The South West Africa case at The Hague

The end approaches —a summary and an analysis

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BACKGROUND

By resolution 1060 (XI) of 26. 2. 1957 the General Assembly of the United Nations requested the Committee on South West Africa to study the following question:

"What legal action is open to the organs of the U.N. or the former members of the League of Nations, acting either individually or jointly, to ensure that the Union of South Africa fulfils the obligations assumed by it under the mandate, pending the placing of the Territory of S.W.A. under the International Trusteeship System?"

At that stage it was clear that the UN members had become completely frustrated by the defiance of their resolutions by the S.A. government. It was felt that some form of action involving the International Court of Justice might induce the United Kingdom to take a more powerful position against S.A. Britain was regarded as the key power — by virtue of her involvement with S.A. — that could effectively act against the S.A. government.

The Committee on S.W.A. submitted a special report on this question and on their findings they were requested to consider further the question of securing from the International Court advisory opinions as regards the administration of S.W.A. The Committee then reported that cases that could be legally sumbitted to the ICJ for decision could be divided into various categories:

1. *Acts relating to the international status of the Territory,* for example: (a) the representation of the Territory in the S.A. parliament; (b) the degree and nature of integration of the Territory with S.A. including the integration of services; (c) the administrative separation of the Eastern Caprivi Zipfel from the rest of the Territory and its administration as an integral part of S.A.; (d) the vesting of the S.W.A. Native Reserves Land in the S.A. Native Trust.

2. *Acts relating to the moral and material well-being and social progress of the inhabitants of the Territory,* for example: (a) application of the practice of apartheid; (b) application of racially discriminatory legislation in the political, economic, social and educational fields; (c) application of restrictions on freedom of movement and alienation of land; (e) legislation providing for the expulsion from the Territory of persons under the protection of the Mandate System.

The Committee further drew attention to the consideration of the extent of the authority of the U.N. General Assembly, especially its supervisory authority in respect of S.W.A., and whether legal procedure could be embarked on concurrently with other and different courses of action by the U.N. towards the solution of the problem.

UNITED NATIONS POSITION

By resolution 1140 (XII) the General Assembly defined in categorical terms its position in respect of the administration of S.W.A. and the trend of administration represented a situation contrary to the Mandate System, the charter of the U.N., the Universal Declaration of Human Rights, the advisory opinions of the I.C.J., and the resolution of the U.N. General Assembly.

THE AFRICAN STATES

Against this background the African independent and semi-independent states met in Addis Ababa in June 1960 where Mr. Ernest Gross, legal adviser to the Liberian government, addressed them on the legal position of S.W.A. and the possible action that could be taken in the I.C.J.

Questions were raised as to the timing of the filing of the proceedings against S.A. in the International Court and the effect of the proceedings on other possible courses of action.

It was then decided that a study be made of these questions and a committee of four states, Liberia, Ethiopia, Ghana and the United Arab Republic, was appointed. The understanding was that the decision to go to court would depend on the report of this committee. On November 4, 1960, Liberia and Ethiopia, through their permanent U.N. representatives, announced that they had filed the case with the I.C.J.

THE CHARGES

Ethiopia and Liberia submitted the charges on the basis of Article 7 of the mandate for S.W.A. and Article 37 of the status of the I.C.J. under which the court had jurisdiction on disputes arising from the administration of mandated territories. They argued that S.A. had violated and continued to violate Article 2 of the mandate and Article 22 of the covenant of the League of Nations.

In their view S.A. had failed "to promote to the utmost the material and moral well-being and social progress of the inhabitants of S.W.A." by:

(*a*) distinguishing, in law and practice, as to race, colour, and national origin in establishing the rights and duties of the peoples of S.W.A., i.e. by the application of apartheid.

(*b*) by adopting and applying legislation, regulations, proclamations and administrative decrees, which were arbitrary, unreasonable, unjust and derimental to human dignity and which had suppressed the rights and liberties of the inhabitants of the territory.

The S.A. government was further charged with violating Article 2 of the mandate and Article 22 of the covenant by exercising powers of administration and legislation inconsistent with the international status of the territory. For example:

(*a*) by the adoption of the S.W.A. Affairs Amendment Act 1949, which provided for the representation of S.W.A. in the S.A. parliament.

(*b*) by transferring the administration of African affairs to the Minister of Bantu Administration and Development of S.A. and vesting all S.W.A. Native Reserve land in the S.A. Native Trust.

