The United Nations Council for Namibia with special emphasis on its Decree No 1

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Submitted in fulfilment of the requirements for the Degree of Master of Laws in the Faculty of Law of the University of Cape Town

1992

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LLM Thesis - UCT

Title: The United Nations Council for Namibia with special emphasis on its Decree No 1

Summary:

This thesis examines the legal status of the United Nations Council for Namibia and the validity of its actions before and after the independence of the Territory with special emphasis on its Decree No 1. Chapter I describes the natural environment of Namibia, its human resources and economic conditions. These are basic to the interpretation and evaluation of the policies concerning administration and development of the Territory.

The problem of Namibia in the UN is analysed in Chapter II. All organs of the Organisation, the GA, the SC, and the ICJ found that South Africa's presence in Namibia was illegal and that South Africa had no right to administer the Territory. As a result the UN terminated South Africa's Mandate over Namibia and established the UNCfN (as a subsidiary organ of the GA in terms of art 22 of the Charter). This body then administered the Territory until its independence in March 1990.

Because UNCfN was a unique institution in the history of the Organisation, and because of the Council's uncertain legal status, Chapter IV examines the legal character of the Council and concludes that UNCfN had legitimate powers over the Territory (even with regard to foreign affairs). In its capacity as administering authority, UNCfN, on 27 September 1974, issued Decree No 1 for the protection of the natural resources of Namibia. The legal force of this Decree in international law before and after independence is the focus of discussion in Chapter V.

With regard of the validity of this Decree before independence, an examination of the practice of states showes that almost all Member States of the UN denied the Decree binding force in international law. To hold otherwise would imply that the Council could create

international legal obligations for UN Members, thereby giving the Council greater powers than those of a sovereign government. Because the Decree is an act of the Namibian Government (following its incorporation into the Namibian Constitition), the validity of Decree No 1 after independence is discussed in terms of the principles governing observance of foreign acts of state. The finding is that other states are free to recognise paras 1 and 3 (as self-executing acts) or execute paras 4 and 5 (as non-self-executing acts). The observance of para 2 of the Decree as an illegal act of state in international law depends on the approach of the state concerned to the act of state doctrine. Continental states adhere to territorial principle, and so they usually deny the validity of illegal foreign acts, whereas Anglo-American jurisdictions refuse to examine foreign acts in terms of their compliance with international law. Because of the confusion surrounding the judicial use and proper scope of the doctrine, however, one can only speculate that an American might observe para 2 of the Decree.

Acknowledgements

I acknowledge with sincere thanks and appreciation the guidance and constructive criticism which I received from my promoter, Professor T W Bennett.

My thanks also go to the staff of the Brand Van Zyl Law Library for their assistance throughout the period of research.

C O N T E N T S

ABBREVIATIONS

AFDI	Annuaire Francais de Droit International
AJIL	American Journal of International Law
ANC	Action Christian National
ArchVR	Archiv des Völkerrechts
Art	Article
AWBB	Außenwirtschaftsdienst des Betriebs-Beraters
BGHSt	Bundesgerichtshof für Strafsachen
BGHZ	Bundesgerichtshof für Zivilsachen
BTD	Bundestagsdrucksache
BYIL	British Yearbook of International Law
CAV	Compania Azucarera Vertientes-Cameguey de Cuba
CDA	Christian Democratic Action
Ch	Chapter
CJTL	Columbia Journal of Transnational Law
Con	Conference
CYIL	Canadian Yearbook of International Law
DGVN	Deutsche Gesellschaft für die Vereinten Nationen
Doc	Document
DTA	Demokratische Turnhallen Allianz
EC	European Community
FAO	Food and Agriculture Organisation
FAZ	Frankfurter Allgemeine Zeitung
FNC	Federal Convention of Namibia
FRG	Federal Republic of Germany
GA	General Assembly

GAOR	General Assembly Official Records
GDR	German Democratic Republic
GG	Grundgesetz der Bundesrepublik Deutschland
GYIL	German Yearbook for International Law
HIJL	Harvard International Law Journal
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organisation
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IFC	International Finance Corporation
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IMF	International Monetary Fund
IMO	International Maritime Organisation
IPR	Internationales Privatrecht
ITU	International Telecommunications Union
JZ	Juristische Zeitschrift
LPIB	Law and Policy in International Buisness
LQR	Law Quarterly Review
MLR	Michigan Law Review
MPLA	Movimento Popular para a Libertacao de Angola
NATO	North Atlantic Treaty Organisation
NJW	Neue Juristische Wochenzeitschrift
NNDP	Namibia National Democratic Party
NNF	Namibia National Front

No	Number
NPF	National Patriotic Front
Nr	Nummer
NYIL	Netherlands Yearbook of International Law
NYUJILP	New York University Journal of International Law and Politics
OAU	Organisation of African Unity
Para	Paragraph
PCIJ	Permanent Court of International Justice
RdC	Recueil des Cours
RDDH	Revue des Droits de l'homme
Res	Resolution
RGZ	Reichsgericht für Zivilsachen
RSA	Republic of South Africa
SA	South Africa
SALR	South African Law Reports
SAYIL	South African Yearbook of International Law
SBGE	Schweizerischer Bundesgerichtshof
SC	Security Council
SCOR	Security Council Official Records
Sess	Session
SJIR	Schweizerisches Jahrbuch für Internationales Recht
Suppl	Supplement
SWA	South West Africa
SWAPO	South West African People's Organisation
SWAPO-D	South West African People's Organisation - Democratic
UCLR	University of Columbia Law Review
UDF	United Democratic Front

UN	United Nations
UNCfN	United Nations Council for Namibia
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNIDO	United Nations Industrial Development Organisation
UNITA	Uniao Nacional para a Independencia Toatl de Angola
UNPC	United Nations Palestine Commission
UNSCOP	United Nations Special Committee on Palestine
UNTS	United Nations Treaties Series
UNYB	United Nations Yearbook
US	United States
VJIL	Virginia Journal of International Law
Vol	Volume
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WMO	World Meterological Organisation
WTO	World Tourism Organisation
YBILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

I. INTRODUCTION

On 31 January 1989, the GA declared 21 March 1990 as independence day for Namibia[1], a première not only for the new State but for the United Nations as well.

By Res 652 of 17 April 1990 the SC recommended that the GA approve Namibia's application to become a member of the Organisation, and on 23 April 1990 Namibia was admitted as the 160th member of the UN, the world's youngest independent State.

These acts resolved one of the most complex problems of modern international law, especially the law of international organisations. Since the establishment of the Organisation in 1945, the UN and its organs have been involved in the situation in southern Africa. Political, economic and humanitarian problems and conflicts were on the agenda of almost every plenary meeting of the UN. More than 150 GA and more than 30 SC resolutions and declarations referred directly to the problem of Namibia.[2] This problem has been the subject of six appearances before

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1 The name Namibia, established by the GA Res 2372 (XXII) of 12 June 1968, is taken from the Namib Desert (which is in the Territory). The name South West Africa, which was used in the older literature, will also occur, depending on the context. The use of one name or the other should not be construed as a judgment on the status on the Territory before independence.

2 See for a survey M Nzuwah 'United Nations decisions on Southern Africa' (1979) 4 Journal of SA Affairs 187-210.

the ICJ,[3] and without doubt it has prompted more resolutions and produced more juridical decisions than any other matter to come before the UN.

The situation in Namibia before independence seemed to be no more than conflict between the UN and South Africa, one of the last problems of decolonialisation. But this conflict was only part of a much larger issue: the conflict between the western industrial countries and the developing countries of the Third World. This issue was intensified by the economic and strategic importance of Namibia.[4] The Territory has a great variety of mineral deposits, including diamonds, lead/zinc, copper, bauxite, salt and, of a particular importance, uranium (5 per cent of the world production). Besides this there are rich marine resources in the 1400 km coastal waters, which are one of the greatest fishing grounds in the world.[5] The exploitation of Namibian natural resources was conducted almost exclusively by South Africa or by European and North American companies under South African concessions.[6]

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3 See II (3) below, which deals with the ICJ Opinions of 1950, 1952 and 1971 and judgments of 1962 and 1966.

4 UNCfN, Report of the UN International Conference in Support of the Struggle of the Namibian People for Independence Paris 25 - 29 April 1983 UN-Doc A/Conf 120/8 1 seq.

5 See Report UNCfN GAOR 42nd Sess Suppl No 24 vol I §§ 511 seq.

6 UNCfN, Report on the Activities of Foreign Economic interests in Namibia of 25 April 1984 UN-Doc A/AC/131/115.

On 27 October 1966 the UN adopted Res 2145 (XXI), in which it revoked South Africa's Mandate over South West Africa and simultaneously designated South West Africa as a territory having international status. (The UN decided, that the Territory should maintain this status until it achieved independence). By these acts the UN laid the foundation-stone of a UN-administration for Namibia, which until independence was exercised by the United Nations Council for Namibia.[7]

Undeterred by the potential constitutional and legal problems raised by the creation of the UNCfN,[8] the Council for Namibia demanded the right to act for the Territory, even in international relations. It entered into international agreements on behalf of the Territory, applied for membership of international organisations and participated in many international conferences.

On 27 September 1974 the UNCfN adopted Decree No 1 for the Protection of the Natural Resources of Namibia. This Decree was probably the Council's most important and most controversial act during its term of office. Few questions have given rise to as much confusion as the legal nature

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7 The UNCfN was constituted by GA Res 2248 (S-V) of 19 June 1967, first as the United Nations Council for South West Africa; after GA Res 2372 (XXII) of 12 June 1968 (which established Namibia as the official name for the Territory) it changed its name.

8 See GA Res 2248 (S-V) of 19 May 1967. The vote on this Resolution was 85 to 2, with 30 abstentions. The large number of abstentions, and the fact that all major powers except China abstained, shows the controversial nature of this decision.

and character of Decree No 1, and even the Commissioner for Namibia himself characterised the Decree as a 'new and strange legal concept'.[9]

It is the aim of this thesis to: clarify the legal character of the United Nations Council for Namibia; determine the international legal validity of the Council's decrees; decide whether such decrees are binding on the new State of Namibia. The major object of research in this connection will be Decree No 1, specifically its legal nature and character and its binding force on Member States of the UN before independence as well as its legal force in the internal laws of Namibia's trading partners after independence.

(1) Namibia - geographic, ethnic, and economic conditions[10]

(a) Geographical features

The Territory of Namibia lies on the Atlantic seaboard of the south-western portion of Africa. The Territory

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9 Report of the Commissioner for Namibia on the implementation of Decree No 1 UN-Doc A/AC/131/81 of 18 July 1980.

10 In my opinion the three factors of natural environment, human resources and their inter-relationship and economic conditions are basic to the interpretation of conditions and future policy in Namibia and cardinal to an evaluation of any policy of administration and development in the Territory.

stretches from the southern border of Angola to the north-western border of the Republic of South Africa, and from the Atlantic Ocean in the West to the western border of Botswana in the East.

Namibia has an area of 824 269 sq km (318 261 sq miles), including the area of Walvis Bay (measuring 1 124 sq km or 437 sq miles), which is a part of the Republic of South Africa administered by its Government in Pretoria.[11] The Territory constitutes nearly 3 per cent of the total area of Africa, while its population amounts to only 0,2 per cent of the total population of the Continent. With the exception of Botswana, it has the lowest population density south of the Sahara,[12] and one of the lowest population density figures in the world.[13]

Topographically, the Territory can be divided into three separate regions: the Namib, the Central Plateau and the Kalahari. The western area between the escarpment and the coast is known as the Namib. It is an extremely arid and desolate region stretching along the entire coastline of the Territory. The lateral width of the area varies from 80 to 130 km, and it constitues more than 15 per cent of

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11 J Pütz, P Caplan & H von Egidy Namibia Handbook and Political Who's Who 13.

12 1962 UN Statistical Yearbook 24-5.

13 UN Statistical Yearbook op cit 21-39. The population density is less than one person per square kilometre. For purposes of comparison, the following population densities per square kilometre have been extracted from the same source: Liberia, 12; Ethiopia, 17; United States of America, 20; the Netherlands, 346.

the total land area of Namibia. It consists mainly of vast plains of constantly moving sand and low mountains. Practically the whole population of this region, being less than 6 per cent of Namibia's population, is concentrated in four coastal urban areas (Swakopmund, Walvis Bay, Lüderitz and Oranjemund). The Central Plateau is an area lying to the east of the Namib. It also stretches all the way from North to South. It varies in altitude from between 1 000 to 2 000 m, and in itself offers a diversified landscape of rugged mountains, sand-filled valleys and softly undulating plains. It covers slightly more than 50 per cent of the land area of the Territory. Finally, the Kalahari covers the eastern, north-eastern and northern areas of Namibia. It is mainly an area of monotonous plains covered by sand dunes, which, in contrast to those of the Namib, are covered with vegetation. The main problem confronting present and future exploitation of the Kalahari region is not an inadequate rainfall, but the lack of surface water (ground water is sometimes so deep as to be economically unexploitable).

(b) Population

The exact population and its structure is disputed. Particular estimates depend on the political point of view of the person computing the figures. Following recent Namibian estimates, the total population of the Territory

can be calculated at 1 184 000.[14] Following a South African projection, however, based on a census of 1970, the total population should have been about 1 000 000 in 1985, composed of 84 per cent Blacks, 5 per cent Coloureds and 11 per cent Whites.[15]

The most recent figures emanating from Namibia indicate that the total population is 1 200 000, composed of 87 per cent Blacks, 6 per cent Coloureds and 7 per cent Whites.[16] In this context one must appreciate that the population of Namibia is, and has been for centuries, a heterogenous one.[17] The main population groups - differing widely in appearance, ethnic stock, nations of origin, culture, language and general level of development[18] - are (in order of their size): the Ovambo (587 000); the Kavango (110 000); the Herero, also known as Cattle Damara or Damara of the Plain (89 000); the Dama, also known as Bergdama or Damara of the Hills (88 000); the European or White population group, mainly of South African and German origin (78 000); the Nama, also known as Khoi or Hottentots (57 000); the Coloured (48 000); the Caprivian (44 000);

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14 Standard Bank Group Namibia in Figures 2.

