ACCEPTANCE OF JURISDICTION IN THE SOUTH WEST AFRICA CASES

Robert S. Mueller, III

ACCEPTANCE OF JURISDICTION IN THE SOUTH WEST AFRICA CASES

. . .

Its Effect on the Development of the International Court of Justice

by

Robert S. Mueller, III

A senior thesis
submitted to the Department of Politics
in partial fulfillment of the requirements for
the degree of Bachelor of Arts
Princeton University
Princeton, New Jersey

April 15, 1966

ACKNOWLEDGEMENT

I would like to extend grateful acknowledgement to Professor Richard A. Falk for his stimulating guidance in the preparation of this Thesis.

TABLE OF CONTENTS

INTRODUCTION

> The Court concludes that Article 7 of the Mandate is a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court and that the dispute is one which is envisaged in the said Article 7 and cannot be settled by negotiation. Consequently the Court is competent to hear the dispute on the merits.[1]

With these words, on December 21, 1962 the International Court of Justice accepted jurisdiction of the dispute between Ethiopia and Liberia, and the Government of South Africa. The decision of the Court was a major step towards resolving the delicate problem of South West Africa; a problem that had been an acute source of frustration to both the Government of South Africa and the international community ever since the inauguration of the Mandate System in 1921.[2]

On November 4, 1960 Ethiopia and Liberia submitted Applications to the Registrar of the International Court of Justice requesting the Court to "adjudge and declare" on two major areas of issues.[3] First, they asked the Court to reaffirm the stand it took in its 1950 Advisory Opinion and uphold the continuing existence of the Mandate and the obligations of the Mandatory derived therefrom. The second area of issues

---

[1]International Court of Justice, South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962: International Court of Justice Reports 1962, p. 347. Hereafter cited as South West Africa Cases. The Mandate for South West Africa is reprinted in Appendix I.

[2]Article 22 of the Covenant of the League of Nations which provides for the establishment of a mandate system is reprinted in Appendix II.

[3]South West Africa Cases, 321-324.

was concerned with apartheid. The Applicants wished the Court to give legal support to their view that the Respondent "has practiced apartheid . . . in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; . . ."[4] The Applicants went on to request the Court to decide that the "Union has the duty forthwith to cease and desist from any action which thwarts the orderly development of self-government in the Territory."[5]

Although the practice of apartheid was the major complaint lodged by the Applicants in their indictment of the Respondent's administration of the Mandate, they alleged South Africa derelict in other of her obligations to the international community. Ethiopia and Liberia charged, inter alia, that the Respondent had established military bases in the Territory, and had "attempted to modify substantially the terms of the Mandate without the consent of the United Nations"; furthermore, she had failed to submit reports and petitions to the General Assembly of the U.N. These aforementioned practices of South Africa were all contrary to the provisions of the Mandate and the Covenant of the League.

The response of the Republic of South Africa was to submit Four Preliminary Objections questioning the locus standi of the Applicants.[6] The Applicants had rested their arguments

---

[4] Ibid., p. 323.

[5] Ibid.

[6] Ibid., pp. 326-327.

for the Court's jurisdiction of the case on Article 7 of the Mandate and Article 37 of the Statute of the Court, with regard to Article 80 (1) of the Charter of the United Nations. In sum, the Respondent contended that the Mandate was not a "treaty or convention in force" within the meaning of Article 37 of the Statute, and that the conditions laid down in Article 7 of the Mandate had not been fulfilled. By this they referred to the "conditions" that there must be a "dispute" incapable of being settled by "negotiations," that the dispute must be between the Mandatory and "another Member of the League of Nations," and lastly that, "The dispute must relate to the interpretation or application of the provisions of the Mandate." The Respondent maintained that none of these conditions had been fulfilled in this present submission.

The purpose of this paper is to show that, though the Court accepted jurisdiction in the face of many persuasive legal arguments backing the view that the case was outside the jurisdiction of the Court, nevertheless the decision was sound in regard to the role of the Court in the maintenance of international peace. An analysis of the arguments for and against accepting jurisdiction found in the decision of the Court, in the separate opinions, and in the dissenting opinions indicate the lines of legal argument that the Court relies upon for its affirmative decision. It is argued here that the decision is based on a sound legal footing and

it therefore does not undermine the continuity, development, and legal authority of the Court.

While it is true that the decision of the Court was a legal decision, not a political decision, the view subscribed to by the Court was also politically opportune in that it was a necessary step forward towards a world peace based on the rule of law. This conclusion is premised on the assumption that the primary role of international law and the International Court of Justice is in the maintenance of peace through a gradual expansion of the scope of jurisdiction of the international legal system. This assumption itself is founded on, and derived from, a definition of international law not unlike the one proposed by Myres S. McDougal in his work, Studies in World Public Order.[7] Although this may become obvious in the last chapter of this Thesis, it is important to note here that the contribution of the International Court of Justice to the development of international law is judged in the light of a definition of international law that is closer to the practicality of McDougal's definition than to the rigidity of Kelsen's.[8]

Chapter One of this Thesis briefly describes the background of South West Africa that is relevant to the Court's decision. This brief history of South West Africa shows the Court's decision to be another episode in a long series of skirmishes between the Government of South Africa and the

---

[7]Myres S. McDougal and Associates, Studies in World Public Order (New Haven: Yale University Press, 1960), pp. 3-41.

[8]Hans Kelsen, Principles of International Law (New

international community as represented by the League of Nations and the United Nations. The litigation initiated by Ethiopia and Liberia is seen as another stage in the cautious, restrained assault of the United Nations on South Africa's pursuit of the policy of apartheid in the Territory of South West Africa.

Chapter Two juxtaposes the arguments of the Court (here to mean the arguments found in the Court's opinion and the arguments found in the separate opinions) and the arguments of the dissenters. In analyzing these arguments, it becomes clear that the dissenting judges and the Court emphasize conflicting principles of international law. The dissimilar starting principles lead to the opposing stands taken on the question of whether the Court should accept jurisdiction of the case.

From these two chapters, Chapter Three attempts to draw some conclusions on the ramifications that the Court's decision will have, first on the development of the Court as a court of law; and second, in the larger context of international relations, on the development of the Court as a factor in international politics. It is argued that the decision on the jurisdiction of the South West Africa Cases is an important contribution to the development of the International Court of Justice in both the limited field of international law, and the wider field of international politics.

York: Rinehart & Company, 1952), pp. 3-89.

CHAPTER I

SOUTH WEST AFRICA: A BRIEF HISTORY

South West Africa: The Land and the People Today

The territory of South West Africa is an area of 317,825 square miles located on the Western coast of South Africa above the Cape Province of the Republic of South Africa. Most of the territory is made up of a large plateau which has an average altitude of about 3,600 feet. The plateau is interspersed with mountain ranges, the largest ranges found in the vicinity of the capital, Windhoek. In contrast to the mountainous areas, the coastal regions and parts of the plateau are desert.[1]

The discovery of diamonds in 1908 marked the beginning of what would become South West Africa's major industry. More recently, the fishing industry built on the adequate supply of rock lobster, pilchards, whitefish, and snoek has come to

---

[1]Information under this heading has been taken from: 1) United Nations, General Assembly, Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration in the Granting of Independence to Colonial Countries and Peoples, Chapter IV: "South West Africa" (A 6000/Add 2*, September 28, 1965); 2) Eric Rosenthal (ed.), Encyclopaedia of Southern Africa (London and New York: Frederick Warne & Co., Ltd., 1961), pp. 493-496; 3) A. Gordon-Brown (ed.), The Year Book and Guide to Southern Africa: 1964 Edition (London: Robert Hale Ltd., 1964), pp. 219-231.

GNP figures and other economic statistics for South West Africa are difficult to find. In most statistical studies the figures for South West Africa are subsumed in the statistics for the Republic of South Africa. However, a useful discussion of the South West African economic situation can be found in an article by Dr. D. C. Krogh: "The National Income and Expenditure of South-West Africa (1920-1956)," The South African Journal of Economics, XXVIII, No. 1 (March 1960), pp. 3-22.

take its place beside the diamond industry as a mainstay of the territory's economy. Several minerals which contribute to a major portion of the exports are vanadium ore, lead-copper ore, and manganese ore. Another notable industry to which the climate and land conditions are well suited is the breeding of Karakul sheep.

The population statistics and the political and economic relationships of the various ethnic groups are important factors in gaining a perspective on the character of South West Africa. According to the 1960 census, the number of Europeans in the territory is 73,154; the number of Coloreds and Natives within the Police Zone is 182,063; and the number of Coloreds and Natives outside the Police Zone is estimated at 269,847.[2]

Although the Natives and Coloreds outnumber the White population by more than six to one, the Whites have total economic and political control of the territory. Ruth First, in her recent book, South West Africa, describes the degree of authority maintained by the White minority:

> In the Police Zone itself, a small minority of White voters, pampered by the South African Administration,

---

[2]The "Police Zone" is that part of South West Africa owned and administrated by the White Europeans, as opposed to the "Homelands" or "Reserves" of the Natives. No Native owns property in the Police Zone. Inside the Police Zone he is considered a transient. 24% of the land in South West Africa is in the "Reserves," 76% in the Police Zone. Ruth First, South West Africa (Baltimore: Penguin Books, 1963), pp. 121-123.

> run a world which Africans share only as unskilled labourers; beyond the Line four all-powerful White officials rule the lives of the remaining quarter of a million.[3]

The Line of which she speaks is the Red Line which demarcates the Police Zone from the land granted to the Natives and Coloreds. The Red Line is in fact a wall, no less severe or impregnable than the Iron Curtain. It runs across the northernmost part of the territory separating the best land of the White sector from the worst land of the Native sector.

This situation in South West Africa is in complete harmony with the theory of apartheid, the acknowledged racial policy of the Republic of South Africa. The lands that are to constitute the 'homelands' of the Natives and the Coloreds are the most arable, the most desolate, the most unproductive of the Territory; and yet the defenders of South African policy argue that the 'homelands' of the Bantu are being returned to him. This is the situation as it stands now, forty-five years after the territory became a 'sacred trust of civilization.'

South West Africa and the League of Nations

Domination by White Europeans was first recognized de jure in 1884. In that year, Adolf Luderitz established European rights over the colony, bringing it under the authority of Germany with the consent of Bismarck.[4] It remained a

---

[3] Ibid., p. 121.

[4] Ibid., p. 71.

colony of Germany until World War I. Shortly after the outbreak of World War I, the territory was invaded by troops from South Africa and surrendered at Nakob in 1915. From 1915 to 1919 it was administered by the Government of South Africa under martial law.[5]

From 1919 to the present day, the history of South West Africa is linked inseparably to the League of Nations, the United Nations, and the Government of South Africa. It is a history of frustration and uncertainty on the question of who holds ultimate sovereignty over the area.

The defeat of the Kaiser in 1918 first brought the status of the territory to the forefront of international discussion. By Article 119 of the Versailles Treaty, Germany ceded the rights to her colonies to the Principal Allied and Associated Powers with the condition that they become Mandates.

The idea of a Mandate System had been germinating in the minds of various Allied statesmen for many years before the defeat of Germany.[6] Ironically, Field Marshall Smuts, the foremost representative of South Africa at the drafting of the League, was one of those visionaries who were responsible for the inclusion of a Mandate System in the League. However, the African territories were not included in his vision of the

---

[5] Ibid., pp. 87-93.

[6] H. Duncan Hall, Mandates, Dependencies and Trusteeship (Washington: Carnegie Endowment for International Peace, 1948), p. 108.

Mandate System. President Wilson would extend the scope of the Mandate System to include the Axis colonies in Africa, whereas Field Marshall Smuts would assume a dissenting role and press for the annexation of South West Africa into the Union of South Africa.

President Wilson most adequately summed up the high aspirations of those who sought to make the Mandate System a reality. In his address to the Joint Session of Congress on January 8, 1918. He listed as the fifth point of the famous Fourteen Points for his "programme of the World's peace,"

> V. A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.[7]

There were three roads open to the Paris Peace Conference in the "adjustment of all colonial claims." The first was open annexation; the second, complete control by the international community; and the third, a combination of the two. The Peace Conference selected the third, a temporary solution being envisaged until the peoples of the Mandated territories would be able to run their own governments.[8]

The first step in setting up the Mandate System was the selection of the Mandatories. This was done by the

---

[7]Ray Stannard Baker, Woodrow Wilson and World Settlement (Garden City, N. Y.: Doubleday, Page & Co., 1922), III, p. 43.

[8]Hall, p. 31.

Principal Allied and Associated Powers. On May 7, 1919, the Supreme Council designated the Union of South Africa as the Mandatory for South West Africa.[9]

In July and August of 1919, the texts for both the "B" and "C" Mandates were drawn up.[10] The League of Nations was established when the Versailles Treaty went into effect on January 10, 1920; in early December of the same year, the drafts of the "C" Mandates were submitted to the Council of the League for review and confirmation. The drafts for the "C" Mandates were confirmed by the Council on December 17 and the Mandate for South West Africa went into effect on January 1, 1921. The Union Government had taken up the reins of administration on behalf of the international community.[11]

The history of the Mandate for South West Africa under the League of Nations was not remarkably different than that of the other Mandated territories during that period. Two aspects, however, are important. First, the Union of South Africa was acknowledged to be the most derelict of all the Mandatories in carrying out its duty to the international community. The Permanent Mandates Commission often had to reprimand the Union for its exploitative Native policies in the

---

[9] Ibid., p. 145.

[10] "Three types of mandates were prepared designated as 'A,' 'B,' and 'C' corresponding to the three classes of territory described in article 22 of the Covenant." Quincy Wright, Mandates under the League of Nations (Chicago, Illinois: The University of Chicago Press, 1930), p. 47.

[11] Hall, pp. 136-143.

Mandated territory.[12] Its system of forced labor and reserves was in no way compatible with the spirit of Article 22 of the Covenant. Many problems resulted from this exploitative attitude of the Mandatory. Quincy Wright in his book, Mandates Under the League of Nations, makes reference to some of these problems:

> The usual African mandate problems of land tenure, forced labor, suppression of slavery and liquor traffic, development of education, and public-health service have arisen in South West Africa in aggravated form.[13]

It suffices to say that the Union administration of South West Africa was at best a token effort to contribute to the progress of the Natives; and at worst, an administration grounded on the assumption that the Mandated territory was a private supply of cheap labor for South Africa.

The second important aspect of the history of the Mandate during the League of Nations was the inability to resolve the question of sovereignty over the Mandated territory. Ruth First places this question in proper focus:

> The whole mandate system constituted a compromise between the open annexation of the colonies as envisaged in the secret treaties among the governments of the Allied Powers, and demands that the colonial territories be entrusted to international administration. It turned out to be a one-sided compromise, however. . . .[14]

The Mandatory from the outset treated the territory as an

---

[12] Wright, pp. 208-212.

[13] Ibid., p. 211.

[14] First, p. 172.

integral part of the Union.

> In South Africa there thus seems to be a tendency greater than elsewhere for the legislature, the executive, and the courts to regard the mandated territory as under the mandatory's sovereignty.[15]

Who had sovereignty over the Mandates: the Principal Allied and Associated Powers, the League of Nations, or the Mandatories? This question was neither answered in the Covenant of the League, in the texts of the various Mandates, nor in the subsequent actions of either the League or the Mandatories. Many views as to who had ultimate sovereignty were put forth, but none gained recognition as being the correct interpretation.[16]

At the dissolution of the League of Nations in 1946, this question remained unresolved.

