

National Conference on the
South African Crisis and
American Action
Washington, D.C.
March 21-23 1965

SOUTH WEST AFRICA
AND THE INTERNATIONAL COURT OF JUSTICE

Mrs. Elizabeth Landis

While we are discussing here today factors which may lead to change in South Africa, the International Court of Justice at the Hague is in the process of determining the future potential of one of these very factors: South West Africa.

Because South West Africa is for geographical and historical reasons an area where both internal and external pressures may be brought to bear simultaneously upon South Africa, it is vitally important to understand the issues before the Court, the probable decision of the Court, and the possible consequences of that decision. Such an understanding requires, in turn, some knowledge of the recent political history of South West Africa. Eschewing technicalities as much as possible, let me start with some information about the territory itself.

South West Africa, a top-heavy, roughly rectangular area containing over 300,000 square miles (that is, about 20% more land area than Texas) lies on the Atlantic coast just north and west of part of the Republic of South Africa; it is bounded on the north mainly by Angola and by Zambia (formerly Northern Rhodesia), where the tiny sliver of land known as the Caprivi Zipfel extends a couple hundred miles east, and on the east by Bechuanaland in the north and South Africa in the south. The territory, which has no permanent rivers except on its borders, consists mostly of semi-desert, verging into true desert areas; stock-raising is the only important agricultural activity. There are large deposits of alluvial diamonds along the littoral -- in areas closed to all but the exploiting companies -- as well as other mineral deposits, which are as yet far from fully explored.

The population of South West Africa (1960 Census) is about 525,000, of whom about 75,000 are white, mostly Afrikaaners from South Africa. The rest are more or less indigenous non-whites: the Bushmen, some still nomadic hunters and gatherers, but most intermarried and integrated with other non-whites; the linguistically related Namas (called by many Hottentots); various Negro tribes, such as the Berg-Damara (whose origin is not known), the bantu-speaking Ovambo (who constitute nearly one-half of the total non-white population), and the Herero, a bantu people traditionally pastoralists; and the so-called "coloreds," that is, persons of mixed descent.

South West Africa is physically divided into two parts: the larger and generally more fertile southern area, called the "Police Zone," where all the whites live and where non-whites may reside only in closed "native reserves" or controlled settlements near work centers; and the remaining area, shaped like an inverted U, with its base along the northern boundary with Angola.

The "Police Zone" was first established by the Germans. It was they who in the late 19th century scramble for colonies seized South West Africa while the British and Dutch to the south of the Orange River boundary struggled against each other for control of the four colonies which eventually became the Union of South Africa. German rule in South West Africa, notable primarily for its bloody repression of repeated insurrections by the indigenous peoples, was ended early in World War I when the Union, as one of the Allies, invaded and took control. With the secret approval of the Imperial War Council, the Union fully expected to annex the territory; but President Wilson's insistence on no annexations, coupled with international responsibility for conquered enemy territory, frustrated this ambition.

Ultimately the League of Nations was created (although the United States failed to join) and was given final responsibility for all ex-enemy territories. But the then Union was named its agent (or "mandatory") to administer South West Africa, the mandated territory (or "mandate"), in accordance with the provisions of the League Covenant and of an individual mandate agreement (also called a "mandate") relating to South West Africa. Together the Covenant and the mandate agreement empowered the Union to administer South West Africa as an integral part of its own territory and required it, inter alia, to administer the territory for the "well-being and social progress" of its inhabitants, to make annual reports on the territory to the League's Permanent Mandates Commission, a staff of technical experts, and to submit to the Permanent Court of International Justice at the Hague unsettled disputes with other League members as to the interpretation or application of the mandate. The terms of the mandate were not to be altered except by the League Council (which was roughly analogous to the Security Council of the United Nations).

South African administration of the mandate was severely criticized by the Permanent Mandates Commission, but the League's voting rules (which allowed nations to vote on matters affecting themselves and required complete unanimity for any action) rendered the Union immune to any pressure except friendly political persuasion. With the League's collapse on the advent of World War II, South Africa stopped reporting on conditions in the territory.

When the United Nations was created in 1946, it was assumed that all mandated territories (except those Near Eastern ones which became independent states) would be placed under the UN trusteeship system. All of them were -- except South West Africa. The South African government

sought to annex South West Africa; but when the UN refused to sanction the move, South African representatives promised to continue to administer the territory in accordance with the terms of the mandate. Their government even submitted reports on South West Africa to the United Nations.