15 R J Rotberg Namibia - Political and Economic Prospects 42, citing the South African Department of Statistics.

16 Pütz, von Egidy & Caplan (n11) 13.

17 See J H van der Merwe National Atlas of South West Africa (Namibia) 42 seq and J H Wellington South West Africa and its Human Issues part I 1-128 and S Bruwer SWA: The Disputed Land.

18 See for further details, Ethiopia & Liberia v South Africa 1966 ICJ Reports 311-48.

the Bushmen (34 000); the Rehoboth Baster (29 000); the Tswana (7 000); Others (12 000).[19]

(c) Economic conditions

Statements about Namibia's economic power are often contradictory. On the one hand, they speak of the richest mineral resources in Africa[20] and on the other hand - according to the South African Government - state that available mineral resources exist in non-workable quantities.[21] More detailed accounts about output, which would clarify the question, are generally withheld by South African and foreign companies.

It is clear, however, that the economy of the Territory is based on mining, agriculture and fishing. These industries together account for 89 per cent of the export rate and 40,7 per cent of the gross national product.[22]

The greatest obstacle to the development of Namibia's economy is its natural environment. Most of the country is desert; only 32 per cent of the Territory receives an

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19 Standard Bank Group (n14) 2.

20 S C Saxena Namibia - Challenge to the United Nations 3 and UNCfN Report of the UN International Conference of the Struggle of the Namibian People for Independence Paris 25-29 April 1983 Doc. A/Conf 120/8 of 4 April 1983 1.

21 Rotberg (n15) 30-32.

22 Standard Bank Group (n14) 3.

average annual rainfall of more than 400 mm which can be regarded as the absolute lower limit for agriculture in warm temperate summer rainfall regions.[23]

(2) Historical Development[24]

In the closing years of the nineteenth century Namibia came into being as a geographically defined territory under agreements and boundary settlements between the three European powers, Germany, Portugal and Britain.

Although Portuguese navigators, such as Diego Cao (1484), Bartholomeu Dias (1486) and Gasper Vegas (1534), went ashore on their voyages along the coast of the present Namibia, interest in this part of the African Continent was stimulated only after the establishment of a white settlement at the Cape of Good Hope in 1652. The 'Grundel' was dispatched by the Cape Governor as early as 1670 to explore the coast of this area. The 'Bode' followed in

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23 ICJ Reports (n18) 295.

24 The historical data and facts are drawn from following publications:
I Goldblatt History of South West Africa from the Begining of the Nineteenth Century;
Interessengemeinschaft Deutschsprachiger Südwester Vom Schutzgebiet bis Namibia 1800-1984 257 seq; M E Townsend The Rise and Fall of Germany's Colonial Empire 1884-1918; W O Aydelotte Bismarck and the British Colonial Policy: The Problem of South West Africa; P Laband Das Staatsrecht des Deutschen Reiches vol II; J Dugard The South West Africa/Namibia Dispute; G M Cockram South West African Mandate and UN Commission of Enquiry into South West African Affairs Report for 1962-1963.

1677. Although both ships anchored at Angra Pequena and Sandwich Bay, the interior could not be explored because of the impenetrable nature of the Namib Desert.

In 1868, Rhenish missionaries, the first European inhabitants of the central area, in desperation asked the British authorities in the Cape Province for protection. They also asked that Hereroland be annexed by the British. Their proposal was, curiously, backed strongly by Bismarck, who was at that time uninterested in German colonial development in the area; he declared in 1868 that 'the advantages expected from colonies rested for the most part on illusions'.[25] The British, however, declined to accept the invitation to annex the area.

Then, in 1883, a German - Heinrich Vogelsang - landed at Angra Pequena, to the South of Walvis Bay, as an agent for a Bremen merchant, Adolf Lüderitz. He succeeded in acquiring an area of approximately 560 000 ha around Angra Pequena to be used for trading stations and settlements from the Nama chief Josef Fredericks. In 1883, since native fighting had broken out in 1880, the German Government asked whether Britain was prepared to protect Lüderitz adding that eventually protection would be given by the German Government itself. Further it wanted to know whether Her Majesty's Government would or wished to exercise

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[25] L S Amery German Colonial Claim 50.

authority in the area. Again the British Government refused to be responsible for any territory outside Walvis Bay.[26]

In April 1884, the German Consul at the Cape was instructed by Bismarck to advise the Cape Government that the area acquired by Lüderitz had been formally placed under German protection. The German flag was hoisted at Angra Pequena, and the Bay was renamed Lüderitzbucht. This marked the creation of German South West Africa.

In August 1884, a German protectorate was formally declared over the area surrounding Lüderitzbucht. This was followed in September of the same year by the declaration of a further protectorate over the coastal area from the Orange River up to Cape Frio, excluding Walvis Bay. In October Namaland was declared a protectorate. In the next year, German agreements with the Rooinasie (Red People) and with the Basters of Rehoboth followed. In October of the same year the Herero also accepted German protection.

While Germany was extending its sphere of influence into the interior, Britain, in March 1885, proclaimed a protectorate over Bechuanaland. In the North the Portuguese were already in possession of Angola. The boundaries of the new Territory of German South West Africa were laid down in agreements with Portugal and Britain. One of the most important of these agreements was the 1885 General Act of

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[26] In 1878, the United Kingdom decided to annex Walfish Bay (Walvis Bay, as it is now known), the only good harbour of South West and its surrounding area. Commander R C Deyer, on board of the ship 'Industry', then annexed the area surrounding Walvis Bay in the name of the Queen. The area was incorporated in the Cape Colony by Act 35 of 1884.

the Conference of Berlin. This Conference, among other things, ratified the protectorate proclaimed by Bismarck in 1884 over the coast of South West Africa. A joint declaration by Germany and Portugal signed in 1886 delimited the northern boundary of South West Africa.[27] An Anglo-German Agreement of 1890 delimited the eastern and southern boundaries and recognised South West Africa as a German sphere of influence.[28] South West Africa remained under German rule until the outbreak of the First World War.

On 9 July 1915, German troops in the Territory surrendered to the South African Forces, who had joined the Allies in the war against Germany.

With the termination of the First World War, and in terms of art 119 of the Peace Treaty of Versailles 1919, Germany relinquished its colonial territories including German South West Africa. All former German overseas possessions were placed under the international control of the League of Nations' mandate system. According to art 22 of the Covenant of the League,[29] South West Africa was classified as a 'C' Mandate, ie one which:

> 'owning to the sparseness of population, or small size, or remoteness from the centres of civilisation, or geographical contiguity with the territory of the

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27 The text of the Proclamation is reproduced in I Brownlie African Boundaries 1277-8.

28 Brownlie op cit 1027-8.

29 For full text see F M von Asbeck UN Textbook part I 8.

> Mandatory, and other circumstances, can best be administered under the laws of the Mandatory as an integral portion of its territory.'

This Mandate was conferred on South Africa by the Council of the League of Nations by a Resolution of 17 December 1920.

During the 1930s and early 1940s proposals were made within South Africa for incorporation of the Territory into the Union as a fifth province.[30] No steps were taken to give effect to these proposals until the end of World War II. In 1945 at the San Francisco Conference, when the Charter of the United Nations was being drafted, no clear provision was made for the future of mandated territories, as it was confidently expected that Mandatory States would place their territories under the new trusteeship system.[31] South Africa, on 9 April 1946,[32] however, served notice on the international community that she intended to incorporate South West Africa into the Union and that she would not place the mandated Territory under the trusteeship system.[33] So began a political and legal conflict between South Africa and the UN which continued until independence of the Territory in 1990.

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30 See GAOR 1st Sess Fourth Committee part I 231-2.

31 See Chapter XII of the UN Charter.

32 League of Nations Official Journal Special Suppl No 194 of the 20th and 21st Ordinary Sess of the Assembly 32 seq.

33 M Scott The Orphans' Heritage: The Story about the South West African Mandate 11-12.

II. THE PROBLEM OF NAMIBIA BEFORE THE ORGANS OF THE UNITED NATIONS

(1) The General Assembly's role

During the Second World War, the white inhabitants of South West Africa had expressed a desire for incorporation into South Africa. In May 1943 the South West African Legislative Assembly had unanimously adopted the following Resolution:

> 'That this House respectfully request His Honour the Administrator to forthwith urge upon the Government of the Union of South Africa that the time has arrived for the termination of its Mandate over the Territory of South West Africa, and that it is the earnest desire of the inhabitants of this Territory that upon such termination of the Mandate, the Territory of South West Africa be formally annexed to and incorporated in the Union of South Africa upon such terms as to financial relations and political representation as may be initially agreed upon between the Government of the Union of South Africa and representatives nominated by this House.'

In 1946 the South West African Legislative Assembly again unanimously adopted a similar Resolution. This was subsequent to the comment of the South African delegate to the final session of the League Assembly in April 1946 that:

> 'the Union Government have deemed it incumbent upon them to consult the peoples of South West Africa,

European and non-European alike, regarding the form which their own future government should take.'[1]

The Union Government informed the UN of the request of the Legislative Assembly of South West Africa, adding (as a concession to opinions in the UN), that the non-European inhabitants of the Territory should also be enabled to express their opinion on the proposal. The results of consultation with the black inhabitants showed that 208 850 were in favour of incorporation, 33 520 were against it, and the opinion of 56 790 could not be ascertained.[2] The Union of South Africa then placed these results before the GA.

The GA, after a long debate, rejected the proposal for incorporation. On 14 December 1946 it passed Res 65 (I) by 37 votes to none, with 10 absentions. This Resolution noted that the African inhabitants of South West Africa had not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion, which the Assembly could recognise, on a question as important as incorporation.[3]

In 1946, 1947 and 1948 South Africa continued to submit annual reports to the UN on its administration of South West Africa . But Mr Harry Andrews, the South African

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1 Assembly Debates vol 56 15 March 1946 col 3682.

2 See G M Cockram South West African Mandate 224.

3 For full text of this Resolution, see J Dugard The SWA/Namibia Dispute 111.

representative, informed the Fourth Committee of the GA[4] that these reports contained the same type of information as was required for non-self-governing territories under art 73(e) of the UN Charter. It was the assumption of his government, Mr Andrews continued, that the reports would not be considered by the Trusteeship Council and would not be dealt with as if a trusteeship agreement for the Territory had in fact been concluded.[5]

In 1948 the National Party was elected in SA. On 11 July 1949 the new Government informed the UN Secretary General of its decision, in the interest of efficient administration, to discontinue the submission of further reports on South West Africa.[6] In the same year the Government introduced the controversial South West Africa Affairs Amendment Act,[7] which provided for closer association with South Africa.[8] In December 1949, the GA passed a Resolution regretting the decision of the South African Government to refuse to submit reports and to

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4 UN Doc A/422 of 27 October 1947. See also GAOR 3rd Sess Fourth Committee 287 seq.

5 Ibid.

6 See GAOR 4th Sess Fourth Committee, Annex to Summary Records of Meetings of 1949 7-8.

7 Act 23 of 1949.

8 The Act gave South West Africa six representatives in the Union House of Assembly, all of whom had to be elected, and four in the Senate, two of whom had to be elected and the other two nominated by the Governor-General.

introduce the 1949 Act and urged South Africa again to enter into a trusteeship agreement.[9]

In a second Resolution of 1949[10] the GA decided to seek clarity on the legal status of South West Africa by asking for an advisory opinion from the ICJ. In its Opinion delivered in 1950,[11] the Court held that there were no legal obligations on the Union to place South West Africa under the UN Trusteeship system. On the other hand, the Court found that the Union continued to have the international obligations in art 22 of the Convenant of the League of Nations, as well as the obligation to transmit petitions from the inhabitants. The GA accepted the Court's Advisory Opinion as a basis for the supervision of the administration of the mandated Territory of South West Africa and established an 'Ad Hoc Committee' to discuss with South Africa measures necessary to implement the Opinion.[12] Although the Ad Hoc Committee was reconstituted in 1952[13] and 1953,[14] it was unable to reach any agreement with the South African Government. Consequently, in 1953, a permanent Committee on South West Africa was established by

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9 GA Res 337 (IV) of 15 December 1949.

10 GA Res 338 (IV) of 6 December 1949. The Resolution was adopted by 40 votes in favour, seven against, and four abstentions.

11 International Status of South West Africa 1950 ICJ Reports 128 seq.

12 GA Res 449 A (V) of 13 December 1950.

13 GA Res 570 (VI) of 19 January 1952.

14 GA Res 651 of 20 December 1953.

Res 749 A (VIII) 'until such time as an agreement is reached between the United Nations and the Union of South Africa'.[15] The Committee on South West Africa was as unsuccessful as its predecessor in attempting to implement the 1950 Advisory Opinion because South Africa refused to co-operate.[16] Hence, in 1961, the Committee was dissolved by the GA.[17]

In the same year the UN established a Special Committee on South West Africa,[18] consisting of representatives of seven Member States, nominated by the President of the GA, to prepare the Territory for independence. This was now viewed as a desirable goal in lieu of a trusteeship agreement. The Special Committee's task was to achieve the following objectives:

'(a) A visit to the Territory of South West Africa before 1 May 1962;

(b) The evacuation from the Territory of all military forces of the Republic of South Africa;

(c) The release of all political prisoners without distinction as to party or race;

(d) The repeal of all laws or regulations confining the indigenous inhabitants in reserves and denying them all freedom of movement, expression and association, and of all other laws and regulations which establish and maintain the

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15 GA Res 749 A (VIII) of 28 November 1953 No 12.

16 South Africa's main criticism of the Committee on South West Africa was that it included no member with experience of African administration.