> But in the case of mandates, the League died without a testament. . . . There was no transfer of sovereignty to the United Nations. Either title expired with the League or there never had been any League title. The mandatories were left in undisputed occupation of the territories.[17]

The League of Nations had proven incapable of: first, compelling the Union to live up to its obligation to the international community and to the progress of the peoples in the Mandated territory; and second, resolving the question of

---

[15]Wright, p. 427.

[16]E. Kahn, "The International Court's Advisory Opinion on the International Status of South West Africa," The International Quarterly, IV, No. 2 (April, 1951), p. 98.

[17]Hall, p. 273.

which of the parties to the Mandate Agreement was the legitimate source of power. Would the United Nations prove more effective than the League in resolving these problems?

South West Africa and the United Nations

While the League of Nations was concluding its affairs in 1946, a solution to the question of who had sovereignty over South West Africa was being proposed in another international arena by Field Marshall Smuts of South Africa. In a speech before the Fourth Committee of the United Nations General Assembly (committee in charge of trusteeship questions, including non-selfgoverning territories), he put forth the Union Government's arguments for the incorporation of South West Africa into the Union of South Africa.

> South West Africa is so thoroughly integrated with the Union that its formal incorporation is required mainly to remove doubts and to render it necessary to maintain a separate fiscal system.[18]
>
> . . . integration of South West Africa within the Union would be mainly a formal recognition of a unity which already exists. . . .[19]

There were further reasons for annexation: First, the territory was too sparsely populated and too backward to be capable

---

[18]United Nations, A/C 4/41, 4 November 1946. Official Records of the First Session of the General Assembly, Fourth Committee, Summary Records of Meetings from 1 November to 12 December, 1946 (Lake Success, New York, n.d.) p. 238. (Hereafter, O.R. of the . . . Session of the G.A.)

[19]Ibid., p. 244.

of efficiently governing itself. Second, a majority, in a special referendum, had voted for the incorporation of South West Africa into the Union.[20]

On December 14, 1946 the General Assembly adopted a resolution, drafted by the Fourth Committee, which rebuffed Smuts' move for annexation. The resolution said, inter alia, that the United Nations would not agree to the annexation of South West Africa, and recommended that the Mandate be placed under the Trusteeship System.[21]

This was but the first crossing of swords in the history of the interrelations of the United Nations and the Union Government of South Africa over the Mandate for South West Africa. The question of ultimate sovereignty was to continue to be the causa causans of disagreement. The United Nations would not accede to the demands of South Africa that the territory be annexed, and the Union Government would not bring the territory under the Trusteeship System. It is important to note here the uniqueness of the South West African situation in that South West Africa was the only Mandated territory not to gain independence at the dissolution of the League or be transferred to the authority of the Trusteeship System.

---

[20] Idem, A/123, 17 October, 1946. A/C 4/41, 4 November, 1946. pp. 199-244.

[21] U.N., Resolution 65(I) of 14 December 1946. O.R. of the First Session of the G.A., Supplements: Resolutions Adopted by the General Assembly during 23 October-15 December, 1946 (A/64 Add. 1), pp. 123-124.

In 1947, South Africa submitted the report for 1946 to the United Nations. This was the first and last report that the Union Government was to make on its administration of the Mandated territory.[22] The Union Government's repressive policies, revealed in the report, were extensively denounced by the Trusteeship Council. The theory of apartheid itself was criticized at length.[23]

South Africa's reaction to the criticism was to take affront at what it considered a breach of her rights as a sovereign state by an international organization. Mr. Jordaan, the deputy permanent representative of South Africa, made it clear in a letter to the General Assembly, dated 11 July, 1949, that the Union Government thought the criticism of the report by the Fourth Committee embodied censures of her own domestic policies. According to Mr. Jordaan, in examining the report, the United Nations obviously had not seen fit to take into account the unique circumstances of the South West African situation.[24] This "mismanagement" of the report by the

---

[22]U.N., T/175, May 31, 1948. Trusteeship Council, Official Records of the Third Session, Supplement (T337) (Lake Success, New York: n.d.), pp. 51-152.

[23]U.N., O.R. of the Second Session of the G.A., Trusteeship Council: Report to the General Assembly covering 26 March-28 April 1947, Supplement No. 4 (A/312) (Lake Success, New York: 1947), pp. 42-45.

[24]J. R. Jordaans, Letter of 11 July 1949 addressed to the Secretary General of the United Nations (A/929). U.N., O.R. of the Fourth Session of the G.A., Fourth Committee: Annex to the Summary Records of Meetings (Lake Success, New York: 1949), pp. 7-8.

United Nations was then used as an excuse for discontinuing the submission of further reports on the administration of South West Africa.

In 1949, the dispute between South Africa and the United Nations over the Mandate for South West Africa came to a head. Probably more than any other one person, the Reverend Michael Scott was responsible for impressing the United Nations that action from the international organization was necessary, indeed crucial, to assuring that due justice was done to the Mandated peoples of South West Africa. Michael Scott was an Anglican Minister who had lived in South Africa since 1926; he had taken it upon himself to be the spokesman for the oppressed tribes of that territory.[25]

After much discussion on the legality of allowing Michael Scott to petition on behalf of the peoples of South West Africa, he was permitted to present his case before the Fourth Committee.[26] On November 26, 1949, in a prepared statement, he effectively described the plight of the tribes of South West Africa as a result of the racist doctrines of the Mandatory power.[27] He then crystallized the alternative

---

[25]Michael Scott, in pamphlet, "Shadow over Africa" (London: The Union of Democratic Control, 1950), from introduction by Tom Driberg.

[26]U.N., Yearbook of the United Nations, 1948-1949, Sales No.: 1950 I.11 (Lake Success, New York: Department of Public Information, United Nations, 1950), p. 868.

[27]U.N., O.R. of the Fourth Session of the G.A., Fourth

futures now facing South West Africa, and Africa in general at the hands of the international community:

> The choice before our civilization . . . lies between an honest adherence to the principles of trusteeship, with the prospect of a balanced and orderly development by co-operative methods and means; or a short-term, and necessarily short-lived, programme of repression bringing increasing destruction of both land and people.[27]

Michael Scott's hearing convinced the Fourth Committee of the seriousness of the situation.[29] Nevertheless, before the United Nations could proceed in its attempt to bring South West Africa under the supervision of the international community, several questions had to be answered. The Union Government had consistently expressed the view that the Mandate had expired in 1946 with the dissolution of the League of Nations. Once again the question of the sovereignty of the Mandated territory which had plagued the League of Nations required answering.

The General Assembly embodied its questions in a resolution adopted on 6 December 1949 in which it asked the International Court of Justice for an Advisory Opinion on the Status of South West Africa.[30] The resolution requested the

---

Committee, Summary Records of Meetings from 20 September to 5 December 1949 (Lake Success, New York, n.d.), pp. 258-268.

[28]Michael Scott, pp. 2-3.

[29]U.N., Yearbook of the United Nations, 1948-1949, p. 868.

[30]U.N., Resolution 338(IV) of 6 December 1949. O.R. of the Fourth Session of the G.A., Resolutions from 20 September

Court for an answer to the following question:

> What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South-West Africa arising therefrom, in particular:
>
> (a) Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations?
>
> (b) Are the provisions of Chapter 12 of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa?
>
> (c) Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the territory?[31]

In its opinion on the general question, the Court held unanimously, "that South-West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920."[32]

In answer to part (a) of the question, the Court upheld the view that the Mandatory continued to have obligations of an international nature in pursuance of Article 22 of the Covenant of the League of Nations, and the Mandate for South West Africa.[33] It should be noted that these obligations

---

to 10 December 1949 (Lake Success, New York: n.d.), p. 45.

[31] Ibid.

[32] International status of South West Africa, Advisory Opinion: I.C.J. Reports 1950, p. 143. (Hereafter, Status of SWA.)

[33] Ibid.

included, in addition to the responsibility of submitting reports and petitions to the United Nations, the obligation to submit to judicial supervision in the manner prescribed in Article 7 of the Mandate (the cumpulsory jurisdiction clause).

> . . . and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court; . . .[34]

This part of the Court's opinion was adopted by an impressive vote of 12 to 2.[35] In including a statement on the continuing relevance of Article 7 of the Mandate, the Court laid the legal foundations for the contentious proceedings brought by Ethiopia and Liberia in 1960.

The Court was of the opinion that the provisions of Chapter XII of the Charter were applicable to the South-West African situation, ". . . in the sense that they provide a means by which the Territory may be brought under the Trusteeship System; . . ." But the Court continued saying that the provisions of Chapter XII of the Charter, ". . . do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System; . . ."[36] Although the Court was unanimous on the applicability of Chapter XII, the vote was eight to six on the question of whether Chapter XII

---

[34] Ibid.

[35] Ibid.

[36] Ibid., p. 144.

imposed a legal obligation on the Mandatory.[37]

On the last question (c), the Court was again unanimous in its vote, adjudging that the Union of South Africa did not have the competence to unilaterally modify the status of South West Africa.[38]

Although the opinion of the Court lived up to the expectations of those who had asked for it, the Court failed still to answer the question of who had sovereignty over the Mandated Territory. On the one hand, the Court said that the Union Government did not have the right to bring the territory under her sovereignty; yet, on the other hand, the Court admitted that it did not have the legal right to compel the Mandatory to transfer the territory to the Trusteeship System. South West Africa was still a Mandated territory under the administration of the Union Government; in its role as Mandatory, the Union Government still had the obligation to submit reports and petitions to an international body; but what did that mean?

The 1950 Advisory Opinion ellicited various responses from the foremost scholars in the field of international law.[39] At one end of the spectrum were those who held the

---

[37] Ibid.

[38] Ibid.

[39] E. Kahn, pp. 84-85.

view that the United Nations was the acknowledged successor to the League of Nations. This view, premised on the assumption that the League of Nations held original sovereignty, was defended primarily by Quincy Wright.

On the other end of the spectrum were those such as Kelsen whose international legal theory is founded on an extremely conservative definition of international law. According to his analysis, the contentions of the Union of South Africa were well-founded. He would maintain that the Mandate ceased to exist with the demise of the League of Nations; therefore, the United Nations should have come to some formal agreement with the League of Nations establishing the continuity of the Mandate, or establishing the right of the United Nations to succeed the League as the legal recipient of the supervisory functions. In fact, Kelsen would go so far as to say that the de facto integration of South West Africa should be made de jure integration.

Between these two extremes one would find a variety of authoritative positions. Two who took up such positions are J. L. Brierly and Duncan Hall.[40] Brierly indicates his stand in the following quote:

> The present position is therefore that the mandate continues, but as the only responsibility of the mandatory is to the League of Nations, which is defunct, it is for

---

[40] Ibid., p. 84.

practical purposes at an end.[41]

The decision of the Court would come somewhere between the position of Brierly, and the position of Quincy Wright. The point is, however, that the Court (along with Brierly) fails to locate the sovereignty of the territory. Where Quincy Wright locates the sovereignty in the League of Nations followed by the United Nations, and Kelsen would locate the sovereignty in the Mandatory power, the Court is unclear in positing where it lies.

Would the Union of South Africa abide by the Advisory Opinion of the Court? The fact that she voted against the resolution of the General Assembly which gave effect to the Advisory Opinion indicated that she did not intend to.[42] 1950-1959 were years in which a series of committees, the Ad hoc Committee, the Committee on South West Africa, and the Good Offices Committee attempted to give effect to the Advisory Opinion of the Court by means of negotiations with the Union of South Africa.

The General Assembly accepted the Advisory Opinion of the International Court of Justice on the 13th of December, 1950. In the same resolution in which it accepted the decision,

---

[41] J. L. Brierly, The Law of Nations (Oxford: The Clarendon Press, 1928; Fourth Edition, 1950), p. 155, footnote.

[42] U.N., Yearbook of the United Nations, 1950, Sales No.: 1951 I.24 (New York: Department of Public Information, United Nations, 1951), p. 821.

the General Assembly urged "the Government of the Union of South Africa to take the necessary steps to give effect to the opinion of the International Court of Justice."[43] It also gave authorization for an Ad hoc Committee of five to negotiate with the Government of South Africa on how the Advisory Opinion might best be implemented. The Ad hoc Committee was authorized to receive and examine the reports and petitions that were passed on by the Union Government; at the same time, it was to investigate the possibilities of a new international instrument to replace the Mandate.

A proposal was put forward by the Union of South Africa that would make the three remaining Principal Allied and Associated Powers (the United Kingdom, the United States, and France) the second party to the new instrument. The Union would only go as far as to agree to supervision by the Court, and to United Nations' confirmation of the instrument.[44]

However, the Ad hoc Committee was bound by the 1950 Advisory Opinion of the Court and rejected the South African proposal on the grounds of the Court's stipulation that supervision of the administration of South West Africa was to be executed by the United Nations.[45]

---

[43] U.N., Resolution 449(V) of 13 December 1950. O.R. of the Fifth Session of the G.A., Supplement No. 20 (A/1775) (New York: n.d.), pp. 55-56.

[44] I. Goldblatt, The Mandated Territory of South West Africa in Relation to the United Nations (Cape Town, S. A.: C. Struik, 1961), p. 37.

[45] Ibid., pp. 37-38, 44-49.

The Ad hoc Committee submitted a counter proposal based on the Mandate System which adhered closely to the direction of the Court in 1950:

> The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations.[46]

This proposal was summarily rejected by the Union. The Union Government maintained that any supervision carried out by the United Nations would be more onerous than like supervision under the League. This contention was based on the difference of the voting systems in the two international organizations. Voting in the League of Nations had been on the unanimity rule; any nation could have an effective veto over any proposed legislation. This rule did not prevail in the United Nations.[47]

No middle ground existed between the proposals of the Ad hoc Committee and the Union Government. Neither would concede on the two areas of disagreement summarized by I. Goldblatt:

> (1) There was fundamental difference on how supervision of the administration by the Government of the Union of South Africa should be carried out. . . .
> (2) The Committee and the representatives of the Union Government did not agree on the identity of the second party to the agreement.[48]

---

[46] Status of SWA, p. 138.

[47] Goldblatt, p. 37.

[48] Ibid., p. 32.

In 1953, the Ad hoc Committee had been unable to give effect to the 1950 Advisory Opinion of the Court: no reports had been forthcoming from the Union Government on her administration of South West Africa, nor had there been any progress made in negotiating a new institution to replace the Mandate.[49] Consequently, the General Assembly accepted a resolution setting up a Committee on South West Africa which was to continue the work of the Ad hoc Committee while also, inter alia, examining "such information and documentation as may be available in respect of the Territory of South West Africa."[50]

The Union, notified of the sittings of the Committee on South West Africa and invited to send a representative, declined to do so. The Committee nevertheless continued without the cooperation of the Union Government.[51]

However, in examining reports, petitions, and other evidence of the conditions inside South West Africa, the Committee ran into problems as to how far it should go in conforming to the "procedure" followed by the Council of the

---

[49] U.N., Yearbook of the United Nations, 153, Sales No.: 1954 I.15 (New York: Department of Public Information, United Nations, 1954), pp. 540-541.