However, again there were serious complaints about the administration of the territory, and under UN voting procedure South Africa could not avoid censure as well as constant nagging to bring the territory under trusteeship. At the same time (1948) a far more extremist government came to power in the Union, determined to enforce total apartheid both at home and in the mandate; it discontinued its reports on South West Africa, claiming that it was not legally required to submit them, and it refused to forward petitions from South West Africans to the UN or to allow UN personnel to enter the area. Since there was some doubt as to the exact legal status of South West Africa after the dissolution of the League, many UN members came to feel that if the legal perplexities of the situation could be resolved, perhaps settlement of policy differences would follow.

So the General Assembly sought an advisory opinion from the present International Court, which had succeeded the former Permanent Court when the UN replaced the League, as to the exact legal status of South West Africa. The Court replied that the territory remained subject to the mandate; that the UN was substituted for the League as to supervision of the mandate; but that South Africa was not legally obligated to place the territory under the trusteeship system, as certain countries had argued.

This opinion, which had moral, but no legal, binding force, was never accepted by the South African government, which proceeded unilaterally to annex the territory in fact if not in form by changing its administrative structure and giving it representation in the South African Parliament. Twice more the Assembly sought advisory opinions: First, whether the UN, as successor to the League in supervising the mandate, had to follow the League's unanimity rule in voting on matters affecting South West Africa; the Court said it might properly follow its own majoritarian voting procedure. And second, whether the UN might grant oral hearings to petitioners from South West Africa although League rules had permitted only written petitions; in view of the changed circumstances the Court permitted oral hearings -- clearly a much more effective means of dramatizing the situation than "impersonal" documents could ever have been.

But South Africa remained obdurate, introducing new apartheid measures in South West Africa and allegedly building military installations there in violation of the mandate. The Assembly repeatedly tried conciliation, negotiation, and censure before yielding to its frustration and "inviting" former members of the League to proceed against South Africa in the

World Court under article 7 of the mandate, which provided for such a proceeding in the case of unsettled disputes as to interpretation or application of the mandate. To this "invitation" Ethiopia and Liberia responded, asking the Court to find that the South African government was violating its obligations under the Covenant and the mandate, and to direct it to stop such violations.

This proceeding (the present South West Africa Cases) differed from the earlier ones brought by the General Assembly in that the questions involved were broader and that the proceeding sought a specific remedy -- an order to stop violating the mandate -- rather than a mere opinion on a question of law. But the most significant difference was that the Court's opinion would be binding on South Africa, not merely advisory. Normally an independent country cannot be bound by the decision of any court, even the International Court of Justice, unless it has agreed generally to submit itself to the court's jurisdiction or gives it consent in a particular situation. Since South Africa obviously would not consent, the plaintiffs argued that a general acceptance of the Court's jurisdiction in cases affecting South West Africa was found in the provision of the mandate agreement providing for reference of unsettled disputes about the mandate to the (former) Permanent Court.

Although the complaints of Ethiopia and Liberia were filed late in 1960, the hearing on the merits started on the 15th of this month. In the intervening four and one-half years the South African government employed its best legal talent to stall and then to kill the proceeding on legal technicalities. Without belaboring these technicalities, it is sufficient to indicate that the Republic of South Africa (as the Union became in 1961) claimed that the Court had no power to hear the action by disputing the plaintiffs' theory of general acceptance in the mandate clause. By the narrowest possible majority, 8-7, in December, 1962, the Court turned down the Republic's objections and agreed to proceed with the substantive issues.

That hearing opened last week and will probably continue for a couple of months. The question which concerns us today is what consequences the Court's decision -- which will probably not be delivered until the fall -- will have in South Africa.

Such a question implicitly assumes that the Court will decide for the plaintiffs. Should the Court favor South Africa, the situation, in the Republic as well as in the territory, would be worse, both psychologically and internationally, than it is today. Such a risk had to be carefully weighed before the proceeding was started. However, after the (narrowly) favorable decision in the preliminary round, a favorable outcome appears more probable, but it is not a foregone conclusion. The rest of this discussion will, however, be based on the assumption that the Court will decide for the plaintiffs.

If the decision is as sought by Ethiopia and Liberia, how will it read? In substance it will first repeat certain conclusions of law stated in the Court's advisory opinions and in its 1962 decision on jurisdiction: that the mandate is still in effect; that South Africa is still subject to its obligations; and that the UN is empowered to supervise administration of the mandate. Then it will proceed to find that the South African government has violated its obligations under the mandate in the following ways: by failing to promote the welfare and social progress of South West Africa's inhabitants; by introducing the policy and practice of apartheid in the territory; by substantially modifying the terms of the mandate (annexing South West Africa) without UN consent; by refusing to submit annual reports on the territory and to forward petitions from inhabitants to the UN; and by establishing military bases there. Finally the judgment will order the Republic to cease committing these violations.