17 GA Res 1704 (XVI) of 12 October 1961.

18 GA Res 1702 (XVI) of 19 December 1961.

intolerable system of apartheid;

(e) Preparations for general elections to a Legislative Assembly based on universal adult suffrage, to be held as soon as possible under the supervision and control of the UN;

(f) Advice and assistance to the Government resulting from the general elections, with a view to preparing the Territory for full independence;

(g) Co-ordination of the economic and social assistance with which the specialised agencies will provide the people in order to promote their moral and material welfare;

(h) The return to the Territory of the indigenous inhabitants without risk of imprisonment, dentention or punishment of any kind because of their political activities in or outside the Territory.'[19]

One year later, in 1962, the GA dissolved the Special Committee on South West Africa and transferred the question of South West Africa to the Special Committee on the Situation with regard to the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples (Special Committee of 24).[20]

At the same time, South Africa created a Commission of Enquiry into South West African Affairs under F H Odendaal. Its terms of reference included the drawing up of a five-year plan for the:

'accelerated development of the various non-white groups of South West Africa, inside as well as outside their own territories.'

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19 GA Res 1702 (XVI) No 2.

20 GA Res 1806 (XVII) of 14 December 1962.

The Report of the Odendaal Commission[21] recommended the establishment of separate tribal territorial régimes for twelve African population groups, consistent with the official government policy of separate development (apartheid).[22] In a White Paper tabled on 29 April 1964, the Government of South Africa accepted the report in principle and stated that it would proceed to implement various of its recommendations for the economic and social advancement of the Territory.

The UN's response to the Odendaal Report was immediate and hostile. In 1964 the Report was condemned by the Special Committee of 24[23] and in 1965 the GA added its protest.[24] The South African Government did not immediately act on the Report, but waited for the outcome of the ICJ's proceedings. The 1966 decision of the ICJ shattered the UN programme for change in South West Africa, a programme which, since 1960, had been constructed on the assumption that the Court would hand down a judgment adverse to South Africa and enforceable under art 94 of the Charter.

As a result, the GA took its most drastic action thus

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21 Report of the Commission of Enquiry into South West African Affairs 1962-63 RP 12/1964.

22 For more detailed discussion of this Report, see E Kahn 'South-West Africa and the United Nations' 1960 Annual Survey of South African Law 54-9 and P Mason 'Separate development and South West Africa' (1964) 5 Race 83 seq.

23 1964 June UN Monthly Chronicle 33 seq.

24 GA Res 2074 (XX) of 17 December 1965.

far in its conflict with South Africa: on 27 October 1966, it adopted Res 2145 (XXI) terminating the Mandate for South West Africa.[25] This Resolution set the Territory of South West Africa on its way to independence. Resolution 2145 (XXI) reads:

'The General Assembly,

2. Reaffirms further that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence;
3. Declares that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate;
4. Decides that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefor terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations;
5. Resolves that in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa;
6. Establishes an Ad Hoc Committee for South West Africa - composed of fourteen Member States to be designated by the President of the General Assembly - to recommend practical means by which South West Africa should be administered, so as to enable the people of the Territory to exercise

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25 The Resolution was adopted by 114 votes to 2 (Portugal and South Africa), with 3 abstentions (France, Malawi, and United Kingdom).

the right of self-determination and to achieve independence, and to report to the General Assembly, at a special Session as soon as possible and in any event not later than 1967;

7. Calls upon the Government of South Africa forthwith to refrain and desist from any action, constitutional, administrative, political or otherwise, which will in any manner whatever alter or tend to alter the present international status of South West Africa;

8. Calls the attention of the Security Council to the present Resolution.'

Following this Resolution an Ad Hoc Committee for South West Africa was established consisting of fourteen Member States.[26] The Committee which was charged with the task of recommending practical means by which South West Africa should be administered so as to enable the people of the Territory to achieve independence. When the Committee could not reach unanimity it put forward its proposals to the GA for consideration by that body.[27]

These proposals were then considered by the GA at its fifth Special Session, which commenced on 24 April 1967. On 19 May the Assembly adopted, by 85 votes to 2 (Portugal and South Africa), with 30 abstentions, Res 2248 (S-V) establishing an eleven-member UN Council for South West

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[26] The representatives of the following States were elected to the Committee: Canada, Chile, Czechoslovakia, Ethiopia, Finland, Italy, Japan, Mexico, Nigeria, Pakistan, Senegal, the Soviet Union, the United Arab Republic, and the United States.

[27] See 1967 March UN Monthly Chronicle 6-10 and April 11-16.

Africa to administer the Territory until independence.[28] When in December the GA again took up the question of South West Africa, it had before it a report from the Council for South West Africa in which it was conceded that the Council had been unable to discharge any of its functions in the light of South Africa's illegal presence in the Territory. On 16 December the Assembly condemned South Africa's refusal to comply with Res 2145 (XXI) and 2248 (S-V) and declared that the continued presence of South Africa in the Territory was a flagrant violation of its territorial integrity and international status.[29] Further the GA called upon the SC:

> 'to take all appropriate steps to secure the implementation of the present Resolution and to take effective measures in accordance with the provisions of the Charter of the United Nations to ensure the immediate removal of the South African presence from Namibia and to secure for Namibia its independence in accordance with the General Assembly Resolution 2145 (XXI).'[30]

(2) The Security Council's role

The SC first assumed jurisdiction over the South West

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28 On 13 June the GA elected the following eleven States as Members of the Council: Chile, Colombia, Guyana, India, Indonesia, Nigeria, Pakistan, Turkey, the United Arab Republic, Yugoslavia and Zambia.

29 GA Res 2325 (XXII) of 16 December 1967.

30 GA Res 2372 (XXII) of 12 June 1968.

African dispute at the time of the 'Terrorist Trial'.[31] On that occasion the SC gave implicit support to Res 2145 (XXI), because the trial,

> 'being held under arbitrary laws whose application has been illegally extended on the Territory of South West Africa'[32]

must be regarded as illegal since termination of the

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31 The term 'Terrorist Trial' is the name popularly used to describe State v Tuhadeleni, the trial of 37 South West Africans for offences under the Terrorism Act No 83 of 1967. The trial, conviction and sentencing of the accused evoked protest and condemnation from the United Nations on the ground that, as a result of GA Res 2145 (XXI), South Africa had lost jurisdiction over the Territory and hence the competence to try the accused at all. On 16 December, 1967, by Res 2324 (XXII), the GA condemned the 'illegal arrest, deportation, and trial' of the accused, and on the eve of the judgment in the case on 25 January, 1968, the SC in a unanimous Resolution called upon the Government of South Africa 'to discontinue forthwith this illegal trial and to release and repatriate the South West Africans concerned'(SC Res 245 of 1968). After many of the accused had been sentenced to long periods of imprisonment this call was converted into a demand by SC Res 246 (1968). The South African Government, however, arguing that GA Res 2145 (XXI) was invalid and that it was fully competent in law to prosecute the accused for offences committed in South West Africa, declined to accept these calls and demands. The most important result of the trial was to elevate the twenty-year-old dispute over South West Africa to the SC, where implicit approval was given to GA Res' 2145 (because the trial could only be regarded as 'illegal' if the Mandate had been terminated).
The full proceedings of the trial are not published in the SALR, but the preliminary objection before the Transvaal Provincial Division is reported in State v Tuhadeleni 1967 (4) SA 511 (T). The Appeal Court confirmed the decision of the court a quo in State v Tuhadeleni 1969 (1) SA 153 (AD). For detailed accounts, see J Dugard 'South West Africa and the Terrorist Trial' (1970) 64 AJIL 19-41.

32 SC Res 245 of 25 January 1968.

Mandate.[33] On 20 March 1969 the SC gave its express imprimatur to the revocation of the Mandate:

'The Security Council,

1. Recognises that the United Nations General Assembly terminated the Mandate of South Africa over Namibia and assumed direct responsibility for the Territory until its independence;
2. Considers that the continued presence of South Africa in Namibia is illegal and contrary to the principles of the Charter and the previous decisions of the United Nations and is detrimental of the interests of the population of the Territory and those of the international community;
3. Calls upon the Government of South Africa to immediately withdraw its administration from the Territory;
4. Declares that the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the United Nations Charter;
5. Declares that the Government of South Africa has no right to enact the "South West Africa Affairs Bill", as such an enactment would be a violation of the relevant resolutions of the General Assembly;
6. Condemns the refusal of South Africa to comply with General Assembly Resolutions 2145 (XXI), 2248 (S-V), 2324 (XXII), 2372 (XXII), and 2403 (XXIII) and Security Council Resolutions 245 and

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[33] Both the United Kingdom and France, which had abstained on Res 2145 (XXI), reserved their positions on the termination of the Mandate in the explanations of their votes for Res 245 and 246; see 1968 February UN Monthly Chronicle 14 and 1968 April 35 seq.

246 of 1968;

7. Invites all States to exert their influence in order to obtain compliance by the Government of South Africa with the provisions of the present Resolution;

8. Decides that in the event of failure on the part of the Government of South Africa to comply with the provisions of the present Resolution, the Security Council will meet immediately to determine upon necessary steps and measures in accordance with the relevant provisions of the Charter of the United Nations.'[34]

In its reply of 30 April, the South African Government rejected the Resolution on the ground that:

> 'there is no legal basis for the activities of the so-called Council for South West Africa or for Security Council intervention.'[35]

Following this rebuff, the SC, in Res 269 (1969),[36] condemned South Africa for its refusal to comply with Res 264 (1969); decided that South Africa's continued presence in Namibia 'constitutes an aggressive encroachment on the authority of the United Nations'; and called upon South Africa 'to withdraw its administration from the Territory immediately and in any case before 4th October 1969'.[37]

South Africa's refusal to withdraw from Namibia by 4

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34 SC Res 264 of 20 March 1969. The Resolution was adopted by 13 votes to none, with two abstentions (United Kingdom and France).

35 1969 June UN Monthly Chronicle 31.

36 This Resolution passed by 11 votes to none, with four abstentions (Finland, France, United Kingdom and the United States).

37 See SC Res 269 of 12 August 1969.

October 1969 compelled the SC to accept the political reality of the situation. On 30 January 1970 it adopted Res 276,[38] in which it called upon States to take certain measures against South Africa to compel it to withdraw from Namibia and in which it established an Ad Hoc Sub Committee consisting of all Members of the SC to study ways and means by which the decision of the SC could be effectively implemented. SC Res 276 reads:

'The Security Council,

1. Strongly condemns the refusal of the Government of South Africa to comply with General Assembly and Security Council resolutions pertaining to Namibia;
2. Declares that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid;
3. Declares further that the defiant attitude of the Government of South Africa towards the Council's decisions undermines the authority of the United Nations;
4. Considers that the continued occupation of Namibia by the Government of South Africa in defiance of the relevant United Nations resolutions and of the United Nations Charter has grave consequences for the rights and interests of the people of Namibia;
5. Establishes an Ad Hoc Sub Committee - composed of all members of the Security Council - to study ways and means by which the decision of the

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38 The Resolution was adopted by 13 votes to none, with two abstentions (France and United Kingdom).

Security Council could be effectively implemented;

6. Calls upon all States, particulary those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this Resolution.'[39]

In its report the Sub Committee of the SC recommended a variety of political, economic, legal and military actions which might be pursued by the UN in order to compel South Africa to vacate Namibia.[40] Inter alia, it suggested that an advisory opinion be obtained from the ICJ.

When the SC next considered the question of Namibia it adopted two Resolutions. In the first, Res 283 of 29 July 1970, it requested all States to refrain from any relations - diplomatic, consular or otherwise - with South Africa implying recognition of the authority of the South African Government over Namibia.[41] In the second, Res 284,[42] the SC sent the dispute back to the ICJ. It decided, in accordance with art 94(1) of the Charter and art 65 of the Statute of the ICJ, to submit the following question to the ICJ:

'What are the legal consequences for States of the

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39 SC Res 276 of 30 January 1970.

40 See, for a summary of these recommendations, 1970 August UN Monthly Chronicle 28-9.

41 The voting on this Resolution was 13 to none, with 2 abstentions (France and United Kingdom).

42 This Resolution passed by 12 votes in favour to none against, with three abstentions (Poland, the Soviet Union and United Kingdom).

continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)?'[43]

The Opinion of the ICJ was accepted by the SC on 29 October 1971 by Res 301.[44]

(3) Jurisdiction of the International Court of Justice[45]

(a) Introduction

The concern of the Court with the Namibian problem falls into three distinct periods. The first is the period of the three Advisory Opinions of 1950, 1955 and 1956; these Opinions arose directly from the failure of the international community to bring about the transfer of the Mandate to the UN Trusteeship System. During this period the ICJ enjoyed the overall confidence of the GA. The second period, the decade of the sixties, is dominated by the two phases of the 'South West Africa Cases',

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43 SC Res 284 of 29 July 1970.

44 ICJ Reports 1971 27 seq.

45 The ICJ at The Hague was established after the Second World War as the principal judicial organ of the UN. Its functions are to determine disputes between states and to give advisory opinions to various organs of the UN, in particular, to its political organs. The ICJ replaced an earlier tribunal, the Permanent Court of International Justice, as the main judicial body operating in the field of international law. For a detailed account on the International Court of Justice see, D W Bowett The Law of International Institutions 266-85.

culminating in a sharply divided Court and a serious rift between the Court and the GA which went far beyond the problem of Namibia and threatened the status of the Court as an institution.[46] The third period, introduced by the Advisory Opinion of 1971 (on the legal consequences for States of the continued presence of South Africa in Namibia), is the period in which the relationship between the political organs of the UN and the Court was repaired.

(b) The Advisory Opinions of 1950, 1955, and 1956

Although these three Opinions span a six-year period, they form a coherent whole and should be read together. The 1950 Advisory Opinion is without question the most important, not only in relation to the 1955 and 1956 Opinions, but also in relation to the entire evolution of the Namibian problem within the UN.

In December 1949 the GA decided to seek clarity on the legal status of South West Africa by asking for an advisory opinion from the ICJ on the following issues:

> 'What is the international status of the Territory of South West Africa and what are the international obligations of the Union of South 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

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[46] A Junius The United Nations Council for Namibia 23.

obligations?

(b) Are the provisions of Chapter XII 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 Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?'[47]

The ICJ handed down its Advisory Opinion on 11 July 1950.[48] The first and most important question to be considered by the Court was whether the Mandate, as a legal institution, had survived the demise of the League of Nations. Clearly, if it had ended together with the League, South Africa would no longer be under any international obligation in regard of the Territory.