(*c*) by administering the Eastern Caprivi Zipfel under Union Proclamation No. 147 of 1939 as an integral part of S.A.

(*d*) by refusing to transmit to the General Assembly of the U.N. petitions from the inhabitants of S.W.A. and preventing residents of S.W.A. from appearing before U.N. bodies at the invitation of these bodies.

Finally Ethiopia and Liberia said that they had submitted the case for the compulsory jurisdiction of the court because the issues involved had not been and could not be settled by negotiation, as exemplified by the failure of all attempts at negotiation, e.g. through the three U.N. bodies: the *ad hoc* Committee on S.W.A., the U.N. Committee on S.W.A., and the Good Offices Commission.

The court was asked to rule accordingly.

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South West Africa

SOUTH AFRICAN PRELIMINARY OBJECTIONS

On November 30, 1961, S.A. filed counter-submissions stating that the applicants, Ethiopia and Liberia, had no *locus standi* in the proceedings because:

(*a*) by reason of the dissolution of the League of Nations the mandate for S.W.A. was no longer a "treaty or convention in force" within the meaning of Article 37 of the court statute.

(*b*) neither of the applicants was any longer "another member of the League of Nations" as required by Article 7 of the mandate for S.W.A.

(*c*) no dispute in the sense contemplated by Article 7 of the mandate was involved in the matters presented for adjudication by the court.

(*d*) no dispute existed which could not "be settled by negotiation" within the meaning of Article 7 of the mandate.

On December 21, 1962 the court rejected the preliminary objections by 8 votes to 7. With regard to the first objection (*a*) the court stated that the obligations of the S.A. government to submit to international supervision were clear and that though the League of Nations and the Permanent Court of Justice had both ceased to exist the obligation of S.A. to submit to the compulsory jurisdiction of that court was effectively transferred to the I.C.J. before the dissolution of the League of Nations.

As regards the second objection (*b*) the court held that the interpretation according to the ordinary meaning of the words employed was not an absolute rule and that it could not apply where it resulted in meanings incompatible with the spirit, purpose and context of the provisions to be interpreted.

On the third objection (*c*) the court ruled that the mandate had referred to "any dispute whatever" arising between S.A. and another member of the League. And on the last objection (*d*) the court said that it was evident that a deadlock on the issues of the dispute was reached and had remained since and that no modifications of the respective contentions had taken place since the discussions and negotiations in the U.N.

The line-up of the judges was as follows.

Those for the majority opinion: Judges Alfaro (Panama), Badawi (U.A.R.), Morena Quitana (Argentine), Koretsky (Soviet Union), Bustamente y Rivero (Peru), Jessup (U.S.A.), Sir Louis Mbanefo (Nigeria) *ad hoc*, Wellington Koo (Nationalist China).

Those dissenting: Judges Winiarski (then president of the court, Poland), Basdevant (France), Sir Percy Spender (Australia), Sir Gerald Fitzmaurice (U.K.), Morelli (Italy) Spiropoulos (Greece), Van Wyk (South Africa).

Dissenting opinions were given separately by Fitzmaurice and Spender jointly; Winiarski; Van Wyk.

Fitzmaurice and Spender upheld all four S.A. preliminary objections saying that the mandate was not a treaty or convention in force and that the end however good in itself did not justify the means where the legal means were of such character as to be inadmissible.

Winiarski held that the legal rights of Ethiopia and Liberia were not involved in the dispute before the Court and the Court was therefore not competent to deal with the case.

Van Wyk said that there was no substitute rule of law which provided that where an international organisation came to an end and another one performing similar functions came into being, the powers and functions of the old organisations should pass automatically to the new one.

SOUTH AFRICAN REPLY TO THE CHARGES

S.A. then submitted a counter memorial on January 10, 1964 to answer the charges made by Ethiopia and Liberia.

These are the issues that have been orally argued before the Court since March 15, 1965.

In the course of the present oral hearings Ethiopia and Liberia amended their original submissions by adding the following:

(*a*) that S.A., by virtue of economic, political, social and educational policies applied within the territories . . . has in the light of applicable international standards or international legal norm, or both, failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the territory.

(*b*) that S.A. has established military bases within the territory in violation of its obligations under Article 4 of the mandate and Article 22 of the covenant of the League.