What will the effects of such a decision be as far as the "South African crisis" is concerned? (Purely personal and psychological consequences -- hope, fear, elation, cynicism (if there are no quick, visible changes as a result), demonstrations or riots -- may be far more important than the political consequences, but they are impossible to gage in this paper.

Despite the so-called "binding" effect of the Court's decision, it will not enforce itself, and there is no reason to suppose that the South African government will comply voluntarily. Therefore the effect of the decision will be determined by: (1) the moral effect, if any, of the decision on world opinion; and (2) the steps which are taken to enforce the decision.

It is possible, of course, that the South African government will defy the Court's judgment outright, probably on the grounds that it still does not recognize the Court's jurisdiction to hear the case. However, in view of the South African government's attitude towards courts generally and of its concern for public relations, it is more likely that it will try to divert public opinion by suggesting compliance while in fact stalling, debating the meaning of the judgment, and pointing to new "integrated" names for old segregated realities. There is no international mechanism for quickly resolving the problem raised by such covert non-compliance any more than there is in the United States for quickly evaluating the plans of local school boards for minimal compliance with the school desegregation decision. Nevertheless, it must be assumed that in due course the international community will recognize the Republic's non-compliance as such. At that point Ethiopia and Liberia will be able to seek enforcement of the judgment of the International Court.

It is at that point also that the decision of the South West Africa Cases will begin to have a calculable effect on the situation in South

Africa. It should not be forgotten that the boundary between South Africa and South West Africa is hundreds of miles long; and each has an additional long boundary with Bechuanaland, which has a vital general interest in apartheid as well as a special interest arising from its long-time role as refuge for victims of South African oppression in both the Republic and the territory. Any appreciable change or physical intervention in South West Africa will be known at once in South Africa and may well attract wild (illegal) emigration to the (poor and now generally shunned) territory. Ironically, the consequences of any such change or intervention would be greatly increased by South Africa's recent annexation of South West Africa, for in effect it would be made in an integral part of the South African Republic and not merely in an adjoining area administered by the same government. Enforcement measures which exceeded mere moral strictures would be aimed at the South African government, not at administrative officials physically located in South West Africa; and any penalties imposed for non-compliance would -- if effective -- bear on the people of South Africa itself.

In the light of these considerations, let us finally consider how the Court's assumed judgment may be enforced, so that we may evaluate the effect on the racial situation in South Africa.

Article 94 of the UN Charter provides that if one party fails to comply with a (binding) judgment of the International Court, the other party may appeal to the UN Security Council for enforcement.

In cases in which non-compliance constitutes a threat to the peace, a breach of the peace, or an act of aggression, the Security Council may take any action provided in Chapter VII of the Charter: e.g., it may direct all UN members to suspend or break all economic or diplomatic relations or sever communications with South Africa (boycott) (art. 41); or it may order a blockade against South Africa (art. 42); or it may actually order armed intervention (arts. 43-50). It may also take other unspecified appropriate action (arts. 41-44), probably including the despatch of UN inspectors or civil and/or military administrators to carry out the Court's order to end apartheid and to administer the territory for the benefit of its indigenous inhabitants. These powers should be contrasted with the Security Council's powers to recommend action by UN members to bring about settlement of a dispute or a situation which is merely likely to "endanger the maintenance of international peace and security" (art. 34, ch. VI). (Under this power the Security Council has already recommended an arms embargo on South Africa -- which came into effect at a point when South Africa had become substantially self-sufficient as to arms production.)

It follows that if South African defiance of the International Court's order constitutes ipso facto a threat to the peace, there is no problem as to the Security Council's legal power to direct enforcement measures by UN members. Up till now, however, the Security Council has

refused to find that South Africa's apartheid policy and practices -- even in their most brutal manifestations, as at Sharpeville -- constitute a threat to the peace. Thus a vital question arises: will the Security Council consider as a threat to the peace defiance of a Court order to cease conduct which itself has not yet been held to constitute a threat? The answer is certainly in doubt.

Since "enforcement" is meaningless without some kind of compulsion, and since there is no provision in the Charter for enforcement apart from the Chapter on threats to the peace, the legal problems arising out of article 94 are virtually endless and certainly cannot be determined without long and painstaking study.

However, there are practical considerations which may be as important as the purely legal issues. The most important of these is the attitude of the permanent members of the Security Council. Do they want to have the judgment enforced? Here a whole new set of imponderables is involved.

There have been a number of indications that the American government favors enforcement. At various times State Department officials have said so, and it could be inferred that they would welcome the South West African judgment as a wedge to bring about changes in South Africa. It is apparently not widely known that about a year ago the United States (and Britain) intervened with the South African government to persuade it not to put into effect in South West Africa at that time the recommendations of the so-called Odendaal Report; these recommendations called for the establishment of completely segregated tribal homelands ("Bantustans") for the entire population -- at a moment when the International Court had before it the issue of the legality of any form of apartheid under the mandate!

