statute of Westminster and even Iraq while still technically a "Class A" mandate.[2] But beyond these cases most positivists will not go.

Applying the most basic criterion, absence of foreign control, it is obvious that Namibia is not sovereign. And, realistically, there is little likelihood that it will soon gain control of its own affairs.

Not only does Namibia flunk the sovereignty test; a number of theorists would deny that it is a "state" at all--assuming that one can conceive of a non-sovereign state, perhaps in the same sense that a non-mathematician can conceive of a negative number. In this connection it is important to recall that positivism developed along with the modern nation-state, which it described and which it tends to

justify and glorify. Thus there is frequently an implicit assumption of nationhood, a sort of psycho-social phenomenon or quality, as the basis for the political state.[3] The concept of nation, although necessarily vague, involves common language, culture, and/or history, geographical unity, and similar factors.

When such a test is applied to Namibia, it is apparent that the Territory has no natural geographic, demographic, or cultural unity and no history of national aspiration or political unity. Thus, for example, its territorial boundaries, like those of many African countries, are accidental. The Germans were scavenging among unclaimed lands when they created their South West Africa protectorate. Most of the land beyond the original "Red Line" was held only tenuously, the Angolan border being finally delimited long after German rule had ended. The Caprivi Zipfel, taken in the vain hope of imperial expansion across the Continent, might better have been attached to the then Bechuanaland, Angola, or Northern Rhodesia; it is still divided today into a western arm administered from Windhoek[4] and a virtually inaccessible eastern sector administered from Pretoria.[5]

Demographically, the Territory is inhabited by a number of unrelated tribes. The East Caprivians and, until recently,[6] the Ovambo had little contact with the Africans in the Police Zone; and many of the latter were engaged in recurring struggles for adequate living space in a mostly semi-desert area, which contained limited and generally poor grazing land. Obviously there is no history of common political aspirations.[7] Africans in the Territory have now created several quasi-political movements in reaction to the indignities of South African domination. These are largely tribal in origin and support although generally striving to become more national in character and scope.

It should be noted that when the International Court referred to Namibia it did not term it a state, but a "people which must look to the international community for assistance in its progress towards the goals for which the sacred trust [mandate] was instituted."[8]

(2) Namibia is not an occupied state.

It must be admitted that an occupied (sovereign) state is a contradiction in terms which clear-headed positivists should not tolerate. Nevertheless, in practical fact, such a status has been recognized occasionally, as in the case of the states occupied by Nazi Germany.[9] Of course, it should be remembered that there was a military campaign in progress to free those countries from what was assumed to be temporary subjugation; and their national governments at home or in exile continued in most cases to command the loyalties of a majority in the occupied areas. A more interesting and pertinent example is that of Ethiopia, which continued to be recognized as a member of the League throughout the Italian occupation although that appeared irreversible until Italy entered the Second World War. Again, however, there was a recognized sovereign state in existence prior to the occupation; and, despite predictions to the contrary, within a few years after the conquest the governments which had forsaken the Emperor were engaged in

a war to restore his throne as well as European freedom.

In contrast, Namibia was not a sovereign state prior to termination of the mandate. The effect of the adoption of Assembly resolution 2145 (XXI) 1966 was only to make the continuing South African presence illegal. It did not convert Namibia, which was previously a territory rightfully under mandate--even if the mandate was wrongfully administered--into a sovereign state.

(3) Namibia is not a mandated territory.

Since 1920 mandated territories have constituted a new category of entities which the international community has recognized as sui generis, although the two judgments in the South West Africa Cases make apparent how many different opinions there were as to the nature of the genus.

There is no need to recite to this audience the history of the mandate, particularly since dissolution of the League. The important fact is that, after the International Court decided not to rule on the merits of the South West Africa Cases, the UN General Assembly ended the stalemate over South West Africa by revoking the Republic's mandate on the grounds of its continuing fundamental breaches of its mandate obligations.

During the protracted hearings of the Cases South Africa argued strongly that the mandate had lapsed with the dissolution of the League.[10] When, however, the Assembly, following the Court's 1950 Advisory Opinion to the effect that the mandate subsisted, proceeded in 1966 to terminate the mandate, the South African government argued that the Assembly lacked power to take such action--[11]an argument which made sense only if the South Africans conceded that the mandate was still in existence. At any rate, on 21 June of this year the Court advised the Security Council, in the course of replying to its inquiry concerning "legal consequences for states" of South Africa's continued occupation of Namibia, that the Assembly had validly revoked the mandate. This is now the definitive ruling on the subject, with which the Security Council officially "agrees" despite pained British and French disclaimers.[12]

(4) Namibia is not part of the South African state.

It is easy to find positivist arguments to the contrary of this position, i.e., that Namibia has been incorporated into the sovereign state of South Africa. Such arguments start with an analysis of the actual locus of sovereign power during the inter-War period and continue with developments since the demise of the League.