At the time of writing, S.A. is still replying to the charges, Ethiopia and Liberia having, subject to some reservations, completed their arguments and rested their case.

In her initial argument S.A. had said that these amendments had constituted a new dispute which made it unnecessary for them to call all their witnesses. Argument and the evidence of witnesses continues.

POSSIBLE EFFECTS OF THE JUDGMENT

The next important stage will be the ruling of the court.

There are three possible ways in which the court could adjudge: in favour of S.A.; ambiguously in effect; against S.A. and in favour of Ethiopia and Liberia.

If the court finds in favour of S.A. then it will be left to the General Assembly of the U.N. to decide whether they will accept the ruling as binding in relation to whatever action they may want to take on the basis of their own political conclusion and judgements, and to the people of S.W.A., who are not party to the proceedings, whether they will accept the judgment of the court.

The position of the people of S.W.A. is as follows:

While they feel that the judgment of the court may clarify some issues as regards the international status of S.W.A. they hold that their birthright to self-determination and the territory's right to independence are inalienable rights which cannot be determined by a court of law, especially in a dispute to which they had not been parties. They maintain that as they were not consulted on (let alone participated in) the discussions leading to the conversion of their country into a mandated territory, the mandate holds good only as a basis for a dispute between members of the League of Nations (or the U.N.) and S.A. They submit that, mandate or no mandate, their wishes should be the overriding factor in the determination of the future of S.W.A.

Secondly, if the judgment is ambiguous,

then it will be subject to interpretation either by the court or by the U.N.

Finally, in the event of the court ruling against S.A., the legal position is that S.A. should be bound by the judgment and should abide by whatever the court decides.

As S.A. has refused to indicate whether they will accept the judgment of the Court it can be assumed with a fair amount of certainty that they will not accept an adverse judgment. In that case Article 94 (2) of the U.N. Charter provides that if any party to a case fails to perform the obligations incumbent upon it under a judgment of the court the other party may have recourse to the Security Council which may decide upon measures to be taken to give effect to the judgment.

The question is whether the U.N., judging by previous experience and its present condition and composition, will decide on and impose such measures as will give effect to the judgment of the Court.

Articles 40, 41 and 42 of the Charter provide for possible economic, diplomatic and military sanctions that may be imposed by the U.N. Security Council with binding effect.

But the Security Council may be called upon to act on the judgment of the Court only if S.A. fails to comply with it. This, however, does not preclude it or the General Assembly from acting on political grounds. On the matter of U.N. judgment the possibility of S.A.'s deciding to comply with it cannot be ruled out, however. What is important is the manner in which S.A. may accept the judgment and the form her compliance will take.

(1) S.A. may announce that she is prepared to accept the judgment and indicate her preparedness to administer S.W.A. according to the letter of the mandate. As it appears that there is nothing in the mandate or convention of the statute of the I.C.J. empowering the latter to appoint an alternative administration, the issue will now be between her and the U.N. The U.N. may press that S.A. relinquish the administration of the territory to an administration appointed by them.

(2) A few problems arise in this connection. The Afro-Asian Group supported by the Socialist countries will call for the termination of the mandate, and the insti-

To the Proud

In the twirling mountains overhung with mist
Foretell Nodongo the proud name of the subsequent hours
Since, when you beat the loud music of your wings,
The secret night creeps underneath the measured time.

When you behold the fixed bulk of the sun
Jubilant in its uncertain festivals
Know that the symbol on which you stand shall vanish
Now that the dawning awaits us with her illusions.

Assemble the little hum of your pealing boast
For the sake of the reward meted to Somndeni
Who sat abundantly pride-flowing
Till the passer-by vultures of heaven overtook him.

We who stood by you poverty-stricken
Shall abandon you to the insanity of licence
And follow the winding path
Where the wisdom granaries hold increase.

Then shall your nakedness show
Teasing you before the unashamed sun.
Itching you shall unfurl the night
But we the sons of Time shall be our parent's race.

MAZISI KUNENE

Autumn

Dissent invades the mass'd
Forest ranks. On the heights, above,
Bluegums, pines and firs hold
To the green. Below, the flanks
Fall away. Poplars and oaks,
Turncoat, flare red, yellow, gold
And desperate brown, while stripp'd
Boughs and khaki footpaths
Reproach goldbraid pride.