By emphasising the character of the Mandate as an objective international régime, the Court was able to show that the fulfilment of the obligations flowing from the Mandate did not depend on the continued existence either of the League of Nations or of its organs of supervision. In support of its arguments, the Court referred to art 80(1) of the Charter, which expressly maintained the rights of states and peoples and the terms of existing international instruments until the territories in question had been

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47 GA Res 338 (IV) of 6 December 1949. The vote was 40 to 7, with 4 abstentions.

48 International Status of South West Africa 1950 ICJ Reports 128 seq.

placed under the Trusteeship System.[49] In so far as South Africa's obligations to submit to international supervision was concerned the Court constructed a de facto succession between the League of Nations and the UN. In essence, the Court argued that this obligation continued in force by operation of law if the League's final Resolution on Mandates and art 80 of the UN Charter were read together.[50] The obligations incumbent upon South Africa were those deriving directly from art 22 of the Covenant as well as the obligation to transmit petitions, which had been developed as a practice by the League of Nations and which the Court now found as an acquired right of the inhabitants of the Territory.[51]

In answer to the GA's second question the Court decided that the provisions of Chapter XII of the Charter (Trusteeship System) were applicable to South West Africa as a mandated Territory. The Court interpreted the second part of the question, the manner of application, to mean:

> 'whether the Charter imposes an obligation upon the Union of South Africa to place the Territory under the Trusteeship System by means of a Trusteeship agreement'.[52]

A textual reading of arts 75 and 77 showed, in the opinion of the Court, that the Charter imposed no obligations on

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49 ICJ Reports op cit 133-5.

50 ICJ Reports op cit 136-7.

51 ICJ Reports op cit 133.

52 ICJ Reports op cit 139.

South Africa to place South West Africa under the Trusteeship System. In reaching this conclusion the Court relied on the plain meaning of the language in arts 75 and 77 and rejected the argument that art 80(2) placed a duty on Mandatories to negotiate and conclude Trusteeship agreements. The Court found that:

> 'had the parties to the Charter intended to create an obligation of this kind for a Mandatory State, such intention would necessarily have been expressed in positive terms.'[53]

Finally, with regard to the question of the competence of South Africa to modify the provisions of the Mandate unilaterally, the Court expressed the view that the competence to determine or modify the international status of the Territory was South Africa's acting with the consent of the UN.[54]

The Opinions of 1955 and 1956 are of less importance. In the 1955 judgment the ICJ found that UN decisions pertaining to South West Africa may be taken by a two-thirds majority,[55] and the 1956 Opinion dealt with the admissibility in UN organs of oral petitioners' hearing.[56]

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53 ICJ Reports op cit 140.

54 ICJ Reports op cit 144.

55 Voting procedure on question relating to reports and petitions concerning the Territory of South West Africa 1955 ICJ Reports 67 seq.

56 Admissibility of hearings of petitions by the Committee of South West Africa 1956 ICJ Reports 23 seq.

(c) The South West Africa Cases 1962 and 1966

On 4 November 1960, the Governments of Ethiopia and Liberia, the only two African States which had been Members of the League of Nations, commenced proceedings against South Africa at the ICJ.[57] After the possibility of a political solution to the problem receded (following the failure of the GA's Good Offices Committee in 1958)[58] a new strategy was developed: to obtain a binding judgment of the Court against South Africa, which, unlike an advisory opinion, would be enforceable in accordance with the provisions of art 94(2) of the Charter.

The Ethiopian-Liberian submission was based on the 1950 Advisory Opinion on the status of South West Africa. In the first place they asked the Court to declare that South West Africa was still a territory under the Mandate within the meaning of art 22 of the Covenant and that the Mandate was still valid and constituted a 'treaty in force' within the meaning of art 37 of the Statute. Secondly, they submitted that South Africa had violated a number of provisions in the Mandate and, thirdly, that South Africa

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57 Ethiopia & Liberia v South Africa 1962 ICJ Reports 319 seq.

58 The Committee, composed of representatives from Brazil, the United Kingdom and the United States, engaged in intensive negotiations with South Africa during 1958. One of the proposals discussed with South Africa concerned the partition of South West Africa. The southern part would be annexed by the Union and the northern part placed under a trusteeship agreement. The GA rejected the suggestion by 61 votes to 8, with 7 abstentions. See GA Res 1243 (XVI) of 30 October 1958.

was bound to stop all such violations and respect in good faith the international status of South West Africa.[59]

In answer South Africa submitted certain preliminary objections contesting the Court's right to exercise jurisdiction.[60] In brief these were the following:

(i) The Mandate for South West Africa (or, at least art 7 thereof) never was, at least since the dissolution of the League of Nations, 'a treaty in force' within the meaning of art 37 of the Court's Statute.

(ii) Neither Ethiopia nor Liberia was any longer 'another Member of the League of Nations' as required by art 7 of the Mandate.

(iii) Ethiopia and Liberia lacked any material interest in the alleged conflict and therefore no dispute was present within the meaning of art 7.

(iv) It could not be said that the alleged dispute could be settled by negotiation as required by art 7.

On 21 December 1962, the Court, divided by 8 votes to 7, concluded that the Mandate was a treaty or convention still in force, that the dispute between the parties was one envisaged in art 7 of the Mandate, and that it could not be settled by negotiation. The Court declared itself competent to hear the dispute on the merits.[61]

On 18 July 1966, after three years of pleadings and hearings on the merits of the dispute, the Court delivered

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59 ICJ Reports (n57) 322 seq.

60 ICJ Reports (n57) 326-7.

61 For the full text of this judgment see G Horten 'Das Urteil des IGH in Sachen SWA' (1966) 4 Journal der Internationalen Juristenkommission 189 seq.

the most controversial judgment in its history.[62] The Court found that:

> 'the Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims, and that, accordingly, the Court must decline to give effect to them.'[63]

The judgment was rendered by the President's casting vote (in effect a second vote) in terms of art 55(2) of the Statute of the ICJ.[64]

This judgment was followed by a number of dissenting opinions.[65] The role of chief dissenter was assumed by Judge Jessup. He considered the judgment to be 'completely unfounded in law' dissenting 'not only from the legal reasoning and factual interpretations in the Court's

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62 Junius (n46) 27-8.

63 Ethiopia & Liberia v South Africa 1966 ICJ Reports 51.

64 It seems that this decision was the consequence of changes in the composition of the Court which had resulted in the minority of 1962 becoming the majority in 1966. The majority consisted of President Sir Percy Spender (two votes), Judges Winiarski, Spiropoulos, Sir Gerald Fitzmaurice, Morelli, Gros, and Judge ad hoc Van Wyk. Of these only Judge Gros of France, who had replaced his compatriot Judge Basdevant in 1964, had not formed a part of the minority of 1962. The seven dissenting Judges on this occasion were Judges Koo, Koretsky, Tanaka, Jessup, Nervo, Forster, and ad hoc Judge Sir Louis Mbanefo.

65 Dissenting Opinions of Judges Koretsky, Tanaka and Jessup ICJ Reports 1966 (n63) 237 seq, 248 seq and 323 seq respectively. See also B Cheng 'The 1966 South West Africa judgment of the World Court' (1970) 20 Current Legal Problems 181 seq and W Friedmann 'The jurisprudential implications of the South West Africa Case' (1967) 6 Columbia Journal of Transnational Law 1 seq.

judgment but also from its entire disposition of the case'. In his view the Court was:

> 'not legally justified in stopping at the threshold of the case, avoiding a decision on the fundamental question whether the policy and practice of apartheid in the mandated Territory of South West Africa is compatible with the discharge of the sacred trust confided to the Republic of South Africa as Mandatory.'[66]

Judge Jessup was concerned to limit the effect of the decision. He pointed out that in all its previous decisions, the Court had found that the Mandate remained in force and constituted the only legal basis for South Africa's presence in South West Africa.

> 'The Court now in effect sweeps away this record of 16 years and, on a theory not advanced by the respondent in its final submission..., decides that the claim must be rejected on the ground that the applicants have no legal right or interest.'[67]

Judge Jessup's views with regard to the question of legal interest were echoed in several of the dissenting opinions. Hence Judge Tanaka, for example, held that while it was possible to admit the existence of both a national and a general interest of States in the mandates system, once the general interest was institutionalised in a legal instrument, this amounted to a legal interest justifying the applicant's right to a decision of the Court.[68]

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66 ICJ Reports (n63) 325.

67 ICJ Reports (n63) 328.

68 ICJ Reports (n63) 251.

The 1966 judgment brought to an abrupt end the attempt to resolve the Namibian problem through judicial means and shifted the question back to the political organs of the UN. The involvement of the ICJ did not end there, however. Despite the criticism to which it was subjected in the aftermath of the 1966 decision, the Court was called upon once more, in 1971, to give an advisory opinion.

(d) The Advisory Opinion of 1971[69]

In terms of importance, in the evolution of the Namibian problem, this Opinion must undoubtedly be seen as the counterpart to the 1950 Opinion. Just as the Court in 1950 provided the judicial basis for the GA's assumption of supervisory responsibilities in relation to the Mandate, the 1971 Opinion provided judicial underpinning for the Council for Namibia as the authority entitled to administer the Territory. The Court did this by confirming the validity of the GA's termination of the Mandate and by recognising the binding nature of the SC's decisions relating to that termination.

By Res 284 of 29 July 1970, the SC decided to request an advisory opinion of the ICJ.

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[69] Between 1966 and 1971 the composition of the ICJ underwent important changes as a result of the two triennial elections of the Court held in 1966 and 1969. Of the 1966 majority only two remained, namely, Judges Sir Gerald Fitzmaurice and Gros, while African representation on the Court had increased from one in 1966 to three in 1971.

'What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)?'

On 21 June 1971 the ICJ handed down its Opinion.[70] The Court confirmed that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw its administration immediately and to put an end to its occupation of the Territory.[71] In addition, the Court found that Member States of the UN were obliged to recognise both the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia.[72]

The Court's conclusions are far more than a restatement of the decisions already taken by the GA and the SC. They established the validity and constitutionality of the termination of the Mandate and thereby legitimised the UN's assumption of powers over the administration of Namibia.[73] Thus, the main importance of the 1971 Opinion resides not in its conclusions but in those passages which deal with the competence and power of the GA and SC in relation to Namibia.

The argument of the majority of the Judges was that: the Mandate of South Africa over Namibia was 'in fact and

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70 1971 ICJ Reports 15 seq.

71 This decision was adopted by 13 votes to 2.

72 This decision was adopted by 11 votes to 4.

73 Junius (n46) 29.

in law an international agreement having the character of a treaty or convention',[74] and as such it could be terminated in the ordinary way, regard being had to art 60(3) of the Vienna Convention on the Law of Treaties.[75] In the light of these rules, only the material breach of a treaty justifies termination, such breach being defined as:

> '(a) a repudiation of the treaty not sanctioned by the present convention; or
> (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.'

The GA determined in Res 2145 (XXI) that both forms of material breach had occurred. By stressing that South Africa 'has, in fact, disavowed the Mandate', the GA exercised the right to terminate a relationship in case of a deliberate and persistent violation of obligations that had destroyed the very object and purpose of that relationship.[76] The UN was exercising its right as successor to the League of Nations, at least with respect to supervision over the Mandatory's international obligations.[77]

The Court's Opinion was forcefully attacked by Judges

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74 1971 ICJ Reports 46. See also 1962 ICJ Reports (n57) 330-1.

75 For a criticism of this conclusion see, H W Briggs 'Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice' (1974) 68 AJIL 51 seq.

76 1971 ICJ Reports 47.

77 ICJ Reports op cit 49.

Fitzmaurice and Gros.[78] They argued, first, that although the Mandates had survived the dissolution of the League, the UN, which was not the League's successor in law, had never been invested with the League's supervisory function. The Mandatory's reporting obligation had become dormant and was not transformed into an obligation owing to the the United Nations, because the Mandatory had never consented to such a novation. Even if the UN acquired a supervisory function, this did not include any power of unilateral revocation. Secondly, they said that, even if the Council of the League had possessed a power of unilateral revocation, the GA would not be competent to exercise it because of the constitutional limitations placed on it by the Charter. And, thirdly, that the Assembly lacked general competence of an executive nature. Thus the Assembly had no power to terminate any kind of administration over a territory and Res 2145 (XXI) could have effect only as a recommendation.

Finally, they argued that, so far as the SC was concerned, its powers were no greater than those of the Assembly. The executive powers of the SC were limited to the field of peace and security and binding decisions were possible only under Chapters VII and VIII. In the present case, the SC's intervention had not taken place within the framework of these Chapters, and art 25 did not confer on the SC the power inferred by the Court. Otherwise one would

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78 Dissenting Opinions of Judges Fitzmaurice and Gros ICJ Reports op cit 220 seq and 323 seq respectively.

modify the principles of the Charter as regards the power vested by States in the organs they instituted. These powers had been fixed by the Charter and could not be modified through broad-based interpretations.

> 'Otherwise an association of States created with a view to international co-operation would be indistinguishable from a federation. It would be precisely the super-State which the United Nations is not.'[79]

The criticism of the 1971 Opinion, however, should consider the particular situation in Namibia. Resolutions of the GA have no binding force on members of the UN. In a written statement to the Court, the Secretary-General argued that the powers of the GA in the case of Namibia lay in the special responsibilities of the UN towards the people of Namibia as confirmed by the Advisory Opinion of 1950 and repeatedly reaffirmed by SC and GA resolutions. Accordingly:

> 'Decisions taken by the General Assembly concerning the implementation of the collective responsibilities of the United Nations towards Namibia must therefore be distinguished from other General Assembly resolutions, and from recommendations calling for action within the sovereign authority of States. For in the absence of any intervening sovereign jurisdiction between the General Assembly and Namibia no governmental authority exists other than the General Assembly and the Security Council... It follows that General Assembly resolutions adopted in

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[79] ICJ Reports op cit 340-1.