The mandate system was, of course, intended as a substitute for annexation of enemy colonial territories. Nevertheless, it is clear that most of the victors hoped to achieve effective annexation, at least of "B" and "C" mandates, despite the system. In the case of South Africa, the League's Permanent Mandates Commission repeatedly

called attention to acts which were inconsistent with the (mandate) "international status" of South West Africa, and the Union government would then either back down or reinterpret its action. However, early in the 20's the South African Court of Appeals held, apparently unchallenged by the League, that South Africa exercised full, or at least almost full, sovereignty over its mandate.[13]

Following the dissolution of the League and the UN's refusal to permit annexation of South West Africa by South Africa, the Union began the program of de facto integration of its mandate which is the subject of another member of this panel. Despite the termination of the mandate, South Africa's increasing fulfilment of this program might well be enough to cause pragmatists to find that Namibia had lost its international personality, by merger into the Republic.

However, there is one contrary fact which realists cannot ignore: i.e., reiterated official statements, as late as this fall, that Namibia has not been incorporated in the Republic, that it remains a separate entity.[14] This is clearly decisive, as what might be called a statement against interest. Otherwise it is possible that South Africa might make a most plausible case for the reverse proposition.

(5) The United Nations has not exercised effective jurisdiction over Namibia.

Although the General Assembly stated, in terminating the mandate, that it was assuming "direct responsibility" for Namibia, and although it subsequently established the Council for Namibia to administer the Territory on its behalf (until independence), the Council has made little headway in fulfilling its function, and the Assembly has not acted to correct this situation. The sum total of the Council's effective activities in 4 ½ years of existence is to issue travel documents, valid in over half the UN member states, to some three dozen Namibian refugees and to negotiate a temporary right of return to a handful of African countries for the bearers of these documents. While Council members can recite some substantial reasons for their inactivity,[15] it is significant that the Advisory Opinion of the Court did not even mention the Council.[16]

As far as the Security Council is concerned, it had great difficulty this fall in "agreeing with" the Opinion on Namibia which it had sought the year before.[17] Its primary contribution has been to sabotage a Zambian proposal for the creation of a committee of technical experts on Namibia by establishing instead an Ad Hoc Sub-Committee on Namibia, which is in fact the Security Council sitting as a committee of the whole behind closed doors, where all the Great Powers oppose any effective action. As this paper is written, the Security Council is considering an innocuous appearing resolution introduced by Argentina which would result in completely undercutting resolution 2145 as well as the Court's Opinion.[18]

An Alternative View

Given the situation as I have spelled it out, must we necessarily,

therefore, conclude, along with the positivists, that Namibia has no status at international law? That by terminating the mandate the UN converted the Territory into a non-entity? That the Un undertaking of "direct responsibility" for Namibia, however badly carried out, has no meaning? I submit that we need not.

A better evaluation, I submit, is that Namibia has some unique international status, sufficient to entitle the international community to intervene in Namibia's "domestic" affairs, ie., in South Africa's continuing administration of the Territory, and on occasion to compel modifications of its conduct as a result. Consider, for example, the following:

(a) South Africa yielded to diplomatic pressure by the United States and Britain[19] not to implement its Odendaal Plan in Namibia while the South West Africa Cases were before the Court.[20]

(b) Although at various times claiming to rule Namibia "by right of conquest" [in the First World War],[21] South Africa has repeatedly stated that its former mandate remains a separate territory.[22]

(c) South Africa has not extended population registration to Namibia,[23] and it is removing racially discriminatory provisions from its statutes insofar as they apply to Namibia.[24]

Consider, similarly, that a number of South Africa's trading partners have closed their consulates in Namibia under UN pressure and that the United States has gone so far as to announce that it is official policy to discourage American investment in Namibia.[25]

Of course these actions represent cosmetic transformations more than basic changes, but in what other circumstances have even such outward changes been brought about?

Consider further that the Council for Namibia is, as its President recently pointed out, by necessary inference from the Court's Opinion, the dejure government of Namibia.[26] Although it operated in a legal twilight zone before the Opinion validated resolution 2145, the Council nevertheless during that period put into effect its system of travel documents, which are widely recognized and established a regional office in Zamibia. Now, in response to the Court's Opinion, it has laid out a program of future action under which it is committed, inter alia, to: issue visas for entry into Namibia; seek representation in international agencies and meetings; be substituted for the Republic in existing and future multilateral conventions as they affect Namibia; invalidate (and revalidate) acts of the South African government purportedly taken on behalf of Namibia; draft interim laws for Namibia covering corporations, taxation, and concessions; register and incorporate persons doing business in Namibia; levy taxes on such persons; issue concessions; establish a Supreme Court of Appeal for Namibia; and seek means to prevent breaches by South Africa of its fundamental obligations to

to the Namibian people.

It is clear that, to the extent it carries out this program, the Council will be engaged in a bootstrap operation to establish that it is indeed the government it claims to be. Sovereignty, as the positivists rightly understand, is not obtained by asking for it, but by acting like a sovereign until the world accepts your pretensions. They are wrong, however, to believe that it is necessarily a direct function by physical force (and economic power). While the Namibians may have to use arms to drive the last of the South Africans out of their country, all South Africa's might and economic advantages have not enabled the Republic to achieve its goal of outright annexation of Namibia. A new world outlook has subtly changed the rules of the game in this case.