[50] U.N., Resolution 749(VIII)B of 28 November 1953. O.R. of the Eighth Session of the G.A., Supplement No. 17 (A/2630) (New York: n.d.), pp. 27-28.

[51] Goldblatt, p. 53.

League of Nations. Should decisions on the Mandate be made according to the two-thirds voting procedure of the United Nations since the voting in the League of Nations was based on the unanimity rule? Does the United Nations have the right to give oral hearings to petitioners from South West Africa?[52]

Anxious to prove the sincerity of its endeavors in making the degree of United Nations supervision no more of a burden that that of the League Council, the General Assembly asked the International Court of Justice to illuminate the legality of these two procedures. The question of the legality of deciding matters pertaining to the Mandate on a two-thirds majority was submitted to the Court by the General Assembly in the resolution of November 23, 1954.[53] The Court handed down its Advisory Opinion on June 7, 1955:

> There is thus no incompatibility between Rule F and the Opinion of 1950 in which the Court stated that the supervision to be exercised by the General Assembly should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations.[54]

"Rule F" was a special rule for voting on questions pertaining to the Mandate. It was identical to Article 18, paragraph 2, of the Charter which states, "Decisions of the

---

[52]U.N., Yearbook of the United Nations, 1954, Sales No. 1955 I.25 (New York: Columbia University Press in Cooperation with the United Nations, 1955), pp. 324-331.

[53]U.N., Resolution 904(IX) of 23 November 1954. O.R. of the Ninth Session of the G.A., Supplement No. 21 (A/2890) (New York: n.d) pp. 55-56.

[54]South-West Africa--Voting Procedure, Advisory Opinion of June 7th, 1955: I.C.J. Reports 1955, p. 77.

General Assembly on important questions shall be made by a two-thirds majority of the members present and voting."

In the same year the General Assembly asked the Court to adjudge whether it was within the limits of the 1950 Advisory Opinion to allow the Committee on South West Africa, "to grant oral hearings to petitioners on matters relating to the Territory of South West Africa."[55] In its Advisory Opinion of June 1, 1956, the Court again answered affirmatively to the question posed by the General Assembly: "The grant of oral hearings to petitioners by the Committee on South West Africa would be consistent with the Advisory Opinion of the Court of 11 July, 1950."[56] The opinion of the Court on the voting procedure was adopted unanimously, while the latter opinion on the right to hear oral petitioners was adopted by an eight to five vote.[57]

In 1956, the Committee on South West Africa was given an additional duty. The third report submitted by the Committee recorded both the conditions in the Territory of South West Africa and the uncooperative attitude of the Union Government in trying to come to an honorable solution

---

[55] U.N., Resolution 942(X) of 3 December 1955. O.R. of the Tenth Session of the G.A., Supplement No. 19 (A/3116) (New York: n.d.), p. 24.

[56] Admissibility of hearings of petitioners by the Committee on South West Africa, Advisory Opinion of June 1st, 1956: I.C.J. Reports 1956, p. 32.

[57] Ibid.

of the problem.[58] Thereupon, the General Assembly requested the Committee to investigate the legal action open to the Members of the United Nations, individually or as a group, in order to effect South African compliance with the 1950 Advisory Opinion.[59]

In 1957, another committee was appointed, the Good Offices Committee. Its supposed purpose was to confer with the Union Government ". . . with a view to finding a basis for an agreement which would continue to accord to the territory an international status. . . ."[60] However, it soon became apparent that the real reason for its proposal was to investigate the possibility of finding a solution acceptable to both the United Nations and the Union of South Africa along the lines of a partition.[61] The General Assembly, as was to be expected, refused to consider any such proposal, but urged the Good Offices Committee to continue in its negotiations.[62] In 1959 the Good Offices Committee reported that it had been no

---

[58]U.N., Report of the Committee on South West Africa to the General Assembly. O.R. of the Eleventh Session of the G.A., Supplement No. 12 (A/3151) (New York: 1956).

[59]U.N., Resolution 1060(XI) of 26 February 1957. O.R. of the Eleventh Session of the G.A., Supplement No. 17 (A/3572) (New York: n.d.), p. 30.

[60]U.N., Resolution 1143(XII) of 25 October 1957. O.R. of the Twelfth Session of the G.A., Supplement No. 18 (A/385) (New York: n.d.), pp. 25-26.

[61]Goldblatt, p. 61.

[62]U.N., Resolution 1243(XIII) of 20 October 1958. O.R. of the Thirteenth Session of the G.A., Supplement No. 18 (A/4090) (New York: n.d.), p. 30.

more successful than the previous two committees in its negotiations with South Africa.[63]

In 1959, though, events were moving swiftly along other lines of action. As was mentioned above, in 1956 the General Assembly asked the Committee on South West Africa to report on the legal alternatives that were open to the United Nations.[64] In 1957, the Committee made its report to the General Assembly,[65] and in 1959, the General Assembly invited the Member States to institute proceedings against the Union of South Africa along the lines suggested by the Committee on South West Africa in its 1957 report.[66]

Ethiopia and Liberia soon announced that they would institute contentious proceedings against South Africa before the International Court of Justice. On the 4th of November 1960 they submitted their Applications to the Registrar of the Court.[67]

---

[63] U.N., Report of the Good Offices Committee Incorporated in the Report of the Fourth Committee (A/3959). O.R. of the Thirteenth Session of the G.A., Annexes 1958-1959 (New York: 1959), pp. 14-16.

[64] Supra, p. 31.

[65] U.N., Report of the Committee on South West Africa to the General Assembly. O.R. of the Thirteenth Session of the G.A., Supplement No. 12 (A/3906) (New York: 1958).

[66] U.N. Resolution 1361(XIV) of 17 November 1959. O.R. of the Fourteenth Session of the G.A., Supplement No. 16 (A/4354) (New York: n.d.), p. 29.

[67] South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports, pp. 321-324.

Conclusion

The decision to initiate contentious proceedings culminated forty years of patient waiting on the part of the international community, and forty years of procrastination and delaying tactics on the part of South Africa. South Africa had mismanaged the Mandate for South West Africa under the League of Nations, and had refused to negotiate or cooperate with the United Nations. From the beginning she had shown a total disregard of the values incorporated in both the Covenant of the League, and the Charter of the United Nations. How long can she rely on her sovereignty as a sanctuary, within which she can negate the progress made in the rest of the world in insuring the human rights of all peoples?

CHAPTER II

THE COURT'S DECISION

Conflicting Principles of International Law

In reading through the opinions of the Judges, it becomes apparent that, as in so many debates, those who uphold the decision of the Court, and those who dissent from the decision, argue on two different levels. Because they are at odds on one fundamental premise, the battle is never really joined. Lauterpacht in a quote from his work, The Development of International Law by the International Court, indicates the two principles that are in conflict in the present case:

> The activity of the International Court has shown that alongisde the fundamental principle of interpretation, that is to say, that effect is to be given to the intention of the parties, beneficent use can be made of another hardly less important principle, namely, that the treaty must remain effective rather than ineffective.[1]

He goes on to say that though the two principles seem to express the same thing, ". . . they are potentially in conflict for the reason that deliberately or otherwise, there may have been no intention to render the treaty fully effective."[2] In these two quotes, he has put his finger on the fundamental issue in question.

In amplification of this wide generalization, a

---

[1]Sir Hersch Lauterpacht, The Development of International Law by the International Court (New York: Frederick A. Praeger, 1958), pp. 227-228.

[2]Ibid., p. 228.

comparison of the arguments of the judges for and against the acceptance of jurisdiction are presented in the balance of this chapter. The comparison reveals how the dissenters argue that the Court has no jurisdiction since it has failed to prove conclusively that the Union of South Africa had given her consent to the compulsory jurisdiction of the International Court of Justice. South Africa never had the intention of allowing such a dispute to come before an international tribunal. The Court argues, on the contrary, that it was the intention of the international community to have such a dispute settled in this manner.

The two sides of the debate have a different understanding of what constitutes the primary intentions of the parties in the case. The Court argues that the most important intention was that of the international community which, in instituting the Mandate system, fully intended it to "remain effective rather than ineffective." Spender and Fitzmaurice argue that intentions of the Mandatory are of primary importance to the assumption of jurisdiction by an international tribunal; especially when that tribunal derives its authority from the consent of the subscribing parties. A glance at the opening discussions of Bustamante's separate opinion, and Spender and Fitzmaurice's dissenting opinion, will serve to clarify the different tacks taken by the opposing sides in their analysis of the scope of the Court's jurisdiction.

Bustamante's separate opinion illustrates the line of reasoning employed by the Court. Before turning to his rejection of the four preliminary objections, he embarks on an extensive dissertation on the "sociological interpretation" and the "elements" of the international Mandate System.[3] His purpose in doing so is to present irrefutable documentation to the effect that the intentions of the international community in inaugurating the Mandate System were first and foremost to safeguard the rights of the peoples of the Mandated territories.

He first explains why the intentions of the international community, in drafting the League of Nations and the Mandate System, are legitimate sources of legal interpretation:

> Since the law is a living phenomenon which reflects the collective demands and needs of each stage of history, and the application of which is designed to achieve a social purpose, it is clear that the social developments of the period constitute one of the outstanding sources for the interpretation of law. . . .[4]

In his "sociological interpretation" of the Mandate System, Bustamante points to one of the major currents of the times which he thinks pa-ticularly relevant to the Court's decision. This is the trend manifested in what he describes as the "anti-colonialist conscience" which had been insignificant for some

---

[3]South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962, pp. 350-356 (separate opinion of Bustamante, Judge). Hereafter, SWA Cases.)

[4]Ibid., p. 351.

time, but became increasingly predominant in the postwar period. Article 22 of the Covenant is considered one example of this "new ideological requirement of the world."[5]

Bustamante sees three elements in the Mandate System which should be interpreted in the light of the sociology of the postwar period. The first element is the "purpose" of the institution of the Mandated territories; this is the "well-being and development of the mandated peoples, . . ." The second is the "real" element; this is the territory itself, and the population therein. And the third is the "personal elements"; this consists of three legal parties: 1) the Mandated peoples, 2) the League of Nations and the Member states, and 3) the Mandatory.[6]

These elements are integral parts of the organic body which to Bustamante is the Mandate institution. This is especially true of the second element, the populations of the territory, which Bustamante considers to be a legal party to the Mandate, represented by the League of Nations. The peoples under Mandate are no less important to the character of the Mandate than the Mandatory or the League of Nations.[7]

The Mandate agreement and the Mandate system, according

---

[5] Ibid., pp. 350-351.

[6] Ibid., pp. 351-352.

[7] Ibid., p. 354.

to Bustamante, compose an organic entity which is held together by the performance of the reciprocal obligations laid down in the Mandate agreement, and in Article 22 of the Covenant:

> The Mandate agreements or conventions constitute a subsequent phase of implementation and represent the concrete or objective aspect of the system, its application to a particular case. But there can be no disjoining of the agreement from the system: . . .[8]

By placing primary emphasis on the intentions of the international community in their drafting of the Mandates and the Mandate System in the postwar period; and by using this as the criterion upon which all of the arguments and objections of the Respondent are to be judged, Bustamante has laid the foundation for a logical dismissal of South Africa's objections.

Spender and Fitzmaurice, however, would disagree with the relevance of the "sociological interpretation" of the Mandate System. They would argue that if the Court took notice of the sociological roots of the birth of the Mandate System, it would be founding its decision on something other than on the legal validity of the Applicant's claims. Instead of having recourse to disputable historical interpretations in disposing of the Respondent's objections, the Court should come to its judgment by application of acknowledged principles of international law.

---

[8] Ibid., p. 356.

The contrast in the starting principles of the two opposing views on the Court's decision becomes fully apparent in the opening discussion of Spender and Fitzmaurice's dissent.

> . . . by way of introduction we would say that our conclusions in this phase [of the case, i.e., question of juristiction] have been reached against the background of four major principles of law which we believe to be fundamental to any determination of the issues involved.[9]

The four major principles that they refer to are: 1) "the principle of consent," 2) the "principle that rights conferred on or vested in persons or entities in a specified capacity . . . are not available to them in a different capacity," 3) the "principle that provisions are prima facie to be interpreted and applied according to their terms," and 4) the "principle that a Court of law cannot correct the past errors or omissions of the parties, . . ."[10]

Judges Spender and Fitzmaurice's dissent serves to demonstrate the manner in which the Court wholly ignores these principles in reaching its decision. They review the number of times in word and action the Respondent had given ample indication that she did not consent de facto or de jure to the substitution of the United Nations for the League of Nations in the Mandate Agreement. Furthermore, it could not be said

---

[9] Ibid., p. 467 (Spender and Fitzmaurice, Judg., dissenting).

[10] Ibid., pp. 467-468.

that the Respondent gave her consent to submit to the jurisdiction of an international tribunal in a case such as the present. The Court disregards the second principle of law by maintaining that ex-Members of the League of Nations, or present Members of the United Nations continue to hold the rights they once had in their capacity as Members of the League of Nations. The third principle of law is contradicted by the Court when it carries the principle of maximum effect to an illogical extreme. This it does in its interpretation of the language of Article 7 of the Mandate. And the fourth principle: that "a court of law cannot correct the past errors or omissions of the parties," is supposedly negated by the Court's trying to make amends for the oversight made by the League of Nations when it did not specifically indicate that the Mandate was to continue to remain viable despite what might happen to the League in the future.

Bustamante is arguing from what he considers to be the intentions of the international community in the institution of the Mandate system, whereas Spender and Fitzmaurice argue on what are obviously the intentions of the Respondent; Bustamante believes in the sanctity of the institution, Spender and Fitzmaurice in the sanctity of legal principle. Bustamante is willing to allow that the will of the community is a legitimate source of international law, while Spender and Fitzmaurice will not waver in their defence of the consent of

the parties as the one essential foundation of international law. These two opposing poles of thought, resulting from the conflict in starting principles, become more apparent in the comparison of the arguments for and against the assumption of jurisdiction by the International Court of Justice, as presented in the separate and dissenting opinions of the judges of the Court.

First Preliminary Objection

The First Preliminary Objection questions the fact that the Mandate can be considered a "treaty or convention in force" as it is stated in Article 37 of the Statute of the International Court of Justice. If the Mandate is not "a treaty or convention in force," then Article 37, which serves to transfer jurisdiction from the Permanent Court of International Justice to the International Court of Justice, would not apply and jurisdiction would have to be waived.

The First Objection when submitted by South Africa on 11 October 1962 read:

> Firstly, by reason of the dissolution of the League of Nations, the Mandate for South West Africa is no longer a "treaty or convention in force" within the meaning of Article 37 of the Statute of the Court, this submission being advanced
> (a) with respect to the said Mandate Agreement as a whole, including Article 7 thereof, and
> (b) in any event, with respect to Article 7 itself;
> . . .[11]

---

[11] Ibid., pp. 326-327 (opinion of the court).

On 22 October, the Agent of the Republic of South Africa amended the First Objection to read: "Firstly, the Mandate for South West Africa has never been, or at any rate is since the dissolution of the League of Nations no longer, . . ."[12] By making this change, South Africa is shifting the emphasis of the argument. Before amending this objection, they argued that the Mandate was a treaty until the dissolution of the League of Nations; but upon this dissolution, and because of the League's dissolution, the treaty was made void. Now their major argument is that the Mandate could never have been called a treaty since it was a legislative act of Council.

