

The South West African "Terrorism Trial" Continues:

THE APPEAL CASE

Last February, 33 South West Africans (Namibians) were sentenced to imprisonment for violation of South Africa's Terrorism Act. On September 25 and 26, an appeal was heard in the Appellate Division Court in Bloemfontein, South Africa, on the legal question of whether or not the validity of the jurisdiction of the Supreme Court in Pretoria (which tried the men) could be challenged. No decision is expected for another month. In November judgement on a separate appeal by 11 of the defendants, against the severity of their sentences, will be heard in the same court.

An analysis by international law professor Richard Falk, who was in court when the Namibians were sentenced, has stated:

The nature of apartheid as a system gives opponents no alternative but violent challenge. . . statutory standards are so sweeping as to deny a defense for anyone the Government is seriously interested in convicting. The statute (Terrorism Act) contains a broad definition of what constitutes terrorism and gives the State great latitude in gathering evidence and confessions. People are not brought to trial until they have already confessed the crime for which they are accused . . . The real trial and the real criminal conviction occurs within the prison . . . The terrorist trial itself is extraordinarily artificial. The trial is a sequence of legal forms that culminate in reaching a predetermined result that can be varied only slightly by what happens in the Court . . .¹.

The Terrorism Trial

The trial evoked world attention and condemnation from the United Nations, churches, eminent jurists, and editorial columns. This was because it was the first mass indictment of South West African nationalists following the termination of South Africa's mandate by the United Nations and the U.N.'s assumption of responsibility for South West Africa. It was condemned also because the Terrorism Act was ex post facto legislation, especially enacted by the South African Parliament to apply to South West Africa and to actions which had already taken place.

It is probable that only the pressure of world opinion saved some of the defendants from the death penalty that is included in the law. Yet sen-

1. From a speech reprinted in the Bulletin of the Episcopal Churchmen for South Africa, Michaelmas, 1968.

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tences were severe: 19 men were imprisoned for life, 9 to twenty years in prison, 2 to five-year terms, and 3 to suspended five-year sentences under the Suppression of Communism Act. (Of the original 37 defendants, two were acquitted, one died during the course of the trial, and one too ill to be sentenced with the others later received a life sentence.) The fact that the defendants were tortured while in prison and under interrogation was brought out at the trial, but was not grounds for appeal.

An unknown number of South West Africans have been detained under the Terrorism Act. Eight others have been indicted but have not yet been brought to trial, perhaps due to the extensive publicity the first trial received. One South African has been charged under the act.²

The Appeal Court

Both the appeals (on the jurisdiction of the court and on the severity of the sentencing) are being heard in the Appellate Division Court in Bloemfontein, South Africa. Because the primary appeal, heard September 25, involves the validity of an Act of Parliament, it was heard by a special 11-Judge Appellate Court instead of the usual 3- or 5-man court; and the same court retains jurisdiction of subsidiary appeals in the same case. This special court was created by the Appellate Division Quorum Act of 1955 to meet a series of constitutional crises in the 1950s after the government had been over-ruled by the courts. It has not met since.

That constitutional crisis was created by the government's attempt to remove the common-roll voting rights of the colored population, the last non-whites in South Africa with the franchise. The new court in 1956 validated the Senate Act of 1955, which enlarged the Parliament in order to secure the two-thirds majority necessary to take away the colored vote, and also the South Africa Act Amendment Bill of 1956 which actually removed the colored voters.

It is therefore to be expected that the court will again act to uphold the government.

Basis for the Appeal

When the original trial opened in September, 1967, the defense objected that the court was not competent to try the South West African defendants because the case involved questions of international law: the international status of South West Africa as a League of Nations mandate and the U.N. General Assembly action in 1966 revoking the mandate and de-

2. Mr. Gideon Mdhletshe was charged under the Terrorism Act for alleged offenses committed in Durban during 1962 and 1963 when he was a member and officer of the African National Congress. (Daily News, Durban, August 7, 1968).

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clarifying South West Africa an administrative responsibility of the U.N. until it reaches independence. The presiding judge, Supreme Court Justice Ludorf, then disallowed the objection, stating that he could not question an Act of Parliament (the Terrorism Act) but "merely had to enforce it." It is that decision of the judge which is being appealed.

The legal question is phrased as to whether or not the Supreme Court in Pretoria has "jurisdiction to inquire into or pronounce upon the validity of Terrorism Act No. 83 of 1967 and Section 5 of the General Law Amendment Act No. 62 of 1966 insofar as they purport to apply to the mandated territory of South West Africa." (Section 5, GIA Act No. 62 of 1966 extends the Sabotage Act of 1962 to South West Africa, just as provisions of the Terrorism Act make it apply specifically to South West Africa.)