If this proposition is correct, it follows that Namibia constitutes a state-in-embryo, created by the international community acting through a vaguely recognized new world order, and that we are privileged not only to witness this new phenomenon but also to have an opportunity to assist at the birth.

Footnotes- Status of Namibia

1. Positivism is particularly strongly entrenched in Britain and, through its academic and colonial influence, in the Commonwealth and South Africa. It is fascinating-- and, I think, tragic-- to learn that most of the Third World representatives who presented written or oral arguments to the International Court concerning Namibia this past year used positivist terms and lines of thought instead of urging new approaches on the Court.

2. Purists, of course, could worry about complete sovereignty as long as appeals could be taken from Commonwealth countries to the Privy Council.

3. As in the "unification" of Germany and of Italy a century ago.

4. With the creation of "homelands" in the entire Caprivi Zipfel, and the restriction of the Windhoek Administration to jurisdiction over the "white homeland," it is probably more correct to consider the entire Caprivi ad administered from Pretoria now. But see note 5 as to sec. 38(5) of the South-West Africa Constitution Act.

5. Union Proclamation No. 147 of 1939. See South West Africa Constitution Act, No. 39 of 1968, sec. 38 (5) (substituted by Act No. 25 of 1969, sec. 17), which provides that no Act of Parliament or ordinance applies to the Eastern Caprivi Zipfel unless expressly declared applicable thereto.

6. After the defeat of the Ovambo in the early 20's by South Africa and Portugal and the extension of effective control to the area beyond the Red Line.

7. Compare the strong Polish national aspirations that survived generations of partition.

8. Para. 127.

9. See, in this connection, the Separate Opinion of Judge Ammoun at pp. 69-70.

10. See South West Africa Cases: Preliminary Objections, [1962] I.C.J. Reports 319 at p. 326.

11. See the written and oral statements of South Africa presented to the International Court in connection with its Advisory Opinion of 21 June 1971; see also statement of South African Foreign Minister Muller to the Security Council 27 Sept. 1971 (UN Doc S/PV. 1584 (27 Sept.1971)).

12. Security Council resolution 301 (1971), corr. 1, adopted by a vote of 13-0 with two abstentions (Britain and France). See also UN Doc. S/10330, Report of the Security Council Ad Hoc Sub-Committee on Namibia (Sept. 1971).

13. See R. v. Christian, 1924 A.D. 101, affirming a conviction of a

South West African of treason for engaging in active hostilities against the mandatory power. (Other "Class C" mandatory powers reached substantially the same conclusion as to sovereignty in relation to their mandate.)

Note the terms of art. 2 of the South West Africa mandate: "The Mandatory shall have full power of administration and legislation over the territory...," a provision which has been successively ensconced in the South West Africa Mandate Act, No. 49 of 1919; the South-West Africa Constitution Act, No. 42 of 1925, sec. 44 (1); and the South-West Africa Constitution Act, No. 39 of 1968, sec. 37, and applied in S. v. Tuhadeleni, 1967 (4) S.A. 511 (T.), affirmed on appeal.

14. See speech of Foreign Minister Muller to the Security Council, 27 Sept. 1971 (UN Doc. S.P.V. 1584 (27 Sept. 1971)); South Africa, White Paper, Memorandum: Decisions by the Government on the Financial and Administrative Relations between the Republic and South West Africa (referring to the "Odendaal Report") (1968), para. 3, quoting the Prime Minister speaking in Windhoek August 1967; and 1971 Advisory Opinion, para. 83.

15. Including the refusal by all the Great Powers and all the Western European states to sit on the Council.

16. Only Judge Ammoun referred to the Council, in his Separate Opinion.

17. Security Council resolution 301 (1971), corr. 1.

18. UN Doc. S/10376/Rev. 1 (22 Oct. 1971).

19. So it was rumored at the time. The Applicants also indicated that they were prepared to ask the Court for interim relief in the form of an injunction or interdict.

20. Of course the South Africans "cheated," as by unobstrusively buying up "white farms" scheduled to become part of some African "homeland" when the Plan was subsequently implemented.

2. South West Africa, Second Phase, Judgment, Verbatim Record, 1965, 39th Session, p. 37 (27 May 1965); UN General Assembly Prov. Verb. Rec. 118 (UN Doc. A/PV.1413)(5 Oct. 1966 (XXI))).

22. See p. 6, at note 14, above.

23. See Population Registration Act, No. 30 of 1950, as amended, and So. Af. H. A. Deb., 30 July 1970, cols 702-03. Although there is no "population classification," as such, by race, there is administratively determined classification by "group" or "nation" (i.e., Bushman, Damara, Baster, etc.): see So. Af. H.A. Deb., 30 July 1970, cols. 704, 715.

24. So. Zf. H.A. Deb., 28 July 1970, col. 614: id., 16 March 1971, cols. 2878-85 passim.

25. Statement by Ambassador Yost, Press Release USUN-68 (70), 19 May

1970. Of course, the means of implementing this policy are generally long-term and in futuro.

26. Speech to the Security Council 27 Sept. 1971, UN Doc. S/PV. 1584 (27 Sept. 1971).