After a brief discussion of what constitutes a dispute for the purposes of the Court and a short history of the events surrounding the birth of the Mandate in 1919-1920,[13] the Court dispenses with the modified view taken by South Africa:

> For its confirmation, the Mandate for South West Africa took the form of a resolution of the Council of the League but obviously it was of a different Character. It cannot be correctly regarded as embodying only an executive action in pursuance of the Covenant. The Mandate, in fact and in law, is an international agreement having the character of a treaty or convention.[14]

In backing up this view of the Mandate, the Court points to

---

[12] Ibid., p. 327.

[13] Ibid., pp. 328-330.

[14] Ibid., p. 330.

the Preamble of the Mandate arguing that the engagements embodied in the Preamble constitute "a treaty or convention."[15] Even though the Mandate Agreement is described as a Declaration in the Mandate itself, the Court dismisses this saying: "Terminology is not a determinant factor as to the character of an international agreement or undertaking."[16]

Article 18 of the Covenant reads: "Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat. . . ." If the Mandate was a "treaty or international engagement," why then was it not registered according to Article 18? The Court answers this question by relying on the word "hereafter" of Article 18. The Mandate had been conferred on the Union of South Africa 7-9 May 1919; whereas the Covenant did not go into effect until 10 January 1920.[17]

The interpretation of the Mandate as being "a special type of instrument" and a "novel international regime" is the foundation of the argument's refuting South Africa's Objections and accepting jurisdiction. Those of the Court who disallowed South Africa's First Preliminary Objection rely on a liberal interpretation of what is, or is not, to be considered a

---

[15] Ibid.

[16] Ibid., p. 331.

[17] Ibid., p. 332.

treaty. Of the Judges who voted for accepting jurisdiction, Bustamante, Jessup, and Mbanefo reason along similar lines.

After his analysis of the "elements of the international Mandate," Bustamante turns to the First Preliminary Objection saying that ". . . the Mandate agreements are conventions sui generis, a chain of intentions expressed in successive acts. . . ."[18] He also provides another argument, in addition to those of the Court, for why Article 18 of the Covenant should not be considered to militate against the theory that the Mandate is a "treaty." He maintains that Article 18 was not meant to "nullify unregistered treaties ipso jure, . . ." ". . . Any other interpretation would tend to destroy the principle of good faith which governs, as a basic rule, the legal theory of conventional instruments. . . ."[19]

Judges Jessup and Mbanefo accept this same interpretation of the Mandate as a "treaty." Judge Jessup goes so far as to admit that an oral agreement may be considered a "treaty."[20] Judge Mbanefo also supports this liberal interpretation of what constitutes a "treaty" within the meaning of Article 37 of the Charter:

> The distinction which the Respondent tries to draw between the Mandate as an agreement and the Mandate as

---

[18] Ibid., pp. 371-372 (separate opinion of Bustamante, Judge).

[19] Ibid., p. 372.

[20] Ibid., p. 405 (separate opinion of Jessup, Judge).

> an objective institution is in my opinion not feasible. It proceeds from a misconception of the nature of the Mandate.[21]
>
> . . . As an institution it is a bundle of rights and obligations, not a physical edifice, . . .[22]

Fitzmaurice and Spender are the primary spokesmen for the dissenters who argue from a conservative interpretation of the word "treaty." Where Jessup allows that in some cases an oral agreement may be considered a "treaty," they adopt the definition of the International Law Commission of the United Nations: '"' Treaty' means any international agreement in written form, . . ."'[23]

Spender and Fitzmaurice support their conservative interpretation of what constitutes a treaty with further arguments. They take great pains to show that the Mandate had more the character of "a quasi-legislative act of Council" than of a "treaty." In doing so, they bring up an important point in comparing Article 36 (1) to Article 36 (2). They argue that if the agreements under the optional Clause (which provides for compulsory jurisdiction and therefore resembles Article 7 of the Mandate) were to be considered treaties, then paragraph 2 would lose its raison d'être. In

---

[21] Ibid., p. 443 (separate opinion of Mbanefo, Judge).

[22] Ibid., p. 444.

[23] Ibid., p. 475 (Spender and Fitzmaurice, Judg., dissenting).

their words:

> If a State making a declaration of willingness to accept the jurisdiction of the Court compulsorily for certain classes of disputes were held thereby to have entered into a treaty or convention, a dispute of the class specified would rank as a matter "specially provided for" in "treaties or conventions in force" within the meaning of paragraph 1.[24]

Even though Article 7 includes international obligations, they resemble the obligations found in Article 36 (2), of the Statute of the International Court of Justice. Therefore, "treaty or convention" must be interpreted within the meaning of Article 36 (1) and Article 37 of the Statute. The fact that Article 36 (2) is included in the Statute must necessarily exclude obligations relating to compulsory jurisdiction from being included in Article 36 (1) or Article 37. Even if you grant that one provision of an international institution can serve to give the whole institution its character, this argument should convince one that Article 7 itself cannot be considered a "treaty or convention."

This argument of Spender and Fitzmaurice and their basic criticism of the Court is summed up in the following quote:

> The Judgment of the Court in effect identifies the idea of an international agreement with any act or instrument embodying, or giving rise to, international obligations, or which contains or involves an international "engagement." This we believe to be a fallacy, . . .
> It cannot be too strongly emphasized that the test

---

[24] Ibid., p. 476.

> is not, or is not merely, the creation of international obligations, but the character of the act or instrument that gives those obligations their legal force.[25]

Spender and Fitzmaurice now go into a detailed analysis of the Mandate System as a whole, and the Mandate for South West Africa in particular. To ascertain the "character of the act or instrument," they take great pains to show that the intentions of those men who were responsible for the formulation of both the Mandate System and the Mandate for South West Africa were not to set up an institution in treaty form.

In their discussion of the Mandate System, Spender and Fitzmaurice first point out that the function of Article 22 of the Covenant was not to confer the Mandates, but to provide an outline for the bestowal of the Mandates by the Council of the League of Nations. ". . . It [Article 22] was chiefly concerned with defining and describing the nature of a certain trust, and of the system contemplated for carrying it out; . . ."[26]

They then go on to examine the Mandate for South West Africa, breaking their discussion up into three sections: 1) "The framing of the Mandate for South West Africa," 2) "The promulgation of the Mandate," and 3) "The character of the

---

[25] Ibid., pp. 476-477.

[26] Ibid., p. 481.

Mandate as promulgated."[27]

Their analysis of the framing of the Mandate for South West Africa makes two points to augment their contention that the purposes of the founders of the Mandate did not include setting up a treaty. First, the Principle Allied and Associated Powers chose not to "set out the terms of the Mandates in a formal treaty,"[28] but to adopt the resolution method of defining the terms of the Mandates. Second, at one phase of the formation of the Mandates, the Allied Powers handed their authority over the Mandated Territories to the League Council and the Council from that point on had control of the proceedings.

> In short, the Mandates were not to take the form of treaties or conventions between the Principal Powers and the Mandatories: they were to take the form of a quasi-legislative act of the Council.[29]

The arguments under the headings: "The promulgation of the Mandate" and "The character of the Mandate as promulgated" are subsidiary points included to lend additional support to their contention that the Mandate was a "quasi-legislative act of the Council."[30] The test for Spender and Fitzmaurice must be:

---

[27] Ibid., pp. 482-494.

[28] Ibid., p. 486.

[29] Ibid.

[30] Ibid., pp. 486-494.

> . . . not whether certain background consents or understandings or agreements existed, nor whether international obligations were created, but what was the character of the act or instrument that gave those obligations their legal force.[31]

These are the arguments on both sides in response to part "a" of the Respondent's First Preliminary Objection. On the assumption that the Mandate (and Article 7 thereof) was a "treaty" at the moment of promulgation, the next question is whether it was in force at the time of the institution of proceedings.

The Court harks back to the 1950 decision contending that the arguments then put forward by the Respondent were similar if not identical to the ones now advanced in these proceedings.[32] In answer to those arguments, the Court quotes extensively from the opinion of the 1950 Court, feeling that the 1950 decision "continues to reflect the Court's opinion today."[33] In 1950 the Court ruled that if the obligations of the Mandatory had lapsed, the authority of the Mandatory would then also have lapsed; and since the Mandatory continued to assume authority over the Mandate, it must be assumed that the Mandate has survived in toto.[34] The whole concept and institution of the Mandate for South West Africa, including

---

[31] Ibid., p. 491.

[32] Ibid., p. 333 (opinion of the court).

[33] Ibid., p. 334.

[34] Ibid., p. 333.

the obligation found in Article 7, was transferred intact to the United Nations and the International Court of Justice. The legal link between the League of Nations and the United Nations systems besides Article 37 was the signature of South Africa to the United Nations Charter and thereby to the International Court of Justice through Article 93 (1) without any reservations concerning either the Mandate or Article 7 thereof.[35] The fact that the Mandatory State could not be compelled to sign any document that would render her obligations less burdensome than those of a previous document, is dispensed with by Bustamante. He points out that South Africa at no time made any reservations about the Mandate when she entered the United Nations. If the burden is too onerous, he says, then the way to mitigate it is to enter into a new agreement with the United Nations under the Trusteeship System.[36]

Before the Respondent submitted a modified version of the First Objection, she maintained that the Mandate had survived the dissolution of the League as an objective institution, but without the supervisory obligations. At that point she could argue that Article 7 was not in force having fallen by the wayside with the rest of the supervisory obligations. In the modified version, though, she says that the alternative

---

[35] Ibid., p. 335.

[36] Ibid., pp. 370-371 (separate opinion of Bustamante, Judge).

view might be taken, namely, that the Mandate was never a treaty but rather a unilateral declaration of the Council of the League. But once the Court has decided that the Mandate was in fact a treaty, and that it survived in toto the dissolution of the League, it is no longer feasible for South Africa to argue that Article 7 was a "bastard accretion," an "anomaly,"[37] not essential to the carrying out of the Mandate. Instead, the Respondent must proceed along the lines that there are defects in Article 7, apart from its role in the context of the Mandate as a whole, which prevent the Court from assuming jurisdiction of the present contentious proceedings. These "defects" (i.e., there is no dispute; no longer are there "Members" of the League that can bring proceedings against the Respondent, etc.), provide the substance of the other three Preliminary Objections.

Before going on to analyze these Objections, it is necessary to mention one further argument put forward by Spender and Fitzmaurice. In answering the question of whether the Mandate was still in force at the time the Court was seized by the Applicants, they ask who would be the second party to the Mandate as a treaty. In seeking an answer, they consider one of three possibilities. They are: 1) the Principal Allied and Associated Powers, 2) the individual members of the

---

[37] Ibid., p. 373.

League of Nations, and 3) the League or the League Council.[38]

All three are rejected as possible parties. The Principal Allied and Associated Powers are eliminated because their role had been limited to naming the Mandatories. The individual members of the League could not be considered since their capacity as members of the League would have been lost with the dissolution of the League; and in order to have been considered a party to a treaty in their capacity as individual states, they would individually have had to undergo the process of ratification and registration of the treaty documents. Finally, the League Council could not have been a party because it did not have a treaty-making capacity at that stage of the development of international organizations.[39] Therefore, since no one state or group of states could be considered the second party to the treaty, the number of parties must have been less than two at the initiation of proceedings in 1960. Thus, the Mandate could not be thought of as a "treaty or convention in force."

Second Preliminary Objection

It is difficult to separate the arguments of the First Objection from those of the Second, Third, and Fourth Objections.

---

[38] Ibid., pp. 495-496 (Spender and Fitzmaurice, Judg., dissenting).

[39] Ibid., pp. 496-503.

The Respondent's primary argument is that "the Mandate for South West Africa is no longer a 'treaty or convention in force.'" This argument then proceeds along two lines: 1) "with respect to the said Mandate Agreement as a whole, including Article 7 thereof," and 2) "in any event, with respect to Article 7 itself." The Second, Third, and Fourth Objections expand further on the second line of argument, itemizing the defects in Article 7 that, according to the Respondent, should prevent the Court from accepting jurisdiction. For this reason, the arguments that are made in answer to part "b" of the First Objection extend to parts of the discussion of the Second Preliminary Objection.

Since Article 7 is the key to the jurisdictional issue, it will be useful to reproduce the relevant section of it here:

> The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.[40]

Looking now at the Second Preliminary Objection, it is clear that the Respondent is arguing that Article 7 became void with the dissolution of the League. Those states who had been Members of the League, including Ethiopia and Liberia,

---

[40]League of Nations, Mandate for German South West Africa (21/31/14D) (Geneva, December 17, 1920). Appendix I.

lost that status upon its dissolution. The Second Objection reads:

> Secondly, neither the Government of Ethiopia nor the Government of Liberia is "another Member of the League of Nations," as required for locus standi by Article 7 of the Mandate for South West Africa; . . .[41]

The Court argues back that if the Mandate survived in part, i.e., in the form of the right claimed by the Mandatory to continue to administer the affairs of South West Africa, then the Mandate must have survived as a whole. In any case, those provisions of the Mandate that are essential to the running of the Mandate must have survived. Article 7, according to the Court, is one of those provisions that is essential to the running of the Mandate.[42]

The Court states three major reasons for why Article 7 is essential and therefore the Second Objection unfounded. The first point the Court advances is that "without this additional security the supervision by the League and its Members could not be effective in the last resort."[43] If a report were submitted by South Africa to the Council under Article 6 of the Mandate, the Council would not have the freedom to act on it as a result of the unanimity rule of the Council (Articles 4 and 5 of the Covenant). The Mandatory could prevent

---

[41] SWA Cases, p. 327 (opinion of the court).

[42] Ibid., p. 336.

[43] Ibid.

the Council from adopting a constructive resolution by vetoing any measure that appeared to threaten her interests. The Council, and the Members thereof, were powerless to safeguard the Mandate without the recourse to the Permanent Court of International Justice.

> But neither the Council nor the League was entitled to appear before the Court. The only effective recourse for protection of the sacred trust would be for a Member or Members of the League to invoke Article 7 and bring the dispute as also one between them and the Mandatory to the Permanent Court for adjudication.[44]

The second reason the Court considers Article 7 essential is that Article 7 provided a safeguard not only for the 'sacred trust,' but also for any other unforeseen hazard which might arise.[45] It was "the most reliable procedure of ensuring protection . . . for the peoples of the Territory whatever might happen to the machinery of administrative supervision."[46]

The third argument put forth for why the Second Objection should be dismissed is based on the climate of opinion at the dissolution of the League in 1946. The parties to both the Mandate for South West Africa and the League intended the Mandates to be continued until they could be incorporated into the new Trusteeship System (with the exception of those

---

[44] Ibid., p. 337.

[45] Ibid.