The judge's decision was based on Section 59 (2) of the South Africa Constitution Act of 1961 which declares a court incompetent to pronounce upon the validity of an Act of Parliament. The defense claims that this statute of the Constitution and in fact the Constitution as a whole do not apply to cases involving South West Africa and that the words of that section of the Act do not include South West Africa specifically.

The defense defines a "Constitution of South West Africa" as comprising the Mandate Agreement issued by the League of Nations (1920), several treaties of peace (1919, 1920), South West African Affairs Acts (1935, 1949), and the consolidation of the latter in the South West Africa Constitution Act of 1968. South Africa's Constitution Act of 1961 is part of the "Constitution of South West Africa" only insofar as it establishes the South African Parliament with power to legislate for South West Africa "subject to the limitations imposed by the Mandate." The defense argues that this "Constitution of South West Africa" must be protected by the courts of South Africa.

The defense concludes that the South African Parliament did not intend to remove this protection by Section 59 (2); that South West Africa is not included in the section; and that therefore Judge Ludorf's decision was invalid. If this contention is rejected, the defense further claims that Section 59 (2) is not valid if it purports to apply to South West Africa because the League of Nations Mandate is part of the fundamental law for South West Africa and can be amended only in cooperation with the United Nations.

The appeal hearing, which lasted two days, also had its international observers, and it is hoped that they will publicize it fully. It is reported that British, Belgian, Canadian, Dutch, Swedish, and U.S. diplomatic representatives were present.

Security Council Action

The Security Council of the United Nations condemned the Terrorism Trial on March 14, declaring

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the continued detention and trial and subsequent sentencing of the South West Africans constitutes an illegal act and a flagrant violation of the rights of the South West Africans concerned, the Universal Declaration of Human Rights, and the international status of the Territory now under direct United Nations control.

As yet the Security Council has not dealt responsibly with the whole question of the application of the General Assembly resolution of 1966 which established the United Nations as the administering power in South West Africa. This latest appeal by the defense on behalf of the Terrorism Trial defendants is not a real appeal at all, for it again asks a South African agency to decide on its own right to rule. The real appeal is for international action, on the one hand, and for other Namibians to act, as the defendants have, to free their country.

In the absence of such effective action, South Africa continues to deepen her control over the South West African territory. The "Development of Self-Government for Native Nations in South West Africa Bill" was enacted by the Parliament of South Africa on June 6, 1968 over objections of both United Party (the South African opposition) spokesmen and those of the United National South West Africa Party (a South West African European party); the African majority, of course, has neither voice nor vote. The "native nations" are bantustans, fragmenting the country. The first of these, Ovamboland in the north, has already been authorized to go ahead with its first parliament, which met on October 17.

South African Take-over

South West African governmental functions which have now been incorporated by South Africa include:

revenue, excluding personal income tax, which will remain under the control of the Legislative Assembly, and a few minor sources of income;

health, excluding some services to be retained locally;

commerce, industries, and labor; agriculture, justice, lands, and the Land and Agricultural Bank of the Territory;

colored affairs, education (not including that of whites); post and telegraph; social welfare; water affairs and works, excluding services undertaken by the administration;

mining, roads, with some exceptions; supplies and transport, prisons, deeds and archives, and work of the Surveyor-General.

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The latest measure in the extension of apartheid in South West Africa was to force 8,000 inhabitants of the Old Location in Windhoek, capital of the territory, to move from their homes to a new township of Katutura. After a nine-year resistance, nearly all were forced out this September, although it was acknowledged that Katutura did not have adequate housing for them. Many people had to seek refuge in impoverished rural reserves.

Each continuing step toward destruction of South West Africa and its incorporation into South Africa - trials, appeals, dispossession, fragmentation into "native nations" - must be watched, recorded, called to the attention of the U.N. and particularly the great powers (who have refused to serve on the U.N. Council for Namibia) as a reminder of their responsibility. Until they can be moved to constructive action, private action must continue to aid the South West African nationalist liberation movements; to provide defense for nationalists on trial and to help their families; and to publicize the situation to the world.

Act Now

Ask the United States to take positive action at the United Nations. Write to the Honorable James R. Wiggins, United States Ambassador to the U.N., 799 U.N. Plaza, New York, N.Y., 10017. Urge that the United States support a full Security Council debate on Namibia dealing with the implementation of General Assembly resolutions and support for the U.N. Council of Namibia.

Contribute to the Africa Defense and Aid Fund of the American Committee on Africa, in order to provide legal defense and aid to political prisoners and their families.

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