RON AYLING

tution of a U.N. administration. The Western powers, led by the U.S.A. and the U.K., without directly opposing a U.N. *administration*, will definitely campaign for the continuance of the mandate (perhaps under S.A.) under the *supervision* of the U.N. These powers will argue that S.W.A. cannot stand on its own if only "for the time being"; that the U.N. has not the necessary resources, particularly financial to set up effective technical and administrative machinery in S.W.A. They will point to the present U.N. financial position and the problems of U.N. administration in the Congo and elsewhere. Paramount in their minds, however, will be the thought of a U.N. administration that might bring the Socialist countries as member-states of the U.N. into S.W.A. It is particularly this fear that may induce them to support the candidature of S.A. to continue as the mandatory power of administering authority, should S.A. decide to offer trusteeship status to S.W.A.

It is on the basis of these assumptions that the possibility of talks going on at the moment, at top and secret level between the U.K., U.S.A. and S.A. cannot be ruled out.

The late Ambassador Stevenson of the U.S.A. was quoted as saying that the decision of the court, whatever it will be, shall be enforced. And there is no doubt that Roving Ambassador Harriman did raise the question of S.W.A. with the British Government during his visits to London "to discuss African affairs," first during the Conservative administration and then with the Labour government. What was discussed can only be speculated upon, but it is fairly certain that the U.K. and U.S.A. governments are concerned about the prestige of the I.C.J. (not so much about the sufferings of the people of SWA) if the court should rule against S.A. and its judgment be defied.

On the other hand, the S.A. government is also concerned about its own position in the event of an adverse judgment being handed down. So far they have not stated whether they will accept the judgment of the court or not. This position, though strategically sound on their part, has not helped to allay the anxieties of the settler population in S.W.A.

What has not been so clear to the whites in S.W.A. is why S.A. should spend so much money on the case if they are not prepared to accept the judgment of the court — unless, that is, they are certain of a favourable outcome. Though it is generally assumed that the UN may not be able to put together a force strong enough to overpower the S.A. forces in the event of direct confrontation, the possibility of intervention on the part of the UK and U.S.A. is still feared. Then there is the brunt of the intervention which the civilian whites in S.W.A. may have to bear alone. If S.A. should take this into account she may decide not to defy the judgment of the court in a manner that could provoke the intervention of the U.S.A. and U.K. Since, moreover, the main objective of S.A. in S.W.A. is to maintain its presence there, they may look for ways and means that might ensure their remaining in S.W.A. without a shot being fired. This, then, is the basis for fears that a compromise might be in the offing between the U.K. and U.S.A. on the one hand and S.A. on the other.

WHAT CAN BE DONE?

It is clear that, for the purpose of the judgment the more important states are the Western powers, and particularly the U.K. and U.S.A. This is not necessarily because they are more concerned with the preservation of the prestige of the court, but because S.A.'s political power and ultimately her constitutional position in S.W.A. rest in the main on their economic support.

Here in the economic factor, as distinct from the moral commitment to the rule of law lies the dilemma of the West. Without being naive, it can safely be stated that as long as the commercial interests of the West in S.A. and S.W.A. are effectively safeguarded by a trusted Western and White government, they will consider it their duty to "White civilisation" to help along this black sheep of the family.

As long as the world balance of power in terms of real physical power and not just in terms of votes, favours the West, those countries in which their own White and Western interest "must" be preserved will remain at the mercy of the Western powers — at least as far as action at international level is called for. "African unity" which once posed a threat to Western monopolistic tendencies and practices in Africa is on the way out. Perhaps its going will pave the way for real and principled unity on a progressive and revolutionary basis.

In the circumstances it is difficult to expect any effective international action against the Government of S.A. without the participation of the Western powers.

Some people have said that the U.S.A. and perhaps the U.K. as well may feel they will have the opportunity of "repairing" the damage to their reputation, suffered in places like Vietnam, Malaysia and the Congo. It is said that these powers will feel that taking action against the Whites in S.W.A. will help remove the racialist label at present round their necks. While the view of progressive Africans and South Africans in particular is that action in S.W.A. does not exonerate Western action in other places, it remains to be seen whether feelings about the shattered image can overcome the strong kith and kin motivation.

In spite of all this it is the belief of the people of S.W.A. that with the honest solidarity of the many individuals and groups of some governments in the West, together with real support from the anti-imperialist camp, it is possible to find a way out which will ensure the realisation of the supremacy of the interests of the people of S.W.A. ●