[46] Ibid., p. 338.

that were to be expressly ended at that time--Syria, Lebanon, and Trans-Jordan). The Court refers to the statement of the Union Government at the dissolution of the League, and to the final resolution of the League Assembly which was adopted unanimously. Both expressed the similar intentions of the Mandatories and the League to continue the Mandates during, what was envisaged as being, a short interim period.[47]

Sir Louis Mbanefo, in his separate opinion, emphasizes this latter point, explaining that all other Mandates but the one for South West Africa have been satisfactorily assimilated into the Trusteeship System of the United Nations. Only in the case of South West Africa has the interim period extended beyond the expectations of the Members of the League.[48]

The approach that the Court takes in dismissing the Second Preliminary Objection is summarized in the following quote:

> This contention [the Second Preliminary Objection] is claimed to be based upon the natural and ordinary meaning of the words employed in the provision. But this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.[49]

Ad hoc Judge van Wyk in his dissent, and Spender and

---

[47] Ibid., pp. 338-342.

[48] Ibid., pp. 445-446 (separate opinion of Mbanefo, Judge).

[49] Ibid., p. 336 (opinion of the court).

Fitzmaurice in their dissenting opinion, summarize the arguments of those who agree to the validity of the Second Preliminary Objection. Though van Wyk does not argue as effectively as do Spender and Fitzmaurice, resting his case more on the quotes of scholars of international law than on persuasive logic, he makes some valid points in challenging each of the three contentions of the Court as described above.

These three contentions, van Wyk says, attempt to justify a new interpretation of the phrase, "Member of the League of Nations"; an interpretation completely different from what the drafters of the Mandate had intended, or, if not intended, had provided for.

> It is contended that "Member of the League of Nations" in Article 7 does not mean "Member of the League of Nations," but means a State which is or has been a Member of the League of Nations.[50]

van Wyk does not consider the arguments of the Court to be wholly consistent with the evidence. In discussing judicial protection as one of the essential securities for the 'sacred trust,' he says:

> There clearly could not have been any intention to confer general supervisory rights on every Member or ex-Member of the League.[51]
>
> If Article 7 was intended to have this far-reaching effect somebody would have made some reference thereto and it would have been recorded somewhere. It would

---

[50] Ibid., p. 599 (van Wyk, Judge, dissenting).

[51] Ibid., p. 600.

> have been recorded somewhere. It would have been the subject of violent debates.[52]

This argument, namely, that judicial protection was not to be considered one of the "safeguards" mentioned in Article 6 of the Covenant of the League of Nations, is developed more fully by Spender and Fitzmaurice in their dissent which is discussed below.[53]

The second contention of the Court was that Article 7 was an additional safeguard in case anything should come up that could not be handled by the administration of the Council; the implication of the Court being that proof of this is the present case. In other words, Article 7 was to be a catchall provision which would dispose of any question that might come up and that had not been provided for in any other fashion--the dissolution of the League and the subsequent controversy over the Mandate for South West Africa being one of those questions. van Wyk's answer to this:

> It is difficult to understand this reason but it apparently means that it was considered that the right to bring contentious proceedings should survive the League or the organs of the League. Here again we have a bare assertion unsupported by facts or reasons.
>
> The truth is that the possibility of the dissolution of the League was not contemplated when the Covenant was agreed to or when the Mandate Declaration was made. . . .[54]

---

[52] Ibid., p. 601.

[53] Infra, pp. 67-68.

[54] SWA Cases, p. 601 (van Syk, Judge, dissenting).

He turns lastly to the question of whether there was any agreement, or as he terms it "tacit agreement," between the Members of the League at the dissolution of the League to the effect that the Mandate was to be continued and, if it were to be continued, whether the obligations of the Mandate were transferred automatically to the United Nations.[55]

He says, first of all, that the Applicants rely on a principle of international law that does not exist: the "principle of succession."[56] In answer to this contention, he declares that "no such rule of automatic transfer is to be found in any of the sources of international law enumerated in Article 38 of the Statute of this Court."[57] There is nothing in international law that might serve as a precedent for one international organization automatically succeeding another international organization.

Taking this argument a step further, he maintains that there was nothing in either the Covenant of the League, the Charter of the United Nations, or in the Mandate Declaration itself indicating that the phrase, "Member of the League of Nations," could be construed as "ex-Member of the League of Nations."[58] In looking more specifically at the Charter of

---

[55] Ibid., p. 602.

[56] Ibid.

[57] Ibid., p. 603.

[58] Ibid., pp. 605-640.

the United Nations, he argues that neither Article 37, nor Article 80 could be used to render a different interpretation of Article 7 than, "Member of the League of Nations" in its ordinary meaning. In addition, the Respondent has done nothing, during or since, the dissolution of the League that could conceivably be interpreted as embodying her consent to a tacit revision of the wording of Article 7 to mean "ex-Member of the League of Nations." On the contrary, the Mandatory made it clear that she was against the transfer. Proof of this was her attempt in 1946 to persuade the participants in the dissolution of the League that South West Africa should be assimilated into the Union of South Africa.

> It was at least known that one Member of the League, namely, the Respondent, was opposed to such a transfer as far as South West Africa was concerned.[59]

In sum:

> The above considerations [some of which are mentioned above] compel me to conclude that those provisions of the Mandates which depended for their fulfillment on the existence of the League of Nations were not impliedly amended in any respect, and accordingly ceased to apply on the demise of the League; in any event that the compromissory clause in Article 7 was not amended in any way, and accordingly no longer applies.[60]

The only other dissenting opinion that investigates in depth the arguments arising from the Second Preliminary Objection is that of Spender and Fitzmaurice. Of all of the

---

[59] Ibid., p. 619.

[60] Ibid., p. 640.

dissenting opinions, that of Spender and Fitzmaurice is not only the most extensive, but also the most forceful. Their arguments for why Article 7 of the Mandate became inoperable at the dissolution of the League combine sound logic with comprehensive factual documentation. This is especially true of their handling of the Second Preliminary Objection.

In general, they take exception to the approach of the Court in upholding the relevance of Article 37 of the Statute of the Court.

> In the present proceedings what the Court has done--in our view without legal justification--is to consider the matter on the footing of what jurisdiction the Permanent Court could and would have exercized if it was still functioning now. . . . This is of course to beg the whole question at issue, and to disregard the fact that Article 37 could do no more than operate so as to give the present Court jurisdiction in a case in which the Permanent Court would have had jurisdiction.[61]

In support of this general criticism, Spender and Fitzmaurice proceed to examine the question of which interpretation of Article 7 could lead one to the conclusion that, upon the dissolution of the League, "Member of the League of Nations" was to mean "ex-Member of the League of Nations," or "Member of the United Nations." Discussing first the "actual language" of Article 7, they point out that Membership in the League was a condition for seizing the Permanent Court and therefore should be a condition for seizing the International

---

[61] Ibid., p. 506 (Spender and Fitzmaurice, Judg., dissenting).

Court of Justice. Upon the dissolution of the League of Nations, its Members lost their rights as Members of their own volition, just as Brazil lost her rights when she withdrew from the League. The difference in the circumstances surrounding the loss of membership is not important. The fact remains that upon the dissolution of the League, having lost their capacity as Members, the rights that were coincident with membership in the League were also lost.[62]

Furthermore, it cannot be said that the obligations now held by the Mandatory to the Members of the League are identical to the obligations to the Members of the League while the League was still in operation. The obligations under the United Nations are more onerous than they would have been under the League. Article 94 (2) of the Charter is far more of a burden to the Mandatory than Article 13 (4) of the Covenant.[63]

Is there any rule of interpretation that could be applied to justify a different conclusion than the one above? The principle of maximum effect is suggested as one possible rule of interpretation. In order to see whether the principle of maximum effect would be "'not to interpret treaties but to revise them,'"[64] Spender and Fitzmaurice propose "to

---

[62] Ibid., pp. 507-508.

[63] Ibid., pp. 510-511.

[64] Ibid., pp. 513-515.

write out the changes that would be required in the provision concerned, if it had originally been drafted so as expressly to produce the effect contended for; . . ."[65] In doing this, they argue that the changed provision should have had a clause in it that would have allowed for the possible dissolution of the League, saying in effect that, upon the dissolution of the League, the Members would retain their rights as Members of the League. None of the Mandatories, they contend, would have become a party to such a vague agreement--an agreement that could sometime in the future bind them to a course of action that they might not wish to follow. Thus, by giving maximum effect to the provision, the Court is 'revising' Article 7 rather than 'interpreting' it.[66]

The second principle of interpretation discussed by Spender and Fitzmaurice is the principle of "the presumed intentions of the parties." Spender and Fitzmaurice give their understanding of the argument of the Applicants in applying this principle to the interpretation of the provision:

> If, however, Article 7 had to be read according to its strict language now, there would--so the argument runs--be no State which could invoke it, so that it would cease to operate at all; this void can never have been intended by the original framers of the Mandate, consequently it must be filled by reading Article 7 as still conferring rights on ex-Members of the League.[67]

---

[65] Ibid., p. 512.

[66] Ibid., pp. 511-513.

[67] Ibid., p. 514.

Their counterargument to this contention of the Applicants is essentially the same one that was used to show that it would be wrong to have recourse to the principle of maximum effect in interpreting Article 7. They argue that there is no reason why the drafters of the Mandate should have foreseen the dissolution of the League, and even if they had foreseen the events that necessitated the dissolution, it is possible and even probable that the Mandatories would not have been a party to an agreement which committed them to a certain course of action in an uncertain situation.[68]

Spender and Fitzmaurice sum up their criticism of the Court in respect to the applicability of "the principle of maximum effect" and "the principle of the presumed intentions of the parties":

> But it is not a legitimate process of interpretation to read a provision on the basis of presumed intentions deduced in the light of nothing but after-knowledge.[69]

The next stage in their criticism of the judgment of the Court in respect to the Second Preliminary Objection is to analyze what they call, "the argument from necessity."[70] First, though, they point to two fallacies of the Court's reasoning. The Court argues that the Mandate was an institution, and as such, survived _in toto_. However, Spender and

---

[68] _Ibid._, pp. 514-515.

[69] _Ibid._, p. 515.

[70] _Ibid._, p. 518.

Fitzmaurice question the logic of this argument on two points: 1) It is not correct or logical to assume that survival of an institution necessarily implies survival of all provisions of that institution;[71] and 2) it is not logical "that survival can somehow operate to add stature to the institution, . . . giving it an added effect, . . ."[72]

The Court argues that Article 7 remains operational even after the dissolution of the League for the reason that it is essential to assure the successful operation of the Mandate. If it were not "essential," it could be argued that the provision became defunct upon the dissolution of the League and the removal of the status, "Member of the League of Nations," from those States which had been Members of the League, while the Mandate survived in other respects.

However, Spender and Fitzmaurice point out that to contend a provision of a treaty or convention is essential, it must be clearly proven that the treaty or convention would not stand without the continued operation of the provision in question.

> . . . provisions for compulsory adjudication, desirable though they may be in principle, have never been regarded as a sine qua non of the operation of a treaty, and any such suggestion would normally meet with strong opposition.[73]

---

[71] Ibid., p. 517.

[72] Ibid.

[73] Ibid., p. 519.

The system was to be one of "discussion, negotiation, and common understanding."[74] The League was not trying to impose anything on the Mandatories. To set up the Mandate System so that if there were a malfunction of the administration of the Mandate, another Member could institute proceedings against the Mandatory ("to espouse the cause of the Council")[75] would be excluding from consideration the attitudes of the Mandatories and the other Member States towards the proceedings.

> . . . the real object of Article 7, and the similar articles in other Mandates, was not to enable the individual Members of the League to protect the interests of the Council or the League vis-à-vis the Mandatory, but to enable them to protect their own interests and those of their nationals, in the mandated territories.[76]

It is all too clear that the Mandate could continue to survive without the continued existence of Article 7.

Several other factors are listed by Spender and Fitzmaurice to show that the provision for compulsory jurisdiction was not essential to the Mandate. First was the fact that Article 7 and clauses similar to it were not listed in Article 22 of the Covenant as being one of the "safeguards." Reference was made to the importance of reporting to the Council, but no reference was made to the importance of

---

[74] Ibid., p. 520.

[75] Ibid.

[76] Ibid.

having a judicial safeguard.[77] Second, three out of the four Trusteeship agreements, which had been run as Mandates until the dissolution of the League, have no adjudication clause.[78] Why, they ask, did the adjudication clause become suddenly unnecessary? Third, a State in the United Nations is just as capable of disregarding the will of the Security Council as a State in the League of Nations was able to disregard the will of the Council, despite the difference in voting systems which the Court makes so much of.[79] Fourth, in over forty years, this is only the second time that an "adjudication clause of any Mandate has been invoked."[80] Finally, there has been such manifest uncertainty about the relevance of Article 7, it would be illogical to think that such a clause could be regarded as being essential. The slight majority of the Court on the jurisdictional question is an indication of this uncertainty.[81]

Having proven to their satisfaction that Article 7 could not have been said to outlive the League on grounds of being essential, Spender and Fitzmaurice turn next to prove

---

[77] Ibid., p. 522.

[78] Ibid.

[79] Ibid., pp. 523-524.

[80] Ibid., p. 525.

[81] Ibid.

that there was no "alleged agreement of April 1946";[82] nor was there anything said or done in the years 1945-1946 that would imply that there had been an agreement. By probing into the history of the dissolution of the League and of the actions of both those who participated in the dissolution of the League and those who participated in the drafting of the United Nations, Spender and Fitzmaurice come to three conclusions.[83] First, the Members of the League, expecting only a short interim period, were satisfied with statements as to the good faith of the Mandatories in maintaining the Mandates. Second, the Mandatory herself wanted to annex South West Africa. The Respondent had no intention of transferring the Mandate even then. Third, the drafters of the United Nations were setting up a system different and hopefully more viable than that of the League. They wanted to stay away from the political institutions of the League which had failed to keep the peace. The United Nations, like the League, preferred to rely on the statements of the Mandatories.

> In short, given the view that they took of the whole matter, those concerned thought it unnecessary to provide for this situation and better policy not to. This course having been chosen, and the possible consequences it entailed accepted, there is no legal principle which would enable a Court of law to put the clock back. . . .[84]

---

[82] Ibid., p. 526.

[83] Ibid., pp. 526-525.

[84] Ibid., p. 540.

The arguments of Spender and Fitzmaurice on this Second Preliminary Objection are more persuasive than those of the Court's opinion or of the Separate Opinions. They effectively argue that the Court has based its decision on "hindsight."

Third Preliminary Objection

The Respondent's Third Objection questions the fact that there is a "dispute" between the Government of South Africa, and Ethiopia and Liberia, within the meaning of the second provision of Article 7 of the Mandate.

However, this question of whether there is a dispute can be discussed in two contexts: the first concerns the admissibility of the claims, while the second questions the jurisdiction of the Court. Before the Court can enter into the question of jurisdiction, it should be satisfied that the claims of the Applicants are admissible according to the Statute and Rules of the Court. Articles 36 and 38 of the Statute, and Article 32 (2) of the Rules state that the Court may only pass judgment on a "dispute." Although its Statute and Rules limit the Court to entertaining disputes, it is extremely hard to differentiate the claims of the Applicants from the preliminary objections to jurisdiction, and the merits of the case. In other words, in cases such as this the Court has difficulty deciding on the admissibility of the

Applicant's claims without entering into a discussion of the jurisdiction of the Court and the merits of the case.