> fulfilment of the special responsibilities of the United Nations towards Namibia have constituted, for the authority administering the Territory, the controlling decisions of the international community on whose behalf the Territory has been administered.'[80]

The Secretary-General's statement was based, therefore, not on a textual reading of the power of the GA but on a teleological interpretation of the implied powers of the GA within a very specific context, namely the international status of Namibia and the special responsibilities of the GA in that regard.

The Court appears to have found the Secretary-General's argument convincing. After taking issue with South Africa's assertion that Res 2145 ((XXI) had 'decided a transfer of territory'[81] it stated that:

> 'it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.'[82]

In the Court's view the GA's pronouncement in Res 2145 (XXI) was based on a conclusion reached by the Court in 1950 to the effect that, if the Mandate had lapsed, the Mandatory's authority would also have lapsed.[83] This

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80 1971 ICJ Reports Pleadings vol I 85.

81 The Court found 'that is in fact not so'. See 1971 ICJ Reports 50.

82 1971 ICJ Reports 50.

83 For the 1950 Advisory Opinion, see supra II (3) (b).

conclusion had been confirmed by the 1962 judgment.[84] Thus, relying on these decisions, the GA declared in Res 2145 (XXI) that the Mandate having been terminated by the Mandatory's own conduct, 'South Africa has no other right to administer the Territory'. The Court characterised this to be 'not a finding on facts but the formulation of a legal situation',[85] already foreseen by the Court.[86] But, the Court stated 'lacking the necessary power to ensure the withdrawal of South Africa from the Territory' the GA then went on to enlist the cooperation of the SC.[87]

Despite the criticism of Res 2145 (XXI) one must remember that the judgment of the Court was rejected by only two Judges; 13 agreed with the majority decision.

On 20 October 1971, the SC, by thirteen votes to none with two abstentions, adopted Res 301 in which it accepted the Court's Advisory Opinion. The United Kingdom and France, doubtless encouraged by the dissenting opinions of their national Judges in the 1971 proceedings, were the two abstainers.[88]

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84 For this judgment, see supra II (3) (c).

85 1971 ICJ Reports 50

86 Cf Junius (n46) 34.

87 1971 ICJ Reports 51.

88 Although he rejected the Court's Advisory Opinion, the French delegate argued that South Africa was under an obligation to negotiate in good faith with the UN for the establishment of an international régime: 1971 November UN Monthly Chronicle 14. The British delegate explained that his Government would abstain on the grounds that it was unable to accept the Court's opinion of the validity of Res 2145 (XXI): 1971 November UN Monthly Chronicle 26.

(e) Conclusion

The 1950, 1955, and 1956 Advisory Opinions were both legally and politically significant. From a strictly legal point of view they filled a legal vacuum which had threatened the continued existence of the South West Africa Mandate. In so doing, the Court furnished the political organs of the UN with the foundation for their authority and competence in respect of Namibia. These Opinions can be seen as the product of a creative attitude to the judicial function, one consistent with the ICJ's status as the principal judicial organ of the UN.

In the eyes of most observers the 1966 judgment lacked credibility. From a purely legal point of view the attempt by the majority to distinguish between what the Court had said in 1962 and what it was saying in 1966 was unconvincing. From a political point of view, the Court, at one stroke, alienated the overwhelming majority of States in the GA and condemned itself to an immediate future of opprobrium. In the final analysis, the 1966 judgment does more to illuminate the functioning of the Court and the perils of international adjudication than to solve the Namibian problem. As one writer has observed, it shows that judges' theories about law are highly significant in determining judicial decisions.[89] Thus, the discrepancy between the 1962 and 1966 decisions may be explained on the

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89 W M Reisman 'Revision of the South West Africa Cases' (1966) 7 VJIL 87.

basis of a conflict in judicial philosophy between two schools of interpretation: the teleological or sociological, on the one hand, and the conceptual or formalistic, on the other. It was even suggested that this dichotomy finds some reflection in the opposition between the common and civil-law approaches to the judicial function: for example, Judges Spender and Fitzmaurice as common-law judges were unable to move confidently in a legal order which (because of its incompleteness) required the judge to legislate.[90]

The 1971 Opinion as a whole failed to find complete acceptance. Some States have questioned or rejected certain aspects of the Court's findings. In particular, two permanent Members of the SC, France and the United Kingdom, formally rejected the conclusions reached by the Court. In the final analysis, the 1971 Opinion did not provide the international community with the solid platform it required to complete the process (that had been initiated by the General Assembly in 1966) of evicting SA.

Summing up, however, it may be said that all organs of the UN, the GA, the SC, and the ICJ, found that South Africa's presence in Namibia was illegal and that South Africa had no right to administer the Territory.[91]

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90 S Slonim South West Africa and the United Nations (1973) 355-6.

91 Only South Africa and Portugal voted against GA Res 2145 (XXI); France and United Kingdom abstained.

III. PROCESS OF INDEPENDENCE

Following the unanimous adoption of Res 385 (1976) (which demanded free and fair elections in Namibia), the five western members of the SC (France, United Kingdom, and the United States - as permanent members - together with Canada and the Federal Republic of Germany) approached the South African Government with a view to developing a settlement proposal which could lead to free and fair elections and independence for the Territory. The South African Government agreed that it would participate in such a process on the clear understanding that the people of the Territory should be allowed to decide their own future without intimidation from whatever source.

Over the following two years there were serious and protracted discussions between the so-called 'Western Five' and South Africa, on the one hand, and the South African Government and leaders of Namibia, on the other. These culminated in the settlement proposals which the Western Five presented to the South African Government on 10 April 1978.[1]

The objective of the settlement proposal was to bring about a transition to independence for Namibia, acceptable to all concerned parties. The key element of the proposal related to the holding of elections in the Territory, while allowing for an appropriate UN role. It was foreseen that

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[1] For the full text see Western Proposals for Settlement UN-Doc S/12636.

the Secretary-General of the UN would appoint a Special Representative whose central task would be to ensure that conditions were established which could allow free and fair elections and an impartial electoral process. The Special Representative would be assisted by the United Nations Transition Assistance Group (UNTAG).[2]

The purpose of the envisaged elections would to be elect representatives to a Constituent Assembly which would draw up and adopt, by a two-thirds majority, a constitution for an independent and sovereign Namibia.[3] In carrying out these responsibilities the Special Representative would work together with the Administrator-General, as the representative of the South African Government in the Territory.

The proposal was formally endorsed by SC Res 435 on 29 September 1978. This Resolution can be regarded as the most significant act of the UN in the Namibian dispute. Resolution 435 (1978) reads:

'The Security Council,

1. Approves the report of the Secretary-General (S/12827) for the implementation of the proposals for a settlement of the Namibian situation (S/12636) and its explanatory statement(S/12869);
2. Reiterates that its objective is the withdrawal of South Africa's illegal administration of Namibia and the transfer of power to the people of Namibia with the assistance of the United Nations in accordance with Resolution 385 (1976);

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2 Western Proposals for Settlement op cit (ii) 5.

3 Western Proposals for Settlement op cit (ii) 6.

3. Decides to establish under its authority a United Nations Transition Assistance Group (UNTAG) in accordance with the above mentioned report of the Secretary-General for a period up to 12 months in order to assist his Special Representative to carry out the Mandate conferred upon him by paragraph 1 of Security Council Resolution 431 (1978), namely, to ensure the early independence of Namibia through free and fair elections under the supervision and control of the United Nations;

4. Welcomes SWAPO's preparedness to co-operate in the implementation of the Secretary-General's report, including its expressed readiness to sign and observe the case-fire provisions as manifested in the letter from the President of SWAPO dated 8 September 1978 (S/12841);

5. Calls upon South Africa forthwith to co-operate with the Secretary-General in the implementation of this Resolution;

6. Declares that all unilateral measures taken by the illegal administration in Namibia in relation to the electoral process, including unilateral registration of voters, or transfer of power, in contravention of Security Council Resolutions 385 (1976), 431 (1978) and this Resolution, are null and void;

7. Requests the Secretary-General to report to the Security Council no later than 23 October 1978 on the implementation of this Resolution.'

After the adoption of this Resolution the concerned parties entered a number of further agreements which, together with the settlement proposal, form a comprehensive

whole.[4] The most important agreement was a document about 'Principles Concerning the Constituent Assembly and the Constitution for an Independent Namibia'.[5]

That was the beginning of one of the most extensive UN operations in the history of the Organisation. More than 8 000 soldiers from more than 100 countries were distributed among 200 offices throughout Namibia. The total expenses of the operation were about 400 million US$ (US-Dollar).[6] The main task of UNTAG was to secure the execution of the principles laid down in Res 435 (1978), in particular, free and fair elections for a Constituent Assembly.

The election took place from 7 to 11 November 1989. 97 per cent of those eligible voted. SWAPO won the election by an absolute majority of 57,3 per cent, followed by DTA with 28,6 per cent.[7] On 21 November 1989, the elected representatives of the Namibian people held their first parliamentary session. The Assembly with the help of South African experts, Arthur Chaskalson, Prof Marinus Wiechers and Prof Gerhard Erasmus, drew up a constitution, which was adopted by the parties of the Constituent Assembly on 12

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4 First, a 1982 agreement that UNTAG would monitor SWAPO bases in Angola and Zambia; secondly informal understandings in 1982 on the question of impartiality; and thirdly a 1985 agreement that the elections would be based on a system of proportional representation.

5 UN-Doc S/15287.

6 UNTAG A new Nation is born 2.

7 Deutsch-Namibische Gesellschaft e V Namibia hat gewählt 10.

February 1990.[8] Independence day for Namibia was set for 21 March 1990. When the Namibian flag was hoisted, it announced the birth of a new, independent State and the end of one of the most successful UN operations in the history of the Organisation.[9]

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8 For a detailed analysis of the Constitution see H Melber 'The constitution of Namibia' (1990) 6 DGVN 105 seq and H Weiland 'Namibia am Beginn eines eigenen Weges' (1990) 1 Namibia Magazin 8 seq.

9 'Many people are calling this a success for the United Nations, which it is. But we who worked so closely with Namibians in every corner of this country - through repatriation, registration, the campaign and the election - know that the real success is yours.

We admire your determination in seeing through the election process fairly, your generous spirit in seeking reconciliation with each other and your wisdom in drafting a constitution that is an inspiration to the world.

We leave Namibia grateful for having had the opportunity to help an extraordinary people achieve a historic goal. We will cherish the memory of this experience for the rest of our lives.' Special Representative, Martti Athisaari, on 22 March 1990, in Windhoek. Cited by UNTAG (n6) 49.

IV. THE UNITED NATIONS COUNCIL FOR NAMIBIA

(1) Emergence, functional organisation, and field of competence

On 27 October 1966, the GA of the UN adopted Res 2145 (XXI) by which it terminated the Mandate of South Africa over Namibia and placed the Territory under the direct responsibility of the UN. In the following year, the GA created the United Nations Council for South West Africa, later to be renamed the UNCfN,[1] and entrusted it with the following powers and functions:

'(a) to administer South West Africa until independence with the maximum possible participation of the people of the Territory;
(b) to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage;
(c) to take as an immediate task all the necessary measures, in consultation with the people of the Territory, for the establishment of a constituent assembly to draw up a constitution;
(d) to take all necessary measures for the maintenance of law and order in the Territory;
(e) to transfer all powers to the people of the Territory following the declaration of independence.'[2]

Finally, the Assembly requested the Council to entrust

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1 See GA Res 2372 (XXII) of 12 June 1968.

2 See GA Res 2248 (S-V) of 19 May 1967.

executive and administrative tasks, as it deemed necessary, to a United Nations Commissioner of South West Africa.

At first, the Council consisted of eleven members, but was later[3] enlarged to 31.[4] The Council was organised in two sections: the Council itself and the UN Commissioner, who was, in accordance with operative para 3 of Res 2248 (S-V), the executive and administrative arm of the Council.

(a) The Council

For the purpose of performing the Council's functions, an organ of 31 members was too large to operate. Thus the Council established a Steering Committee and three Standing Committees. The Steering Committee met in closed sessions to discuss major policy issues and to consider and organise the procedures of the Council. It was composed of the President of the Council, three Vice-Presidents and the Chairmen of the three Standing Committees.

The main tasks of the Standing Committees were laid down in the 'Terms of Reference'.[5] According to these,

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3 See GA Res 3031 (XXVII) of 18 December 1972 and GA Res 3295 (XXIX) of 13 December 1974.

4 The 31 Members of the Council were, in its last term of office in 1989, drawn from the following Member States of the UN: Algeria, Angola, Australia, Bangladesh, Belgium, Botswana, Bulgaria, Burundi, Cameroon, Chile, China, Colombia, Cyprus, Egypt, Finland, Guyana, Haiti, India, Indonesia, Liberia, Mexico, Nigeria, Pakistan, Poland, Romania, Senegal, Turkey, Soviet Union, Venezuela, Yugoslavia, Zambia.

5 Report UNCfN GAOR 34th Sess Suppl No 24 para 33-38.

Standing Committee I was responsible for the representation of Namibia with regard to foreign affairs. The 'Terms of Reference' differentiated in this connection between (i) the representation of the Territory in international organisations, (ii) consultations with the Member States of the UN and the Organisation of African Unity and (iii) other regional or political organisations interested in supporting the cause of the Namibian people.

Standing Committee II was responsible for the internal administration of Namibia, in particular:

'(a) to review the progress of the liberation struggle in Namibia in its political, military and social aspects and submit to the Council periodic reports related thereto;

(b) to consider the compliance of Member States with the relevant United Nations resolutions on Namibia, taking into account the Advisory Opinion of the ICJ of 1971;

(c) to consider the activities of foreign economic interests operating in Namibia with a view to recommending appropriate policies to the Council in order to counter the support which those foreign economic interests give to the illegal South African administration in Namibia;

(d) to consider all legal issues relating to the liberation struggle of the Namibian people for self-determination, freedom and national independence in a united Namibia and to the illegal South African administration in Namibia;

(e) to consider the nature and scale of South African military installations and operations in Namibia in order to recommend to the Council ways and means of taking action against and denouncing South African military adventurism in Namibia.'