The statements and the intervention are in line with the predominant American tradition of respect for courts and court decisions. Moreover, the analogy between compliance with our Supreme Court segregation decisions and compliance with their international counterpart is too obvious to be missed. In terms of international politics, moreover, American support for enforcement may help to get the United States out of the African doghouse, to which we have been so thoroughly relegated in recent months. On balance it would seem that these arguments should more than outweigh military and economic reasons for not supporting enforcement action.

The support of the United States is not, however, sufficient. Britain, the most important investor in South Africa, as well as the Republic's most important trading partner, and France, which has always considered apartheid an "internal" problem, must also support, or at least refrain from vetoing, enforcement measures for the Security Council to be able to proceed. The attitudes of these two countries, which will depend somewhat on the parties in power -- there are likely to be elections in both countries before the issue reaches the Security Council -- are less predictable than that of the American government.

If the Security Council fails to act because of a veto by one of the permanent members, it is always possible that the General Assembly might arrogate to itself, on a basis similar to that of the "keeping of the peace" resolution, power to order UN members to assist in enforcement or to direct some form of intervention. This would lead to many interesting political problems, not the least for the Soviet Union, which has long considered such action by the UN illegal, but which would be hard put to it to maintain that position in a situation involving such unfortunate public relations with the non-white countries. Such speculation, however, is too remote for this study.

The propositions in this paper have been founded on a series of if's, the failure of any of which would probably lead to the collapse of the entire structure. Yet a realistic appraisal of the South African situation suggests that this fragile hypothetical structure carries with it stronger potentialities than most of the other hopes to which opponents of apartheid turn, for it rests on the possibility of orders by the Security Council (which all UN members are, by their membership in the UN, bound to respect), and not mere voluntary action by the interested few. It will do no good to blink the fact that the countries of East Africa have hurt themselves more economically than the South Africans by their trade boycott, and the actions of longshoremen here or city councils there have been more significant as moral gestures than for the resulting disruption in South African trade.

The evidence shows that South Africa is close enough to economic self-sufficiency today so that nothing short of economic boycott is likely to force a change. The sacrifices which a beleaguered people will undergo and the ingenuity which they will exercise to preserve what they believe to be their God-given rights should not be underestimated. Nevertheless, world-wide action, under Security Council direction, might be effective not only through its own force, but also because it would once and for all stifle large-scale capital investment and discourage large-scale immigration of skilled personnel, both of which are essential for South African prosperity.

In the event of a boycott, which is the obvious first meaningful peaceful measure to enforce the judgment, a more serious question is whether the UN would be able to enforce its own enforcement measure, certainly for the length of time necessary to make it effective. As the screws were tightened and the rewards of breaking the boycott rose, could discipline be maintained? Would non-members of the UN support the boycott? (Evidence has already indicated that Communist China has no scruples about dealing with the South African government -- even in armaments -- if the price is right and the transaction can be kept from public view.) Would a blockade or military intervention be required to enforce the boycott? If a maritime blockade were set up to cover the whole South African and South West African coastline, how many ships would be engaged, at whose expense, and under whose command? Would

such a deployment of naval forces be an invitation to the restless nations around the world to "act up" while most of the great navies were engaged off the South African coast?

Previous South African actions have made it clear that the country would use force to prevent UN personnel -- even technical personnel of UNICEF or WHO -- from entering South West Africa. Hence any attempted civilian administrative intervention would probably require armed force to back it up. And South Africa is militarily so strong now and so nearly self-sufficient that the limited force employed by the UN so diffidently in the Congo could have little hope of success, even if the entire non-white population -- those not slaughtered by the white South Africans, in any case -- and a handful of their white supporters rallied to the "invaders." (Indeed, UN intervention, whether in the Gaza Strip, the Congo, or Cyprus, represents a far from happy precedent; but in all these cases the UN was attempting to maintain a sort of "neutrality," which would not be required in the projected situation.)

South West Africa, therefore, represents the most obvious chink in the South African armor, because it represents simultaneously (1) the point at which apartheid becomes clearly and finally an international problem; (2) the point on which conservatives (advocates of "law and order") can join with liberals in advocating the status quo ante (i.e., before apartheid) and obedience to judicial orders; and (3) the basis for mandatory international action (on order of the Security Council). To paraphrase a bit of American political wisdom, "As South West Africa goes, so goes the nation." The chink is small, but it is possible that it may expose South Africa's Achilles' heel.