In his dissent, President of the Court Winiarski points to the dual relevance of the question of whether or not there is a dispute. However, he subscribes to the pragmatic position of the Permanent Court, i.e., that there is no distinction between the question of admissibility and the question of jurisdiction in international law.[85]

There is little space devoted to the question of the admissibility of the claims in the Court's opinion or in the separate or dissenting opinions. The dissenting opinion of Morelli is the one exception to this generalization.

Judge Morelli investigates in detail the admissibility of the claims. Although this is a complex problem, Morelli describes the applicability of the dispute question to this stage of the proceedings:

> The fact that the Respondent raised the point with reference to Article 7 of the Mandate (which is assumed, for purposes of argument, to be in force) clearly was no bar to the Court's considering the question of the existence of a dispute from the point of view of the consequences to be drawn from a negative finding on that issue on the basis of the Statute and the Rules: independently, therefore, of the issue whether Article 7 of the Mandate is at present in force.[86]

In the balance of his dissenting opinion, Morelli

---

[85] Ibid., p. 449 (Winiarski, President, dissenting).

[86] Ibid., p. 565 (Morelli, Judge, dissenting).

speaks where the Court, to all practical purposes, remained silent; he investigates independently of Article 7 to see if there was a "dispute" at the time the Applications were submitted. Since he is unable to find in either the actions of the Respondent or the actions of the Applicants the claim, counter-claim exchange which he deems necessary to the meaning of "dispute,"[87] Morelli maintains that the "claims put forward in those Applications should be held to be inadmissible."[88]

The Court, however, prefers not to define "dispute" as narrowly as does Morelli. Rather, the Court quotes from the Mavrommatis Palestine Concessions Case of the Permanent Court of International Justice, in which the Permanent Court defines a dispute as "'a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.'"[89] Relying on this definition of "dispute," the Court then dismisses the relevance of the question:

> It must be shown that the claim of one party is positively opposed by the other. Tested by this criterion there can be no doubt about the existence of a dispute between the Parties to the Court, since it is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory.[90]

---

[87] Ibid., pp. 568-573.

[88] Ibid., p. 573.

[89] Ibid., p. 328 (opinion of the court).

[90] Ibid.

While there is little debate on the question of the admissibility of the claims, this is not the case on the question of the jurisdiction of the Court as it rests on Article 7 of the Mandate.

The Third Preliminary Objection reads as follows:

> Thirdly, the conflict or disagreement alleged by the Governments of Ethiopia and Liberia to exist between them and the Government of the Republic of South Africa, is by reason of its nature and content not a "dispute" as envisaged in Article 7 of the Mandate for South West Africa, more particularly in that no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby; . . .[91]

The position taken by the Government of South Africa is that "dispute" as it appears in Article 7 is to be interpreted not as "any dispute whatever," but as any dispute over material interests between the Member States of the League and the Mandatory.

The Court, however, puts forth a view consistent with the stand it took on the First Preliminary Objection where it ruled that the Mandate, including Article 7, was still a "treaty or convention in force." In this part of its opinion, the Court held that the Mandate was a body of obligations and that Article 7 was one of the obligations essential to the continuing viability of the Mandate for South West Africa.[92] In dismissing

---

[91] Ibid., p. 327.

[92] Ibid., p. 335.

the Respondent's Third Objection, the Court contends that the phrase, "any dispute whatever . . . relating to the interpretation or the application of the provisions of the Mandate," should be interpreted in the manner which would be in keeping with Article 7's role as one of the securities of the Mandate system:

> Protection of the material interests of the Members or their nationals is of course included within its [Article 7] compass, but the well-being and development of the inhabitants of the Mandated territory are not less important.[93]

Judge Mbanefo in his separate opinion accepts this same view,[94] while Bustamante also concurs, adding that he considers the populations of the Mandated territory to be legally represented by the Members of the League of Nations:

> Since the Treaty of Versailles, Mandates have introduced a new principle into international law, . . . that of legal tutelage for the well-being and development of former colonial peoples. . . . Since that time, Member States, as integral parts of the League itself, have possessed a direct legal interest in the protection of underdeveloped peoples.[95]

Judge Jessup, in agreement, adds yet another argument for a liberal translation of the terminology of Article 7. He argues that four areas of agreement were manifested among the States at the drafting of the League of Nations in 1919. The

---

[93] Ibid., p. 344.

[94] Ibid., pp. 446-448 (separate opinion of Mbanefo, Judge).

[95] Ibid., p. 380 (separate opinion of Bustamante, Judge).

States agreed that: 1) "peace was indivisible," 2) the rights of minorities must be protected, 3) poor labor conditions should be ameliorated, and 4) a "sacred trust" should be held by the international community to ensure the rapid development of the ex-colonial territories.[96] Jessup contends that a dispute concerning any of these areas of agreement was thought to be under the jurisdiction of the Permanent Court.

> In no one of the three examples--minorities, labour, mandates--was it necessary for a State invoking the jurisdiction of the Court to allege that it had a direct "material" interest, either for itself or for its nationals.[97]

He supports this argument with reference to what is called the "Tanganyika clause," the second paragraph of Article 13 of the British Mandate for East Africa.[98] The first paragraph of Article 13 resembles closely the second paragraph of Article 7 of the Mandate for South West Africa, but the second paragraph of Article 13 states that Members of the League may also seize the Court on behalf of its nationals. This clause occurred only in the Mandate for East Africa although it was proposed for the texts of other Mandates. Judge Jessup argues that the Tanganyika clause did not appear in the other Mandate texts because it had been covered by the previous paragraph. He thinks the Tanganyika clause important

---

[96] Ibid., p. 429 (separate opinion of Jessup, Judge).

[97] Ibid., p. 430.

[98] Ibid., pp. 431-432.

in that it illustrates the original intentions of those who were responsible for the drafting of the Mandates. The drafters considered the right of the Member States to protect the 'sacred trust' to be equal in importance to the right of the Member States to protect their nationals. The terminology of the second paragraph of Article 7 of the Mandate for South West Africa was purposely made broad: "any dispute whatever" was to include both disputes over the rights of nationals, and disputes over the administration of the Mandate. The Tanganyika clause serves to show that the drafters had it in mind to have Article 7 cover both types of dispute.

As in the first two Preliminary Objections, the dissenting opinion of Spender and Fitzmaurice is the most compelling expression of the arguments against the acceptance of jurisdiction by the International Court of Justice. Their major argument is that the dispute is one that could not be adjudged on legal grounds and, as such, was not the type of dispute envisaged in Article 7 of the Mandate. Therefore, the dispute does not come under the jurisdiction of the Court.

Spender and Fitzmaurice first point out that they consider the two Applicant States, Ethiopia and Liberia, to be appearing in a "representational capacity" on behalf of the United Nations, the Applicants themselves having no legal interest in the case.[99] In order to prove this proposition,

---

[99] Ibid., p. 548 (Spender and Fitzmaurice, Judg., dissenting).

they turn to a discussion of two ambiguities which evolve from the terminology of Article 7.[100] The first ambiguity is that the provision could be read as meaning "any dispute whatever" between the Mandatory and the other Members of the League of Nations. Spender and Fitzmaurice would dismiss the case on the grounds that, at the time of the submission of the Applications, there was no dispute as such between the Mandatory, and Ethiopia and Liberia.[101] They do this on the basis of their view that the parties to the dispute would have to be States acting in their capacity as States rather than ex-Members of the League of Nations.

The second ambiguity arises from interpreting the provision to mean either "any dispute whatever," or "any dispute whatever" concerning the material interests of the Member States in relation to the Mandate.[102] Spender and Fitzmaurice argue that the latter, limited interpretation of "dispute" is more consistent with the "principle of interpreting provisions according to their natural and ordinary meaning in the context in which they occur."[103] They justify this interpretation with an argument based on another phrase of Article 7 which states that the

---

[100] Ibid., pp. 550-560.

[101] Ibid., p. 550.

[102] Ibid.

[103] Ibid.

dispute shall be one which "cannot be settled by negotiation."[104] They reason that in including this phrase stipulating negotiations, the drafters implied that the dispute must be one capable of being resolved through negotiations. In order to be a dispute capable of being solved by negotiations, it must be one in which the parties are free to make concessions, while also having the requisite authority for concluding a final settlement. It is clear that the two Applicant States would not have the authority to bind the other Members of the United Nations, or ex-Members of the League in any final settlement they might come to with the Mandatory. Any dispute about the peoples of the Mandated territory would not be negotiable; the material interests of the two parties to the dispute are a prerequisite as grounds for negotiations.

van Wyk, for the same reasons, rejects the opinion of the Court on the Third Preliminary Objection. He maintains that taking the liberal interpretation of "any dispute whatever," would lead to absurd results: any State in the League could have brought the Mandatory to Court on the slightest pretext.[105] He points out that the Permanent Court was authorized to pass on legal disputes only. What then constitutes

---

[104] Ibid., pp. 551-552.

[105] Ibid., p. 659 (van Wyk, Judge, dissenting).

a legal dispute for the purposes of the Permanent Court? Since Article 22 of the Covenant does not include judicial supervision of the administration of the Mandate as one of the essential securities, to confer this right on the individual States of the League, through the Permanent Court, would be to amend Article 22.[106] Therefore, a dispute over the administration of the Mandate would not have been considered a legal dispute to the Permanent Court, and cannot be considered a legal dispute to the International Court of Justice.

Judge Winiarski, along with Spender and Fitzmaurice, expands van Wyk's line of reasong, referring to the climate of opinion in 1919:

> These Powers [Principal Allied and Associated Powers] were realistic; their resistance to the Mandate idea is known. It is difficult to believe that they should have, as Mandatories, accepted the heavy new burden of judicial accountability, with all its unforeseeable implications, towards any Member of the League which might take exception to their administration of the Mandate.[107]

Also relevant to the Third Preliminary Objection, Spender and Fitzmaurice attempt to refute the argument on the Tanganyika clause propounded by Judge Jessup in his separate opinion.[108] They maintain that it is inexplicable why the Tanganyika clause was never merged with the one preceding it in the Mandate for East Africa. The Tanganyika clause was

---

[106] Ibid., pp. 659-662.

[107] Ibid., p. 453 (Winiarski, President, dissenting).

[108] Ibid., pp. 559-560 (Spender and Fitzmaurice, Judg., dissenting).

"redundant";[109] in all other Mandates it was combined with the clause that resembles Article 7 of the Mandate for South West Africa. In any case, they say, the fact that the Tanganyika clause remained a separate provision was a fluke and should have little relevance to the interpretation of Article 7.

Fourth Preliminary Objection

The Respondent's Fourth and final Preliminary Objection holds that yet another of the conditions found in Article 7 of the Mandate has not been fulfilled. The Fourth Objection reads:

> Fourthly, the alleged conflict or disagreement is as regards its state of development not a "dispute" which "cannot be settled by negotiation" within the meaning of Article 7 of the Mandate for South West Africa.[110]

The arguments on this objection are brief and can be summarized in a few sentences. The Court dismisses this objection pointing to several indications that the discussion between the Republic of South Africa and the Applicants, as representatives of the United Nations, were deadlocked and that the prospects for further negotiations providing a solution to the problem were slim. One of these indications was the history of the negotiations of the Committee on South West

---

[109] Ibid., p. 560.

[110] Ibid., p. 327 (opinion of the court).

Africa and the Government of South Africa.[111] A second was the attitudes of the two parties to the dispute in the written pleadings and the oral arguments; it became apparent as the proceedings progressed that the two attitudes were irreconcilable.[112]

The Respondent contended that collective negotiations under the United Nations were not the same as direct negotiations between the two parties, and that the latter form of negotiation was the form intended in Article 7. In reply to this, the Court emphasizes the special nature of the question at issue. It expresses the opinion that Ethiopia and Liberia were acting on behalf of the United Nations, and saw no reason why the rest of the States should be made to go through the same process of instituting proceedings. Judge Bustamante also subscribes to this opinion, holding that there is nothing in Article 7 stipulating that the negotiations should not be communal.[114]

Judges Spender and Fitzmaurice touch upon the Fourth Preliminary Objection. They emphasize two arguments in particular. The first is that communal negotiations were not the

---

[111] Ibid., p. 345.

[112] Ibid., p. 346.

[113] Ibid.

[114] Ibid., p. 384 (separate opinion of Bustamante, Judge).

form of negotiations envisaged in Article 7.[115] Second, the type of negotiations which Article 7 required, namely, direct negotiations on the statal level, had not even been entered into.[116]

At the end of their dissenting opinion, Spender and Fitzmaurice summarize their criticism of the reasons put forth by the Court for its dismissal of the Third and Fourth Objections:

> We shall conclude by pointing out that requirements about "disputes" and "negotiations" are not mere technicalities. . . . They are inserted purposely to protect the parties, so far as possible, from international litigation that is unnecessary, premature, inadequately motivated, or merely specious.[117]

Conclusion

The arguments of the judges on the Four Preliminary Objections correspond closely to the pattern introduced at the outset of this chapter. There it was shown that the starting principles of Bustamante are far different from the starting principles of Spender and Fitzmaurice. It will be remembered that this major split was manifested in the uncertainty over what constituted the true intentions of the

---

[115] Ibid., pp. 560-561 (Spender and Fitzmaurice, Judg., dissenting).

[116] Ibid., p. 562.

[117] Ibid., p. 563.

drafters of the Mandate System and the Mandate for South West Africa. Bustamante starts from the principle that the authority of international law is best upheld by giving full power to agreements and treaties. From this it follows that the drafters intended the present case to be covered by the Mandate Agreement. Spender and Fitzmaurice, however, start from the principle of consent; the consent of the parties to the dispute is a prerequisite to international adjudication by the International Court of Justice. It follows that the Government of South Africa did not consider this case to be covered by the Mandate Agreement. The stands taken by the judges on the Four Preliminary Objections are a result of the starting principle to which they subscribe.

In the First Preliminary Objection may be seen the diversity of opinion as to what constitutes the true intentions of the framers of the Mandate System and the Mandate for South West Africa. The Court and Bustamante place primary emphasis on the intentions of the framers to found an enduring system based on the principle of the international community as the protector of the uncivilized peoples in the underdeveloped countries. Spender and Fitzmaurice, however, emphasize that the framers, including the Mandatory, did not intend the Mandates to be in the form of treaties. To them, this, and the fact that South Africa had not given her consent to the proceedings, is more important to the question of the

Court's jurisdiction than the intention to make the Mandate System a lasting embodiment of the principle of the 'sacred trust of civilization.'

Throughout the Four Objections, the judges who agree with the decision of the Court rely on liberal interpretations of the key words of Article 7. In the First Preliminary Objection, the Court rules that the Mandate is a "treaty or convention in force." In the Second Preliminary Objection, the Court gives a wide meaning to "Member of the League of Nations," and in the last two Objections it liberally interprets the words, "dispute" and "negotiations."

There is no criterion on which the arguments of the two points of view can be judged right or wrong. Nevertheless, it is possible to evaluate an argument on its legal relevance. On the basis of the discussion of the Four Preliminary Objections, the arguments against acceptance of jurisdiction are more forceful in presentation than the arguments for acceptance of jurisdiction. However, this does not mean that the arguments of the Court are unfounded on legal grounds as will be seen in Chapter Three.