Standing Committee III had the task - in co-operation with the information bureau of the UN - to consider ways and means of increasing the dissemination of information relating to Namibia, and in this regard to recommend appropriate measures and policies to the Council. Besides this, it had to organise and co-ordinate contacts by Council delegations with the media, educational and cultural institutions, and action and support groups.[6]

The Council for Namibia was associated with SWAPO, whose role and function must briefly be explained. The GA recognised SWAPO as 'the authentic representative of the Namibian people'[7] and accorded it observer status to participate in the sessions and work of the GA, including all conferences convened under the auspices of the Assembly. The GA accorded similar observer status to other African national liberation movements[8] but SWAPO's status and relationship to the GA was administratively far closer than that of any other organisation or movement. SWAPO enjoyed a particularly close relationship to the Council, in which it was formally an observer; but, in practice, no decision of the Council was taken without consultation with

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6 Besides the Standing Committees there was a Drafting Committee to prepare the annual reports of the Council to the GA and a Committee on the United Nations Fund for Namibia, for the financial support of the Namibian people during the transition period. See GA Res 2679 (XXV) of 9 December 1970.

7 See GA Res 3111 (XXVIII) of 12 December 1973.

8 The basic decision with regard to the African national liberation movements is to be found in GA Res 3280 (XXIX) of 10 December 1974.

SWAPO. Moreover, a SWAPO representative was always included in missions or delegations of the Council.[9]

(b) The Commissioner

The Commissioner for Namibia was the executive and administrative arm of the Council. He was responsible for implementing the decisions of the Council and he engaged in a number of substantive activities such as: administration and supervision of the support programmes of the United Nations Fund for Namibia; execution of Decree No 1 for the protection of the natural resources of Namibia; research into foreign economic activities in the Territory; and demographic research about the people of Namibia.[10] He had offices in Gaborone (Botswana), Luanda (Angola), and Lusaka (Zambia). The Commissioner had also been designated the Special Representative of the Secretary-General within the framework of the settlement proposal approved by the SC in Res 431 (1978), a dual function which had given rise to some difficulties because the exercise of these two functions was not necessarily compatible.

The position of the UN Commissioner for Namibia was occupied by, inter alios, the former Legal Adviser of the

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9 See Report UNCfN GAOR 36th Sess Suppl No 24 135 seq.

10 A detailed survey of the Commissioner's activities is listed in all annual reports of the Council to the GA under the Chapter 'Activities of the Office of the United Nations Commissioner for Namibia'.

UN, Stavropoulos, and the Special Representative of the Secretary-General during the transition period to independence, Martti Athisaari.

(2) Legal character of the United Nations Council for Namibia

(a) Introduction

The legal basis for the Council itself and, hence its authority to 'promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory', rested on uncertain ground.[11] The reason for this was the doubtful juridical

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[11] The following authors affirmed the existence and particular rights of the Council: H G Schermers 'The Namibia Decree in national courts' (1977) 26 ICLQ 81 seq; R Barsotti 'In tema di amministrazione diretta di territori non autonomi da parte dell'ONU: il caso della Namibia' (1980) 16 Communicazioni e Studi 55; F Rigaux 'Le Décret sur les Resources Naturelles de la Namibie adopté le 27 Septembre 1974 par le Conseil des Nations Unies pour la Namibie' (1976) 9 RDDH 471; I Sagay 'The right of the United Nations to bring actions in municipal courts in order to claim title to Namibian products exported abroad' (1972) 66 AJIL 600 seq; A U Obozuwa The Namibian Question - legal and political Facts 147; J Faundez 'Namibia: the relevance of international law'(1986) 8 Third World Quarterly 549 and J Castaneda Legal Effects of United Nations Resolutions 128.
The following authors disapproved of the Council: H Booysen & G E Y Stephan 'Decree No 1 of the United Nations Council for South West Africa' (1975) 1 SAYIL 63 seq; L Herman 'The legal status of the United Nations Council of Namibia' (1975) 13 CYIL 320; L Lucchini 'La Namibie, une construction des Nations Unies' (1969) 15 AFDI 366; S Solomon South West Africa and the United Nations: An International Mandate in Dis-

basis of Res 2145 (XXI): the powers of the GA in terminating the Mandate of South Africa were questionable since it acted without a binding decision of the SC;[12] and the Resolution constitutive of the Council[13] was passed prior to any independent action by the SC confirming the GA's termination. It is clear, however, that the intention of the GA was to make the Council for Namibia an administering authority for Namibia (with full administrative and legislative powers) until the Territory achieved independence. The notion that a UN organ might act as an international administering authority is not unique.[14] A precedent can be found in the case of West

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pute 320; E Menzel & K Ipsen Völkerrecht 223; I Seidl-Hohenveldern Das Recht der Internationalen Organisationen 303; J F Engers 'The United Nations travel and identity documents for Namibians' (1971) 65 AJIL 574; L Tauber 'Legal pitfalls on the road to Namibian independence' (1979) 12 New York University Journal of International Law and Politics 386; C Cadoux 'L'Organisation des Nations Unies et le Problème de le'Afrique Australe - l' Évolution de la stratégie des pressions internationales' (1977) 23 AFDI 152 and S Carrillo & A Juan 'Un caso de decolonizacion: el territorio del Sudoeste Africano'(1967) 20 Revista Espanola de Derecho Internacional 425.

12 See the above discussion about the treatment of Res 2145 (XXI) in the 1971 Namibia opinion of the ICJ.

13 Res 2248 (S-V) was adopted by 85 votes to 2, with 30 abstentions. The large number of abstentions and the fact that all major powers except China abstained, underlined the controversial nature of this decision. For a complete and considered record of the Members' attitudes towards Res 2145 (XXI) and 2248 (S-V), as well as other resolutions relating to Namibia, see, Report of the Secretary-General 'Compliance of Member States with the United Nations Resolutions and Decisions relating to Namibia' UN-Doc A/AC 131/37 of 12 March 1975.

14 For examples see infra IV (2) (e).

Irian,[15] where UN administration was established on the basis of an agreement between Indonesia and the Netherlands.[16] In the case of Namibia the establishment of the Council derived from resolutions of the GA. In this sense then, one can say that the Council for Namibia was unique in UN practice, because it was an attempt by the UN to set up an international administering authority without the express agreement of all the parties directly concerned.

Nevertheless, the Council was a duly established subsidiary organ of the GA in terms of art 22 UN Charter,[17] and, at the very minimum, it had to be regarded as a legitimate organ within the legal order of the Organisation. Defining the Council as a subsidiary organ of the GA, does not clarify its actual powers, in particular whether the Council's actions were binding on the Member States of the Organisation.

(b) As an exile government

The most liberal interpretation of UNCfN's powers would

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15 For further details on this case see J Leyser 'Dispute and agreement on New West Guinea' (1962) 10 ArchVR 257 seq.

16 Agreement of 15 August 1962. The text is reprinted in the Report of the UNCfN GAOR 33rd Sess Suppl No 24 23-24.

17 Article 22 reads: 'The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.'

treat the Council as a lawful government for Namibia. The strongest argument in this regard derives from the fact that the Council was vested with powers which were comparable with those of a real government, viz:

> 'to promulgate such laws decrees and administrative regulations as are necessary for the administration of the Territory.'[18]

Besides, the financing of the Council's activities was on a basis similar to that of an ordinary executive power:

> 'the administration of South West Africa under the United Nations shall be financed from revenues collected in the Territory.'[19]

The UNCfN was, by the transfer of these powers, in a comparable situation to so-called 'exile governments'.[20] These are governments which usually have only law-enforcement agencies, very rarely legislatures, and which have their seats of government outside the territory of which they claim to be a government.[21]

One has to distinguish between governments which transferred their seat to another territory because of an

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18 GA Res 2248 (S-V) of 19 May 1967 II 1 (b).

19 GA Res op cit III 1 (a).

20 Consequently the Council called itself the authentic representative of the Namibian people in the form of an exile government. See the former President of the Council 1970 May UN Monthly Chronicle 41. See also Provisional Record of the International Labour Conference 64th Sess 28; statement of the Minister of Foreign Affairs of the Netherlands 'In terms of status, the Council is comparable to a government in exile' (1982) 13 NYIL 184 and Seidl-Hohenveldern (n11) 156.

21 W Wengler Völkerrecht vol I 299.

external act of violence and those which are created in foreign territories. This difference can be found in a useful terminological distinction used in German law: authentic and non-authentic exile governments.[22] While an authentic exile government administered a territory - lawfully established with regard to constitutional law - before its expulsion, non-authentic exile governments do not fulfil these conditions. They are created in exile for an existing or future State and it makes no difference whether it had ever exercised public authority in the territory.[23]

Thus, the UNCfN can, at most, be regarded as a non-authentic exile governent. These 'governments' are generally not accepted by the international community before they actually begin to control at least parts of the territory.[24] The Council sought to fulfil the requirement of territorial control; in other words, it tried to exercise de facto control over the Territory. But this attempt was frustrated because South Africa refused to allow Members of the Council to enter the Territory.[25] The lack of de facto control over Namibia shows that the

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22 This is my translation of the German terms 'echt' and 'unecht'. See O Kimminich 'Völkerrechtsfragen zur exilpolitischen Betätigung' (1962) 10 ArchVR 148 seq.

23 For examples see, K H Mattern Die Exilregierung 29 seq.

24 For example the de facto recognition of the De Gaulle Government by the United States and the United Kingdom on 11 July 1944. For further details on this case and more examples see, Mattern op cit 44 seq.

25 See 1968 May UN Monthly Chronicle 50 seq.

institution of exile government was not applicable to the Council. Nevertheless, the essential point is that the Council lacked a criterion required for all exile governments: the support of the people of the territory on behalf of which it claimed to act. Such a support was obviously lacking in the case of the UNCfN; its 31 Members represented Member States of the UN. They had been elected by the GA in which the Namibian People had no vote at all.

Besides this, the attempt to generate support of the Namibian people for the Council with help of SWAPO as the 'authentic representative of the Namibian people'[26] failed. Although the Council worked closely with SWAPO,[27] there were two reasons why this attempt was doomed to failure. First, the activities of SWAPO in the UN were limited to observing and advising. Secondly, SWAPO was composed mostly of Ovambos, who constituted 52 per cent of the black population of Namibia. Thus, SWAPO represented only 40-45 per cent of the total population of the Territory. Consequently - despite political opposition and the fact that not all Ovambos supported SWAPO[28] - many European and other countries in the UN refused to recognise SWAPO as the 'sole authentic representative of the Namibian

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26 See GA Res 3111 (XXVIII) of 12 December 1973.

27 See Report UNCfN GAOR 36th Sess Suppl No 24 vol I 135 seq.

28 In 1975 SWAPO called for a boycott of elections, but only 55 per cent of the Ovambo population responded. See R v Lucius 'Die verfassungs- und völkerrechtliche Entwicklung Namibias' (1975) 29 Journal der Südwestafrikanischen Wissenschaftlichen Gesellschaft 92.

people'.[29]

Summing up, it may be said that the UNCfN could not be treated as an exile government without the overt expression of support by the Namibian people, and this was lacking during the Council's term of office. Consequently, the model of exile government as the basis of an autonomous administration was not applicable to the UNCfN.

(c) Definition of the legal character in terms of the UN Charter

Barsotti proposed another approach to the legal qualification of the UNCfN.[30] He regarded the Council as a subsidiary organ of the GA in terms of art 22 of the UN Charter, with the implication that it had extensive governmental powers under arts 1(2), 10, and 14 UN Charter.[31] This approach is noteworthy because Barsotti assumed that the UN Charter was the compulsory constitution for all Member States and any award of governmental powers to a UN organ must be explained in terms of the Charter. His reference to arts 10 and 14 of the Charter is incorrect, however, since both articles restrict the power

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29 See 1981 UNYB 1130-2.

30 Barsotti (n11) 53 seq.

31 Barsotti (n11) 57-8.

of the GA to recommendations and debates.[32] Thus, neither is appropriate to explain the GA's power to delegate governmental powers to a subsidiary organ.

Further, because UNCfN was established in lieu of the former Mandatory, South Africa, it is possible that governmental powers could be delegated to the Council under Chapter XII of the UN Charter ('Trusteeship System').[33] According to this chapter, after termination of the South African Mandate over Namibia the GA had constituted itself as the trustee for the Territory in terms of art 81 UN Charter. This legal basis meant, in the opinion of some authors,[34] that the UN could administer the Territory under the provisions of the International Trusteeship System (Chapter XII of the UN Charter).

An essential requirement for the application of Chapter XII of the Charter, however, is that the territory to be administered should fall within the scope of art 77(1). This article demands the conclusion of a trusteeship agreement:[35] 'the Trusteeship System shall apply to such

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32 Article 10 'The General Assembly may discuss...' and art 14 'The General Assembly may recommend...'.

33 See the statement of H Jagota on 23 June 1981 during a seminar on the 'Legal Issues concerning the Question of Namibia' (UN-Doc A/AC 131/3).

34 See Jagota op cit; Schermers (n11) 85 and H G Schermers International Institutional Law vol II 484.

35 United States proposals during the negotiations of the San Francisco Conference to regulate the conclusion of trusteeship agreements unilaterally by the United Nations were refused. See R B Russel A History of the United Nations Charter - The Role of the United States 1940-1945 332.

territories as may be placed thereunder by means of trusteeship agreements.'[36] Notwithstanding repeated requests by the GA,[37] a trusteeship agreement between South Africa and the UN was never concluded because of South Africa's refusal. Consequently, Chapter XII of the Charter does not apply, at least in so far as the governmental powers of the GA to administer a former trust territory are concerned. The ICJ confirmed this view in its Advisory Opinion of 1950,[38] by denying that the provisions of Chapter XII of the Charter were applicable to the Territory.[39]

From the above it is evident that neither the model of an exile government nor Chapter XII of the UN Charter can be used as a basis of authority for the powers exercised by the Council. Are there any other ways of legitimating UN administration of the Territory?