CHAPTER III

THE SOUTH WEST AFRICA CASES AND THE DEVELOPMENT OF THE INTERNATIONAL COURT OF JUSTICE

> The complexity of the issue of jurisdiction, and the far-reaching ramifications of the results of a decision, one way or the other, on a question of jurisdiction, are reflected in the prominent place which these questions occupy in the general practice of the Court.[1]

There can be no doubt that the development of the International Court of Justice is integrally related to the scope of its jurisdiction. Rosenne (quote immediately above) is not alone in postulating the importance of the jurisdictional issue; Lauterpacht concurs:

> The development of international law by international tribunals is, in the long run, one of the important conditions of their continued successful functioning and of their jurisdiction.[2]

The question of jurisdiction is important to any case brought before the International Court of Justice, but the decision to adjudicate the South West Africa Cases, probably more than most other cases, will have a lasting effect on the future of the Court.

One reason for this is that in this particular case it is difficult to separate what should be considered the merits of the case from what is necessary to the jurisdictional issue. The Applicant's locus standi is founded on both Article 37 of the Statute of the Court and Article 7 of the

---

[1]Shabtai Rosenne, The International Court of Justice (Leyden, Netherlands: A. W. Sijthoff's Uitgeversmaatschappij N.V., 1957), p. 337.

[2]Sir Hersch Lauterpacht, The Development of the International Court of Justice (New York: Frederick A. Praeger, 1958), p. 6.

Mandate. Article 37, however, uses the term "treaty or convention in force " in transferring jurisdiction from the Permanent Court of International Justice to the International Court of Justice. Yet in the Applications, Ethiopia and Liberia request the Court to find that the Mandate is a "treaty in force." If the Court accepts jurisdiction, it has to do so on the grounds that the Mandate is a "treaty or convention in force." In accepting jurisdiction, the Court finds for the Applicants on the first part of their case.

There are two approaches to weighing the possible ramifications of the Court's decision in the South West Africa Cases. The first is to consider if the decision is a positive contribution to the development of the Court as the primary institution for giving authority and weight to the dictates of international law. At the same time it is necessary to evaluate the decision in the larger context of the Court as a factor in the maintenance of peace. The former approach analyzes the contribution of the decision to the limited, legal role of the Court; the latter analyzes the contribution of the decision to the larger, political role of the Court as a stabilizing factor in international relations.

The latter approach is integrally related to the former. The Court will play a significant role in the maintenance of peace by carrying out its duties as a court of law. The primary purpose of the Court is not to keep the

peace by providing an arena in which any dispute that threatens the peace can be impartially adjudicated. This is important, but what is even more important is for the Court to build a respected tradition in formulating and propounding international law. By doing this, the Court will prove far more effective in preserving the peace than if it attempted to adjudicate any dispute whatever (judiciable or nonjudiciable) brought to it. Thus, the contribution of the South West Africa cases to the development of the International Court of Justice as a factor in the maintenance of peace is dependent upon the extent to which the decision helps augment the legal authority of the Court.

It is clear that the Court must handle the question of its jurisdiction with care. The effectiveness of the Court in contributing to the growth of an acknowledged body of codified international law is limited by the narrow confines of today's decentralized state system. The Court is hampered in the scope of its jurisdiction by the reliance of international law on the consent of the participating states. Because each state is ultimately sovereign, the Court is dependent on the willingness of the parties to bring the dispute before the International Court of Justice. It is clear that a state would not allow a dispute in which it had an interest to come before the Court unless it expected a favorable outcome, or was prepared to accept an unfavorable decision.

The greater the interest at stake, the less likelihood

> there is of a contestant foregoing the advantages of a political settlement in which the power factor would work in his favor.[3]

On the other hand, though, if the Court adjudicates only those cases which are not crucial to the solution of a dispute and are insignificant to the parties of the case, the Court will lose its authority and effectiveness as a court of law.

The question of South West Africa is not insignificant. However, there is some question as to whether the Court has overstepped its limits and accepted jurisdiction of a case in which the consent of the parties was never given. If this is the case and a decision is handed down by the Court which threatens the interests of South Africa, it is unlikely that effect could be given to the decision without the assistance of a powerful third party since South Africa has fought the Court's adjudication of the case. If compliance is not forthcoming, then the authority of the Court is undermined by the ineffectiveness of its decisions. de Visscher describes this relationship of state sovereignty to the work of the Court:

> From its beginnings the Court understood that, in the application of the law as in the establishment of its own powers, sovereignty would be the center and symbol of resistance, the critical element that it must seek to contain without provoking dangerous reactions, and must respect without subordinating to it the law which was

---

[3]Oliver J. Lissitzyn, The International Court of Justice (New York: Carnegie Endowment for International Peace, 1951), p. 74.

in its keeping.[4]

Lauterpacht also emphasizes this point:

> Nothing should be done which creates the impression that the Court, in an excess of zeal, has assumed jurisdiction where none has been conferred upon it.[5]

Has the Court in the South West Africa Cases assumed jurisdiction "in an excess of zeal"? To evaluate the role of the South West Africa Cases in the development of the International Court of Justice this question must be answered.

In coming to its decision to accept jurisdiction, did the Court rely on sound legal principles? The answer to this question is that the Court did base its decision on viable legal principles; however, not the same legal principles that Spender and Fitzmaurice would have the Court base its decision on. The discussion in Chapter Two (under the heading "Conflicting Principles of International Law") introduced the principle of interpretation upon which the Court relies in the South West Africa Cases, namely, "that the treaty must remain effective rather than ineffective." Lauterpacht, who states this principle in these terms, also gives some indication of its importance:

> That principle of effectiveness of obligations, conceived as a vehicle of interpretation, is an instrument

---

[4]Charles de Visscher, Theory and Reality in Public International Law. Translated from the French by P. E. Corbell. First published in Paris, 1953. (Princeton, N. J.: Princeton University Press, 1957), p. 354.

[5]Lauterpacht, p. 227.

of considerable potency.[6]

This is especially true in the South West Africa Cases where this principle serves as the foundation of the arguments of the Court. It is presented as being equal in importance to the principle of consent. The Court has shown its reliance on this principle throughout its decision. Its reaffirmation of the 1950 Advisory Opinion, where it held that the Mandate for South West Africa and the obligations of the Government of South Africa therein, had survived the dissolution of the League, is an example of the application of this principle. On the other side of the decision, the dissenters, especially Spender and Fitzmaurice, base their arguments on the principle of consent. Spender and Fitzmaurice repeatedly refer to the importance of this principle.[7] For example, in their discussion of the First Preliminary Objection, they say:

> Moreover, quite apart from any question of onus of proof, a duty lies upon the Court, before it may assume jurisdiction, to be conclusively satisfied--satisfied beyond a reasonable doubt--that jurisdiction does exist. If a reasonable doubt--and still more if a very serious doubt, to put it no higher--is revealed as existing, then, because of the principle of consent as the indispensable foundation of international jurisdiction, the conclusion would have to be reached that jurisdiction is not established.[8]

---

[6] Ibid., p. 282.

[7] South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962, p. 474 (Spender and Fitzmaurice, Judg., dissenting). Hereafter cited as SWA Cases.

[8] Lauterpacht, p. 228.

Lauterpacht wrote that these were "potentially conflicting principles."[9] These two principles are the conflicting principles in the South West Africa Cases. The important point though is that they are acknowledged principles of international law.

Furthermore, the international judge is freer to choose which principle of international law he thinks relevant than is a municipal judge. Because the Court must operate in a decentralized political system, the judges of the Court must by necessity allow a greater degree of subjectivity enter into his decisions. International law does not have the tradition nor the long history of precedents that municipal law has; much of international law is still controvertible. This grants the international judge wider scope in making his decision. Lauterpacht writes describing the role of the judges in a case such as the South West Africa one:

> . . . when it is said that the task of interpretation is to give full effect to the scope of the treaty, the question inevitably arises: Is it the scope of the treaty as contemplated by the parties or the scope of the treaty as the judge or arbitrator sees it by reference to what, in his view, are the rational considerations and political circumstances surrounding the conclusion of the treaty or prompted by some general international interest? The two questions are not necessarily identical. Their juxtaposition brings vividly to mind the contingency that, under the guise of the principle of effectiveness, the door may be thrown wide open to a substantial measure of judicial legislation in disregard of the actual intention of the parties.[10]

---

[9] Ibid., p. 229.

[10] de Visscher, p. 355.

Lauterpacht is saying that there is no ready-made rule in a litigation such as the South West Africa one. In this case, it is the task of the judges to decide on the relativity of the dispute to judicial adjudication by whatever procedures they deem relevant. de Visscher also points to this aspect of international law:

> The international judge is naturally concerned to reinforce with logical apparatus the application of rules that are often far from precise. But the significance of these procedures must not be exaggerated. The rules of reasoning are not the rules of law. It has been justly observed that those relating to the interpretation of international treaties, for example, are not generally the determining cause of the decision, but rather the clothing in which the judge dresses a solution that he reached by other paths.[11]

Lissitzyn gives further evidence of this characteristic of international law:

> The value of the Court's work as a guide for the future, and consequently as a means of development of international law, is enhanced by full and cogent presentation of the reasoning behind its decisions. It is realized, of course, that a court may sometimes be guided in its action by considerations and feelings different from the ostensible grounds given in its opinion.[12]

In light of the views held by these eminent scholars of international law, it is apparent that the principle of consent is not the only valid principle of international law. The Court was free to decide on those principles of international law which it thought relevant to the case. It bases

---

[11]Lissitzyn, p. 27.

[12]de Visscher, p. 331.

its arguments on legitimate legal principles and therefore makes a positive contribution to the development of the International Court of Justice.

There is another important consideration in coming to a conclusion on the contribution of the Court's decision to the development of the International Court of Justice. Is the dispute one that can be settled in a court of Law? If the dispute is one that cannot be satisfactorily resolved by resort to legal theory, then the authority of the Court is impaired by the ineffectiveness of its decision. According to de Visscher,

> International practice demonstrates the reluctance of governments to submit to compulsory decision conflicts of high political significance, not because it would be impossible for the judge to decide them, but because his decision would not satisfy the grievances out of which such conflicts spring.13

Spender and Fitzmaurice argue that the dispute is one that is incapable of being legally resolved. The Applicants, they say, are asking the Court to decide that the Mandatory has not conformed to Article 2 of the Mandate which obligates South Africa to "promote to its utmost the material and moral well-being and the social progress of the inhabitants of the territory. . . ." In reference to this phrase, Spender and Fitzmaurice conclude:

---

[13]SWA Cases, p. 466 (Spender and Fitzmaurice, Judg., dissenting).

> There is hardly a word in this sentence which has not now become loaded with a variety of overtones and associations. There is hardly a term which would not require prior objective definition, or redefinition, before it could justifiably be applied to the determination of a concrete legal issue.[14]

Spender and Fitzmaurice, however, are not the only ones who find the dispute difficult to resolve on legitimate legal sources. Another source has declared,

> It seems clear that the real difficulty for Ethiopia and Liberia is to find a judicially satisfactory way to declare apartheid illegal.[15]

Accepting jurisdiction of a nonjusticiable dispute will hinder the development of the Court equally as much as accepting jurisdiction on weak legal arguments.

In answering the question of the justiciability of the dispute, it is necessary to leave the limited area of discussing the Court as a court of law, and enter into discussion of the Court as a factor in the larger context of international politics. This is so because the Court itself, in deciding on whether a dispute is justiciable must have reference to political realities. de Visscher sums up this point:

> . . . the real obstacle to international jurisdiction lies in the individualistic character of the existing distribution of power among nations, the subjective attitude of governments in regard to judicial settlement

---

[14]SWA Cases, pp. 467, 474, 478, 526, 530, 545-546, 563 (Spender and Fitzmaurice, Judg., dissenting).

[15]Zoltan Min, "Awaiting Final Judgment in the South West Africa Cases" (unpublished paper, n.d.), p. 10.

> being merely a reflection of the present structure of international relations.[16]

Because each state is sovereign, there is no legislative body or police force that has the requisite authority to impose its will on a delinquent state. Thus, compliance to a decision of the Court, whether it be to an Advisory Opinion or to a decision on contentious proceedings, generally rests with the parties to the case, and more particularly with the party that has lost the case. It is for this reason that the consent of the parties is so important to the continued growth of the International Court of Justice. The development of the Court is dependent on the willingness of the states to bring their disputes before the Court, and their willingness to abide by the decision handed down by the Court.

Returning to the question of whether or not the dispute is one capable of judicial resolution, it is apparent from the preceding discussion of the limitations of the scope of the Court's jurisdiction, that the primary consideration in answering this question is whether compliance will be forthcoming from the Republic of South Africa when the Court's decision is handed down. Although whatever might be said about the future actions of South Africa is speculation, it is possible to discuss some of the problems surrounding this question of compliance.

---

[16] de Visscher, p. 332.

The extent to which South Africa is willing to adhere to the decision of the Court hinges on the severity of the decision. The Court could hand down a strong decision in which it holds that the Mandate is still in force along with the obligations therein, that the practice of apartheid is against the provisions of the Mandate, and that the Mandatory has the duty to 'cease and desist' from such practice. At the other extreme, the Court could decide that the Mandate has lapsed along with the obligations incorporated in it. It is expected that the decision will be closer to the former hypothetical decision of the Court. At the minimum the Court will have to give verbal condemnation of apartheid as being against the principles of human rights embodied in the Covenant.[17]

Supposing though that the decision does embody a 'cease and desist' order, it is extremely unlikely that the Republic of South Africa would obey such a judgment. There is little prospect of a change of attitude towards apartheid among the White minorities of either the Republic of South Africa or the territory of South West Africa. In fact, in recent years the political balance in South Africa has shifted towards the right and has resulted in a stronger stand on

---

[17]Interview with Hon. Ernest A. Gross, Member of the New York Bar, Representative of Ethiopia in the South West Africa Cases in New York City, February 11, 1966.

apartheid.[18] South West Africa represents a buffer zone for the Whites of South Africa; if their policy of apartheid is threatened there, the prospect of a South Africa ruled by the Natives seems closer.[19] For these reasons there is little doubt but that the Government of South Africa would not willingly submit to a cease and desist order of the Court.

However, the means available to South Africa for avoiding the will of the international community are limited. It is possible that South Africa may attempt to stall even longer in avoiding the decision of the Court. As was seen in Chapter One, the Government of South Africa delayed a direct confrontation with the United Nations from 1950 through 1960 by saying that she was ready to negotiate a new institution to replace the Mandate, and then proposing new institutions which would be inacceptable to the international community. South Africa's only hope would be to find ways of delaying the enforcement of the Court's decision as she did in response to the 1950 Advisory Opinion of the Court.

There are several ways in which the international community can give effect to the decision of the Court. One is "self-help." One state or more can intervene in South Africa on behalf of the international community to relieve the

---

[18]New York Times, Marcy 30, 1966, p. 5.

[19]Elizabeth S. Landis, at a conference held in New York City on the South West Africa Cases under the auspices of New York University on October 10, 1965.

oppression of the Natives under the policy of apartheid. However, John Carey, in a paper written for a conference on the South West Africa Cases, quotes Professor and Mrs. Thomas saying that, "'humanitarian intervention in the twentieth century . . . retains but little vigor,' in view of its disuse against the dictators in the 1930's."[20]

> Another method of enforcement is through judicial supervision. It is submitted that the Court's power to construe its own prior judgments may under certain circumstances rightly be regarded as enforcement through judicial supervision.[21]

However, continuing the case under the auspices of the International Court of Justice would disappoint many who feel that the proceedings have been too long and too drawn-out already.