Following GA Res 2145 (XXI) of 1967, which declared any South African administration within Namibia illegal, there was an administrative vacuum. The UNCfN had a general authority of the UN to take up responsibility in default of any other body, state or organisation.

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36 Article 77(1) UN Charter.

37 See GA Res 65 (I) of 14 December 1946; GA Res 141 (II) of 1 November 1947; GA Res 227 (III) of 26 November 1948; GA Res 337 (IV) of 6 December 1949 and GA Res 449 B (V) of 13 December 1950.

38 See supra II (3) (b), which deals with the ICJ Opinion of 1950.

39 See GA Res 338 (IV) of 6 December 1949.

> 'It is inconceivable that the interests of the people of a territory placed under the sacred trust of civilisation by the League of Nations, over which the General Assembly exercised a supervisory role for 21 years and which has ultimately been brought under a direct responsibility of the United Nations, should be delivered into a juridical vacuum.'[40]

To argue the contrary would mean that the Organisation would have been forced to tolerate an illegal situation until South Africa agreed to a trusteeship agreement.

The power to act could even be construed as an obligation to act in terms of the right of self-determination as laid down in arts 1(2) and 55 of the UN Charter. The abstract right of self-determination was put in concrete terms in many UN resolutions, codifications and declarations and is today a generally recognised principle of international law.[41] (Some authors even hold that the right is part of ius cogens).[42] In this context, however, it is sufficient to acknowledge the Namibian people's right of self-determination[43] and to note that this right was

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40 UN Interoffice Memorandum by Eric Suy, Legal Counsel, UN-Doc 23A/No 82 of 20 April 1982.

41 See, K Doehring 'Das Selbstbestimmungsrecht der Völker als unumstößlicher Grundsatz des Völkerrechts' (1974) 14 Berichte der deutschen Gesellschaft für Völkerrecht 15-19.

42 I Brownlie Principles of Public International Law 513 and 515.

43 See GA Res 1514 (XV) of 14 Decmber 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples) which is the fundamental resolution for the right of self-determination of colonial people. This general principle was concreted in GA Res 1803 (XVII) of 14 December 1962; GA Res 2625 (XXI) of 24 October 1970; GA Res 3171 (XXVIII) of 5 February 1974

confirmed by all UN organs[44] and all Member States of the Organisation,[45] including South Africa.[46]

By termination of South Africa's Mandate over the Territory in 1967,[47] the UN had the obligation to realise the right of self-determination for the Namibian people. From this point of view, the UN bound itself to establish an administration for the Territory, based on the principles of the UN Charter, to bring about the immediate independence of the Namibian people. The UN discharged this obligation by establishing of the UNCfN.[48] This did not correspond to the principles for the administration of non-self-governing territories laid down in Chapter XII of the UN Charter (Trusteeship System), because there was no treaty agreement between the Mandatory and State(s) or the Organisation.[49]

It is obvious that the organs of any international organisation are obliged to meet the constitutional goals of the organisation by using the institutions provided. The establishment of other institutions, which were not

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and GA Res 3201 (S-VI) of 1 May 1974.

44 For instance, GA Res 2248 (S-V) of 19 May 1967; SC Res 309 of 4 February 1972 and the 1971 Advisory Opinion of the Court 1971 ICJ Reports 31 seq.

45 See supra II 3 (e).

46 See J Dugard The South West Africa/Namibia Dispute 523.

47 GA Res 2145 (XXI) of 27 October 1966.

48 GA Res 2248 (S-V) of 19 May 1967.

49 See arts 75 and 77 UN Charter.

explicitly mentioned in the Charter, is possible only on the understanding that there is no other way of discharging obligations within the UN system. Thus, with respect to the UNCfN, its establishment was lawful if the system for the administration of non-self-governing territories (Chapter XII of the UN Charter) was unavailable. This argument depends on whether there were other possible ways, apart from establishing the Council, of administering Namibia during the transition.

(i) Conclusion of trusteeship agreements in terms of Chapter XII UN Charter

In the first instance it must be determined whether the UN could transfer the Territory into the trusteeship system of the Charter by concluding an agreement with South Africa, other States, or SWAPO.

The conclusion of a trusteeship agreement with South Africa was unrealistic. Despite all their efforts and repeated requests by the GA and the SC,[50] South Africa was not willing to co-operate;[51] it tried, on the contrary, to incorporate the Territory as its fifth province. However,

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50 See GA Res 85 (I) of 14 December 1946; GA Res 141 (II) of 1 November 1947; GA Res 227 (III) of 26 November 1948; GA Res 337 (IV) of 6 December 1949; GA Res 449 B (V) of 13 December 1950 and at last GA Res 1143 (XII) of 25 October 1957 and GA Res 1243 (XIII) of 30 October 1958.

51 See GAOR 2nd Sess 4th Committee 134-5 Doc A/334.

one might envisage a trusteeship agreement with another State or group of States.[52] Even here, a basic requirement for the application of the trusteeship system was missing. Fiduciary administration in terms of arts 73 seq of the Charter is possible only if the territory concerned is not capable of self-government. In the case of Namibia, since GA Res 2248 (S-V) of 1967, the UN had assumed that the people of Namibia were prepared for self-government, because the rights vested in the Council by that Resolution contemplated the early independence of the Territory.[53] In addition it would have been virtually impossible to find consensus on the selection of a trustee or trustees, because of the different attitudes States had to decolonialisation in general and to the Namibian problem in particular.[54]

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52 An example can be found in the case of Somaliland which obtained independence on 1 July 1960. This formerly Italian colony was administered for 10 years by Italy (as the official Mandatory) and a trusteeship council consisting of representatives from Colombia, Egypt and Philippines. See, for further details, GA Res 289 (IV) of 21 November 1949; 1950 UNYB 797 seq and G A Costanzo The Administration of Somaliland 1950-1955. National Studies on International Organisation: Italy and the United Nations.

53 In this sense also see SR Res 385 (1976) and SR Res 435 (1978).

54 See 1967 UNYB 694; 1960 October Revue des Nations Unies 69. The only example - besides Somaliland - of a group of states acting as an administering authority was the régime for Nauru, consisting of representatives from Australia, New Zealand and United Kingdom. Article 4 of the trusteeship agreement, however, stated that Australia - in the name of the three States - exercised full administrative and legislative power. See UNTS vol 10 3.

Finally, one might consider a trusteeship agreement with SWAPO as the 'authentic representative of the Namibian people'. There is no basis in the Charter, however, for the exercise of administrative powers by a liberation movement like SWAPO. Article 81 of the Charter states that the task of an administering authority could be fulfilled only by 'one or more States or the Organisation itself'.[55] More importantly, a trusteeship agreement with SWAPO would contradict art 81 UN Charter. The administering powers of the trustee are extensive, and most trusteeship agreements gave the trustee 'full power of legislation, administration and jurisdiction'.[56] If SWAPO could have fulfilled these tasks it would have been established as an independent government in Namibia. Apart from the difficulty of treating SWAPO as a government for the Namibian people,[57] the sense of art 76(b) of the Charter ('development towards self-determination') would have been fulfilled, and the application of the trusteeship system would have been point-less.

Summing up, there was no realistic possibility of the UN transfering Namibia to the Trusteeship System.

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55 Membership in the UN is not necessary. So, for example, in case of Somaliland mentioned above, when the trusteeship agreement between Italy and Somaliland was concluded on 2 December 1950, Italy was not a member of the Organisation.

56 For instance, art 5 of the Tanganyika-Trusteeship Agreement with United Kingdom. See UNTS vol 8 94.

57 See, for this problem, supra IV (2) (b).

(ii) Sanctions by the Security Council in terms of Chapter VII of the UN Charter

Apart from concluding trusteeship agreements, the UN might have terminated South Africa's illegal de facto administration over Namibia by initiating sanctions in terms of Chapter VII of the Charter. Leaving aside the question of efficacy of sanctions in solving conflicts, the initiation of sanctions in terms of arts 41 and 42 would have been conceivable, because all necessary requirements of art 33(1) of the Charter[58] for a peaceful settlement of the dispute had been ignored by South Africa.

On 13 April 1978, the 'Committee on the implementation of the declaration of the granting of independence' adopted a Resolution recommending

> 'that the Security Council consider taking appropriate measures under Chapter VII of the Charter of the United Nations to secure South Africa's speedy compliance with the Council's decisions.'[59]

So, in 1981, the former GDR and the Soviet Union applied to the SC for sanctions against South Africa to secure the immediate independence for the Namibian people.[60]

A basic requirement for the initiation of sanctions,

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58 Article 33(1) UN Charter provides: 'shall first of all, seek solution by negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

59 See 1978 UNYB 229.

60 See 1981 UNYB 1129.

however, was that the situation in Namibia posed a threat to international peace and security.[61] Efforts to characterise the situation as such were consistently thwarted by the permanent Members - United Kingdom, France and the United States - and by the objections of the Western Five. These States argued that there was no threat to international peace and security in the case of Namibia and that negotiations between South Africa and the UN should not be pre-empted. Besides, the United States doubted the efficacy of sanctions (for the international community as well as for the Namibian people) to reach immediate independence for the Territory.[62]

Hence it appears that a solution of the problem by initiation of sanctions in terms of Chapter VII of the Charter was politically impossible in the UN.

(d) Direct UN-authority

From the above examination it is evident that there was no

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61 See arts 41 and 42 UN Charter. The only case in the history of the UN (before the Gulf War) in which the SC initiated sanctions in terms of art 41 was the former Southern-Rhodesia (today Zimbabwe) by SR Res 221 (1966) of 9 April 1966. For a comparison of this with the Namibian case see, A S Minty in P Taylor & A J R Groom (eds) Utilizing the System: A Non-governmental Perspective 428. He comes to the conclusion that there were no differences regarding the requirements for sanctions, and that accordingly the initiation of sanctions is a political rather than a legal question.

62 See 1981 UNYB 1137.

method under the Charter for the UN to discharge its obligations towards the Namibian people as prescribed in arts 1(2) and 55. The only option available was for the Organisation to directly undertake the powers of administration itself by internationalising the Territory. Internationalism means the limitation of a State's sovereignty by an international contract and the transfer of the State's administration to a community of States, an international commission or another organ.[63] The degree and scope of the international administration may differ according to the form of the internationalism: a distinction can be drawn between international administration with full[64] or limited[65] governmental powers.

In contrast to all examples of internationalism in the history of the Organisation, in the case of Namibia there was no agreement between the parties concerned (South Africa and the UN). On the contrary, the UN unilaterally declared the termination of the Mandate and constituted itself as the administering power. This did not mean that

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63 See K Herndl in K Strupp (ed) Wörterbuch des Völkerrechts vol II 138-9.

64 For instance, the administration of the 'Saargebiet' between 1919 and 1935 (arts 50-58 Treaty of Versailles); the international zone of Tangier (Tangier-Convention of 1923) and status of the Free City of Danzig 1919 to 1939 (arts 100-108 Treaty of Versailles).

65 So, for instance, the administration of the 'Seedonau' (mouth of the Danube) by the European Danube-Commission 1856 to 1940, which was authorised to administer the Territory only with regard to shipping traffic.

UN administration of the Territory was illegal, but legality must be established, since the UN may not exercise administering authority without an international contract. In other words, can the UN exercise administering powers outside the Charter?

Kelsen categorically denies the exercise of 'rights of sovereignty' outside the provisions of art 81 UN Charter.[66] He gives the following reasons for his opinion:

> 'No provision of the Charter confers upon the Trusteeship Council other functions than those relating to trust territories. Neither the General Assembly nor the Security Council has the power to confer upon the Trusteeship Council functions which are outside of the trusteeship system. The fact that the Charter does not expressly preclude the General Assembly or Security Council from delegating to the Trusteeship Council the performance of special tasks not included in the trusteeship system does not justify such delegation. The principle: what is not forbidden is permitted, may apply to the relationship of a subject to the legal order. Organs of a community are permitted to perform only those acts which the legal order authorises the organs to perform. Otherwise, any constitution of a national as well as of an international community would be meaningless. To confer upon the Trusteeship Council functions outside of the trusteeship system is unconstitutional even if these functions have some similarity to the trusteeship functions. Such similarity cannot be substituted for the missing authorisation by the Charter.'[67]

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66 H Kelsen The Law of the United Nations 833 seq.

67 Kelsen op cit 684-5.

A similar remark was made by the British Minister of State for Foreign Affairs, when commenting on the proposal that Antarctica should be placed under United Nations sovereignty: 'there is no provision in the United Nations Charter for accepting the sovereignty of this or any other part of world.'[68]

In contradistinction to this view, most scholars agree[69] that the exercise of administrative powers by the UN is not strictly limited by arts 77 and 81 of the Charter:

> 'In the first place, article 81 of the Charter expressly provides that the authority administering a trust territory may be one or more States or the Organisation itself. This is not, of course, the same thing as saying expressly that the United Nations shall have the capacity to be sovereign over a trust or any other territory, but it is a clear indication that the United Nations was intended to possess sufficient personality to exercise jurisdiction and control over territory. The difference between the exercise of jurisdiction and control and the possession of sovereignty is sufficiently small for it

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68 House of Commons Debates vol 551 col 1758 25 April 1956. Similar observations were made by the Secretary of State of the United States in relation to the possibility of placing Cyprus under the control of NATO; see Department of State Bulletin (1956) 34 713.

69 E Lauterpacht 'The contempary practice of the United Kingdom in the field of International Law' (1956) 5 ICLQ 411-12; J Leyser (n14) 270-1; I von Münch 'Völkerrechtsfragen der Antarktis' (1958) 7 ArchVR 251; E Klein Statusverträge im Völkerrecht 303; A Vedovato 'Les accords de tutelle' (1950) 76 Academié de Droit International (RdC) 655; F Seyersted 'United Nation Forces - some legal problems' (1961) 37 BYIL 447 seq and J H Verzijl International Law in Historical Perspective vol III 473.