A third possibility is assurance of compliance by the United Nations Security Council. Article 94 (2) of the Charter of the United Nations states that:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The Applicants had this recourse in mind when they initiated

---

[20]John Carey, "Appropriate Methods of Enforcing an I.C.J. Judgment in the South West Africa Case" (unpublished paper, 1965), p. 15. Quote of A. V. and A. J. Thomas from "Non-Intervention" (1956).

[21]Ibid., p. 18.

proceedings in 1960.[22] Whether or not this method of enforcing the Court's decisions is effective is yet to be proven, however, since the application of 94(2) has been limited.

In summing up the applicability of these three methods of giving effect to the decision of the Court, Carey gives his opinion on which method would be most likely to succeed:

> To gain the goal of final freedom, South West Africa would seem to need most desperately the Court's continuing surveillance. The Court is better suited than a U. N. body, because of the opportunity for deep investigation. . . .[23]

From this brief discussion of the possible decisions of the court, the possible responses of the Republic of South Africa, and the possible subsequent reactions of the international community in order to give effect to the decision, two points emerge. First, it is clear that it is likely that South Africa will reject any decision which calls for the discontinuation of apartheid in South West Africa. Second, it is also clear that there are various methods available to the international community to insure enforcement of the decision, although there is no assurance as to their effectiveness. These two points though do not enable one to come to a conclusion that the dispute is justiciable. One can hypothesize

---

[22]Interview with Hon. Ernest A. Gross, New York City, February 11, 1966.

[23]Carey, p. 33.

on the various courses the dispute might take in the future but, as of now, it is impossible to answer the question of whether the dispute is one that can be resolved by resort to international law.

In evaluating the decision as it affects the development of the Court as a court of law, it is possible to say that the decision was a positive contribution to the Court's development since it was based on legitimate principles of international law. On the other hand, the question of the justiciability of the dispute remains unresolved. In sum, on the basis of what is known of the case at the present moment, the decision was a positive contribution.

Conclusion

The development of the International Court of Justice as a factor in the maintenance of peace is proportional to its effectiveness in promoting respect for international law as an impartial, prevailing authority. de Visscher points to this fundamental duty of the Court:

> Much more than the establishment of peace, the development of international law is the essential function of judicial settlement and more particularly of the International Court of Justice.[24]

By basing its decision on sound legal principles, it appears that the Court carried out its duty in developing international

---

[24] de Visscher, p. 351.

law. In doing so the Court made a substantial contribution to the ultimate goal of a world peace founded upon the rule of law.

Robert S. Mueller III

APPENDIX I

LEAGUE OF NATIONS

MANDATE FOR GERMAN SOUTH-WEST AFRICA

THE COUNCIL OF THE LEAGUE OF NATIONS:

Whereas by Article 119 of the Treaty of Peace with Germany signed at Versailles on June 28th, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions, including therein German South-West Africa; and

Whereas the Principal Allied and Associated Powers agreed that, in accordance with Article 22, Part I (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory aforementioned, and have proposed that the Mandate should be formulated in the following terms; and

Whereas His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

Whereas, by the afore-mentioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:

Confirming the said Mandate, defines its terms as follows:--

Article 1.

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

Article 2.

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate

as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.

Article 3.

The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on September 10th, 1919, or in any convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

Article 4.

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

Article 5.

Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

Article 6.

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5.

Article 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate.

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

The present Declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany.

Made at Geneva the 17th day of December, 1920.

Certified true copy.

Secretary-General.

Note: League of Nations Mandate for South-West Africa, Miscellaneous publications for South-West Africa, Vol. 1.

APPENDIX II

League of Nations--Official Journal

ARTICLE 22

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the

sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

Note: "The Covenant of the League of Nations." League of Nations--Official Journal, No. 1 (February 1920), pp. 9-10.

BIBLIOGRAPHY

LEAGUE OF NATIONS DOCUMENTS

League of Nations. Mandate for German South West Africa. 21/31/14D. Geneva: December 17, 1920.

UNITED NATIONS DOCUMENTS
(listed in chronological order)

General Assembly

United Nations. Speech of Field Marshall Smuts before the Fourth Committee on 4 November 1946. A/C 4/41, A/123. Official Records of the General Assembly, Fourth Committee, Summary Records of Meetings from 1 November to 12 December, 1946. Lake Success, New York: n.d.

_____. Resolutions Adopted by the General Assembly during its First Session from 23 October to 15 December, 1946. Official Records of the First Session of the General Assembly. Supplements. A/64 Add. 1.

_____. J. R. Jordaans, Letter of 11 July, 1949 addressed to the Secretary General of the United Nations. A/929. Official Records of the Fourth Session of the General Assembly, Fourth Committee: Annex to the Summary Records of Meetings. Lake Success, New York: 1949.

_____. Official Records of the Fourth Session of the General Assembly, Fourth Committee, Summary Records of Meetings from 20 September to 5 December, 1949. Lake Success, New York: n.d.

_____. Resolutions Adopted by the General Assembly during its Fourth Session from 20 September to 10 December, 1949. Official Records of the Fourth Session of the General Assembly, Resolutions from 20 September to 10 December, 1949. Lake Success, New York: n.d.

_____. Resolutions Adopted by the General Assembly during its Fifth Session from 19 September to 15 December, 1950. Official Records of the Fifth Session of the General Assembly, Supplement No. 20, A/1775. New York: n.d.

_____. Resolutions Adopted by the General Assembly during its Eighth Session from 15 September to 9 December, 1953. Official Records of the Eighth Session of the

General Assembly, Supplement N. 17, A/2630. New York: n.d.

_____. Resolutions Adopted by the General Assembly during its Ninth Session from 21 September to 17 December, 1954. Official Records of the Ninth Session of the General Assembly, Supplement No. 21, A/2890. New York: n.d.

_____. Resolutions Adopted by the General Assembly during its Tenth Session from 20 September to 20 December, 1955. Official Records of the Tenth Session of the General Assembly, Supplement No. 19, A/3116. New York: n.d.

_____. Report of the Committee on South West Africa to the General Assembly. Official Records of the Eleventh Session of the General Assembly, Supplement No. 12, A/3151. New York: 1956.

_____. Resolutions Adopted by the General Assembly during its Eleventh Session from 12 November to 8 March, 1956-1957. Official Records of the Eleventh Session of the General Assembly, Supplement No. 17, A/3572. New York: n.d.

_____. Resolutions Adopted by the General Assembly during its Twelfth Session from 17 September to 14 December, 1957. Official Records of the Twelfth Session of the General Assembly, Supplement No. 18, A/385. New York: n.d.

_____. Resolutions Adopted by the General Assembly during its Thirteenth Session from 16 September to 13 December, 1958. Official Records of the Thirteenth Session of the General Assembly, Supplement No. 18, A/4090. New York: n.d.

_____. Report of the Good Offices Committee. Incorporated in the Report of the Fourth Committee. A/3959. Official Records of the Thirteenth Session of the General Assembly, Annexes 1958-1959. New York: 1959.

_____. Report of the Committee on South West Africa to the General Assembly. Official Records of the Thirteenth Session of the General Assembly, Supplement No. 12, A3906. New York: 1958.

_____. Resolutions Adopted by the General Assembly during

its Fourteenth Session from 15 September to 13 December, 1959. Official Records of the Fourteenth Session of the General Assembly, Supplement No. 16, A/4354. New York: n.d.

_____. Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration in the Granting of Independence to Colonial Countries and Peoples. Chapter IV: "South West Africa," A 6000/Add. 2*. New York: 1956.

Trusteeship Council

United Nations. Report of the Union of South Africa on its Administration of the Territory of South West Africa. T175. Trusteeship Council; Official Records of the Third Session, Supplement, T337. Lake Success, New York: 1947.

_____. Trusteeship Council: Report to the General Assembly covering 26 March to 28 April, 1947. Official Records of the Second Session of the General Assembly, Supplement No. 4, A/312. New York: 1949.

United Nations Yearbooks

United Nations. Yearbook of the United Nations, 1948-1949, Sales No.: 1950 I.11. Lake Success, New York: Department of Public Information, United Nations, 1950.

_____. Yearbook of the United Nations, 1950. Sales No.: 1951 I.24. New York: Department of Public Information, United Nations, 1951.

_____. Yearbook of the United Nations, 1953. Sales No. 1954 I.15. New York: Department of Public Information, United Nations, 1954.

_____. Yearbook of the United Nations, 1954. Sales No. 1955 I.25. New York: Columbia University Press in Co-operation with the United Nations, 1955.

INTERNATIONAL COURT OF JUSTICE PUBLICATIONS

International Court of Justice. International Status of South West Africa, Advisory Opinion of July 11th, 1950: I.C.J. Reports 1950.

_____. Pleadings, Oral Arguments, Documents: International Status of South West Africa, Advisory Opinion of July 11th, 1950.

_____. South-West Africa--Voting Procedure, Advisory Opinion of June 7th, 1955: I.C.J. Reports 1955.

_____. Admissibility of hearings of petitioners by the Committee on South West Africa, Advisory Opinion of June 1st, 1956: I.C.J. Reports 1956.

_____. South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962.

BOOKS

Africa 1960 Committee. Mandate in Trust: the Problem of South West Africa. London: Africa 1960 Committee, 1960.

Baker, Ray Stannard. Woodrow Wilson and World Settlement. Garden City, N. Y.: Doubleday, Page & Co., 1922.

Brierly, J. L. The Law of Nations. Oxford: The Clarendon Press, 1928; Fourth Edition, 1950.

Calvocoressi, Peter. South Africa and World Opinion. London, Institute of Race Relations with the Oxford University Press, 1961.

Clark, Grenville, and Louis B. Sohn. World Peace Through World Law, Second Edition, Revised. Cambridge, Massachusetts: Harvard University Press, 1964.

Claude, Inis L., Jr. Swords into Plowshares, Third Edition, Revised. New York: Random House, 1964.

de Beer, Z. J. Multi-Racial South Africa--the Reconciliation of Forces. London: Institute of Race Relations with the Oxford University Press, 1961.

de Visscher, Charles. Theory and Reality in Public International Law. Translated from the French by P. E. Corbell. (First Published in Paris, 1953.) Princeton N. J.: Princeton University Press, 1957.

Falk, Richard A., and Saul H. Mendlovitz (eds.). The Strategy of World Order. Vol. I: Toward a Theory of War

Prevention, Vol. II: International Law, Vol. III: The United Nations. New York: World Law Fund, 1966.

First, Ruth. South West Africa. Baltimore: Penguin Books, 1963.

Friedmann, Wolfgang. The Changing Structure of International Law. New York: Columbia University Press, 1964.

Goldblatt, I. The Mandated Territory of South West Africa in Relation to the United Nations. Cape Town, S. A.: C. Struik, 1961.

Gordon-Brown, A. (ed.). The Year Book and Guide to Southern Africa: 1964 Edition. London: Robert Hale Ltd., 1964.

Gould, Peter R. (ed.). Africa: Continent of Change. Belmon, California: Wadsworth Publishing Company, 1961.

Gross, Ernest A. The United Nations: Structure for Peace. New York: Published for the Council on Foreign Relations by Harper & Brothers, 1962.

Hall, H. Duncan. Mandates, Dependencies and Trusteeship. Washington: Carnegie Endowment for International Peace, 1948.

Hudson, Manley O. The Permanent Court of International Justice 1920-1942. New York: Macmillan Company, 1943.

Jenks, C. Wilfred. The Common Law of Mankind. Published under the auspices of the London Institute of World Affairs. New York: Frederick A. Praeger, 1958.

Kaplan, Morton A., and Nicholas deB. Katzenbach. The Political Foundations of International Law. New York: John Wiley & Sons, Inc., 1961.

Kelsen, Hans. Principles of International Law. New York: Rinehart & Company, 1952.

Lauterpacht, Sir Hersch. The Development of International Law by the International Court. New York: Frederick A. Praeger, 1958.

Lissitzyn, Oliver J. The International Court of Justice. New York: Carnegie Endowment for International Peace, 1951.

Mansergh, Nicholas. South Africa 1906-1961. New York: Frederick A. Praeger, 1962.

McDougal, Myres S., and Associates. Studies in World Public Order. New Haven: Yale University Press, 1960

Mockford, Julian. South-West Africa and the International Court. London: The Diplomatic Press and Publishing Co., 1950

L'Connell, D, P. International Law. Vols. I and II. Dobbs Ferry, New York: Oceana Publications, Inc., 1965

Rosenne, Shabtai. The International Court of Justice. Leyden, Netherlands: A. W. Sijthoff's Uitgeversmaatschappij N.V., 1957.

_____. The World Court, What It Is and How It Works. New York: Oceana Publications, Inc., 1962.

Rosenthal, Eric (ed.). Encyclopaedia of Southern Africa. London and New York: Frederick Warne & Co., Ltd., 1961.

Scott, Michael. Shadow Over Africa. London: The Union of Democratic Control, 1950.

_____. A Time to Speak. Garden City, New York: Doubleday and Company, Inc., 1958.

Wright, Quincy. Mandates under the League of Nations. Chicago: University of Chicago Press, 1930.

_____. The Role of International Law in the Elimination of War. New York: Oceana Publications, Inc., 1961.

ARTICLES AND PERIODICALS

Green, I. C., "South West Africa (in the United Nations General Assembly, 1950)," The International Law Quarterly, IV, No. 2 (April, 1951), pp. 219-221.

Kahn, E., "The International Court's Advisory Opinion on the International Status of South West Africa," The International Law Quarterly, IV, No. 2 (April, 1951), pp. 78-99.

Krogh, D. C., Dr. "The National Income and Expenditure of South-West Africa (1920-1956)," The South African

Journal of Economics, XXVIII, No. 1 (March, 1960), pp. 3-22.

Landis, Elizabeth S., "South West Africa in the International Court: Act II, Scene 1" Cornell Law Quarterly, XLIX, No. 2 (Winter, 1964), pp. 179-227. New York Times, 1960-1966.

UNPUBLISHED MATERIAL

Carey, John, "Appropriate Methods of Enforcing an I.C.J. Judgment in the South West Africa Case." Unpublished paper for a conference held in New York City on October 15, 1965. The conference was on the South West Africa Cases. Copyright, 1965.

Dale, Richard, "The Evolution of the South West African Dispute before the United Nations 1945-1950." Unpublished Ph.D. dissertation, Princeton University, 1962.

Min, Zoltan, "Awaiting Final Judgment in the South West Africa Cases." Unpublished paper.

Rath, Alfred H., "A Study of South-West Africa 1915-1952." Unpublished M.A. Thesis, University of Southern California, 1955.

Taylor, Pauline, "The Union Government's Treatment of the South-West African Mandate." Unpublished M.A. Thesis, University of Cape Town, 1944.

OTHER SOURCES

Conference on the South West Africa Cases held under the auspices of New York University in New York City on October 15, 1965.

Personal interview with Hon. Ernest A. Gorss, Member of the New York Bar, Representative of Ethiopia in the South West Africa Cases in New York City, Febryary 11, 1966.