> to be of real importance. There would seem no good reason in law for drawing a distinction between the capacity of the United Nation to administer a trust territory and its capacity to administer other territories.'[70]

Even the practice of the UN showed that Kelsen's restrictive interpretation was not tenable in international law.[71] Furthermore, there are examples outside the practice of the UN of international organisations wielding general administering powers. The case of the 'Saarbecken' is one: according to the Treaty of Versailles this Territory was administered by a body ('Regierungsrat') which represented the League of Nations. The 'Regierungsrat' had full administrative power, including legislative, judicial and fiscal competence.[72] This case is comparable to that of Namibia because both administering powers were temporally limited according to their term of office (the UNCfN until independence of the Territory and the 'Regierungsrat' until the plebiscite in 1934).

Another argument in favour of UN competence to administer territories outside Chapter XII of the Charter is the Advisory Opinion of the ICJ in the Reparations for Injuries Suffered in the Service of the United Nations Case.[73] Here the Court stated:

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70 Lauterpacht op cit 411-12.

71 See infra IV (2) (f), dealing with examples of UN administration outside Chapter XII of the Charter.

72 Paragraphs 20, 25 and 26 Annex to arts 45 to 50 of the Treaty of Versailles.

73 1949 ICJ Reports 174 seq.

> 'Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'[74]

In its judgment of 20 July 1962[75] the ICJ stated that:

> 'the functions and powers conferred by the Charter on the General Assembly are not confined to discussions, considerations, the initiation of studies and the making of recommendations; they are not merely hortatory.'

Similarly, in an Advisory Opinion of 1954, the Court pointed out that although the Charter contains 'no express provision for the establishment of judicial bodies or organs and no indication to the contrary', the capacity to establish a tribunal to do justice as between the Organisation and staff members 'arises out of the Charter'.[76] In other words the Court supported the existence of 'inherent powers' of organs of international organisations.[77]

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74 ICJ Reports op cit 182.

75 Certain Expenses of the UN Case 1962 ICJ Reports 151 seq.

76 Effects of Awards of Compensation made by the United Nations Administrative Tribunal 1954 ICJ Reports 56.

77 See also in favour of the existence of implied powers of the GA the ICJ's West-Sahara Opinion 1974 ICJ Reports 12 seq and the 1971 Namibia Opinion 1971 ICJ Reports 15 seq where the Court stated: 'it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting in specific cases within the framework of its competence, resolutions which make determinations or have operative design.'

(e) UNO-practice in comparable cases

There are some examples in State practice of the recognition of the UN's capacity to administer or to supervise the administration of territories other than trust territories. The first is the case of Trieste. In the Peace Treaty with Italy of 10 February 1947,[78] provision was made for the establishment for a Free Territory of Trieste.[79] Organisational questions were laid down in a Protocol annexed to the Treaty. Although the Protocol never came into force (on 5 October 1954, United Kingdom, Italy, Yugoslavia and the United States signed in London a Memorandum which parcelled out the Territory between Italy and Yugoslavia), it provided evidence of the UN's capacity to supervise the administration of a territory. Article 2 of the Statute provided 'the integrity and independence of the Free Territory shall be assured by the Security Council'.[80] This responsibility implied that the Council should ensure the observance of the Protocol (and in particular the protection of the basic human rights of the inhabitants) and ensure the maintenance of public order and security. Article 19 also recognised the SC's right to

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78 For text see UNTS (1950) 49 139.

79 Article 21 of the Peace Treaty with Italy.

80 In the case of Trieste the SC, not the GA, was the administering power because of the particular situation which was a threat to international peace and security. See H J Schlochauer 'Berichterstattung zu völkerrechtlichen Fragen von europäischer Bedeutung' (1949) 1 ArchVR 69 seq.

disallow legislation which in its view contradicted the Protocol.

A second example is the city of Jerusalem. By a series of Resolutions passed between 1947 and 1948, the GA provided that the city should be placed under a special international régime subject to UN control. Article 1 of the draft Statute[81] establishing this régime constituted the city as 'a corpus under the administration of the United Nations'. The Governor of the city, who was entrusted 'on the behalf of the United Nations' with full executive power, was to be appointed by and be responsible to the Trusteeship Council.[82] He had the power to conduct the external affairs of the city and to conclude treaties on its behalf.[83] Although, there was no express disposition of the Territory to the UN, it was clear that the Organisation or its representative, the Governor, was intended under the Statute to exercise extensive powers amounting to full sovereignty.

The final example is that of Palestine. Because of its similarity to the case of Namibia, it is the most apposite case. Apart from South West Africa, Palestine was the only mandated Territory which, until 1947, was neither

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81 Report of the Trusteeship Council on the Question of an international régime for the Jerusalem area and the protection of the holy places GAOR 5th Sess Suppl No 9 Annex II 19 seq.

82 Articles 12 and 13 of the above mentioned Statute.

83 See art 37 of the Statute.

independent nor transferred into the UN Trusteeship System.[84] The United Kingdom as the Mandatory power could not find a solution for the future of the Territory that would meet the wishes of the majority Arab population and the minority Jewish population. On 2 April 1947 the British Government submitted the problem to the GA 'to make recommendations under article 10 of the Charter concerning the future government of Palestine'.[85] On 25 May 1947, the GA established the 'United Nations Special Committee on Palestine' consisting of 11 Members.[86] In August 1947, this Committee submitted a proposal ('Partition Plan with Economic Union') which suggested an Arab and a Jewish constituent State.[87] On 29 November 1947, the GA adopted Res 181 (II) which established the 'United Nations Palestine Commission (UNPC)' to realise the plan proposed by UNSCOP:[88]

> 'The administration of Palestine shall, as the Mandatory power withdraws its armed forces, be progressively turned over to the Commission which

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84 After the end of the First World War Palestine became a mandated Territory with the United Kingdom as Mandatory under the supervision of the League of Nations.

85 Cited from R N Chowdhuri International Mandates and Trusteeship Systems - a comparative Study 105.

86 The 11 Member States were: Canada, Czechoslovakia, Guatemala, Holland, Peru, Sweden, Uruguay, Australia, India, Iran and Yugoslavia.

87 Chowdhuri (n85) 108.

88 The Members were: Bolivia, Czechoslovakia, Panama, Denmark and Philippines.

shall act in conformity with the recommendations of the General Assembly under the guidance of the Security Council.'[89]

The UNPC had, inter alia, the following tasks: to establish a body for each constituent State which would have the power to administer the Territory; to maintain security in the Territory by organising a police force; to hold and observe elections for a constituent assembly and to establish an economic council for the preparation of a tax and monetary union.[90]

Like the case of Namibia, the UNPC could not exercise these extensive powers effectively because the United Kingdom refused to co-operate with the Commission or to recognise it.[91] The United Kingdom changed its attitude on 15 May 1948, however, and recognised the Commission as the 'sole authority which will be the Government of Palestine'.[92] On 16 May 1948, the UNPC was dissolved by the GA.[93]

The United Kingdom's recognition does not weaken the

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89 GA Res 181 (II) of 29 November 1947.

90 GA Res 181 (II) op cit.

91 See the statement of the UNPC to the GA of 10 April 1948 GAOR 2nd Sess Suppl No 1 36: 'The armed hostility of both Palestinian and non-Palestinian Arab elements, the lack of co-operation from the mandatory power, the disintegrating security situation in Palestine and the fact that the Security Council did not furnish the Commission with the necessary armed assistance are the factors which have made it impossible for the Commission to implement the Assembly's resolution.'

92 Report UNPC GAOR 2nd Sess Suppl No 1 7.

93 See GA Res 189 (S-II) of 16 May 1948.

precedent value of the UNPC in the present argument. There are two characteristics in particular which would suggest that the Council had extensive powers of administration over the Territory of Namibia: first in the field of functions (in terms of the establishment of a police force, the functions of the UNPC were even more extensive than the functions of the Council); and, secondly, and more importantly, although the constitutive Resolution for the UNPC demanded a SC hearing before the Commission could execute its tasks,[94] resolutions passed by the UNPC were binding and would immediately become effective unless the Commission had previously received contrary instructions from the SC.[95]

Apart from the fact that the UNPC could never discharge its tasks (because of circumstances which are not relevant to the Namibian problem) it is a useful precedent for the UNCfN. The UNPC (as a subsidiary organ of the GA) was an accepted authority for a particular territory. In this context it is important to note, that the legal basis for the Commission was based on a GA Resolution.

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94 'The General Assembly requests that the Security Council consider whether the situation in Palestine constitutes a threat to the peace. If it decides that such a threat exists, the Security Council should empower the Commission to exercise in Palestine the functions which are assigned to it by this Resolution'. See GA Res 181 (II) part II No 14.

95 GA Res 181 op cit No 15.

(f) Conclusions

From the above discussion it appears that the practice of the UN confirmed the Organisation's administrative powers outside Chapter XII of the Charter and that these powers could be exercised by a subsidiary organ of the GA in terms of art 22 UN Charter. Thus, the establishment of the UNCfN as a subsidiary organ of the GA was consonant with the UN's policy and practice in comparable cases. Hence it seems clear that the UNCfN was a legitimate organ for the execution of administering powers in the Territory until its independence.

(3) Capacity of the Council to represent Namibia in foreign relations

Although UNCfN might have been the legitimate organ to administer the Territory, the question of the Council's capacity to act for the Territory in external matters is still unanswered. Such a power does not automatically arise from UNCfN's double role as an organ of the GA in terms of art 22 of the Charter and as the 'legal administering authority for Namibia'.[96] The implication of this dual capacity was merely that Members of the UN were obliged to accept the Council's actions regarding the Territory as those of a legitimate Namibian government. Above all it

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[96] See GA Res 32/9F of 4 November 1977.

would have been wrong to accord the Council the right to represent Namibia internationally with binding force on Member States. The corollary would be that the binding force of GA resolutions, and therewith a competence of the GA to enact binding laws, would also have to be accepted. The general legislative power of the GA, however, must be denied; it may act with legal effect only when competent under the Charter.[97] Apart from such matters resolutions of the GA are only recommendations to the Members:

> 'It is in the nature of recommendations that, although on proper occasions they provide a legal authorisation for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them.'[98]

One has to proceed, however, from the generally accepted thesis that only sovereign States may act on behalf of their territory in international law.[99] One of the requirements of a sovereign State is a government in

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97 H Kelsen The Law of the United Nations 195; A Stone Legal Control of International Conflict 275; G Fitzmaurice 'Hersch Lauterpacht - the scholar as judge' (1962) 38 BYIL 3 seq; F B Sloan 'The binding force of a "recommendation" of the General Assembly of the United Nations'(1948) 25 BYIL 1 seq; D H N Johnson 'The effect of resolutions of the GA of the United Nations' (1955-6) 32 BYIL 97 seq. Also Judge Fitzmaurice in the Expenses case (1962) ICJ Reports 210.

98 Voting Procedure 1955 ICJ Reports 155.

99 A Verdroß & Bruno Simma Universelles Völkerrecht - Theorie und Praxis 3ed para 378. He gives an extensive survey of the literature and a number of judgments and examples for this particular thesis.

the form of an independent authority.[100] Even if one could have qualified the Council as a government, which is not possible from my point of view,[101] it lacked independent authority because the UNCfN was a subsidiary organ of the GA, and as such subject to UN direction. Thus, if UNCfN lacked independence, as an element of statehood,[102] it had no authority to represent Namibia in international law.

If one simultaneously denied South Africa's power to represent the Territory after termination of the Mandate, there would have been no representative of the Namibian people in international relations and consequently no way of defending their interests in international organs. This would have been an untenable situation in terms of arts 1(2) and 55 of the UN Charter. Consequently, one has to understand the establishment of the Council as an obligation of the UN to discharge its responsibilities towards the Namibian people under the Charter. For the execution of this basic task it would have been impossible to restrict the powers of the Council to only internal

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100 The definition of 'State' was adopted in the Montevideo Convention on the Rights and Duties of States of 1933: 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) capacity to enter into relations with other States.' For the requirement of the independence of the government see, Verdroß op cit para 380.

101 See supra IV (2) (a), which deals with the legal qualification of the UNCfN as an exile government for Namibia.

102 In this context it does not mean the political, but the 'external independence'. See D Gunst Der Begriff der Souveränität im modernen Völkerrecht 105 seq.

executive and legislative matters. This means that the UNCfN had of necessity to be allowed to act for the Territory in international relations as the legitimate representative of the Namibian people.

The Council's capacity in this regard would not be as extensive as in case of a sovereign State, because the UN administration for Namibia was based on the requirements of administration as laid down in arts 1, 73 and 76 of the Charter. Consequently, all actions of the Council had to find authority in the Charter. This would mean that the Council was not authorised to incur any unnecessary obligations for the later independent people of Namibia and it could act only for the purposes of development to self-government and protection of natural resources and human rights. Only then would the Council's actions be valid in law.

(4) Analysis of the Council's actions

(a) Multilateral activities - representation within the United Nations

Since its establishment, the UNCfN considered one of its principal functions to be the representation of Namibia in international organisations and conferences, both in and

outside the UN.[103] In the initial period, the Council sought to obtain observer status in international organisations and conferences, and, where the constitution of the specialised agencies permitted, associate member status.[104] The 1971 Advisory Opinion of the ICJ[105] gave added impetus to the Council's quest for international representation of Namibia and the Council conducted a campaign to obtain the approval of the GA in this regard. The campaign was successful, with the adoption of two Resolutions by the GA in 1976 and 1977.[106] The first of these Resolutions requested:

> 'all specialised agencies and other organisations and conferences within the United Nations to grant full membership to the United Nations Council for Namibia so that it may participate in that capacity as the legal administering authority for Namibia in the work of those agencies, organisations and conferences.'[107]

On the basis of these Resolutions Namibia, as represented

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103 There was no obligation for international organisations to allow any kind of membership in the Council because of its status as a subsidiary organ of the GA or as the lawful administration for the territory of Namibia. The decision to allow membership in special organs of the UN is exclusively reserved to the organ themselves, following the procedures laid down in their constitutions.

104 For a detailed account on the status as an observer and as an associate member see, E Suy 'The status of observers in international organisations' (1978) 160 Académie de Droit International (RdC) 75 seq.

105 See supra II (3) (d).

106 GA Res 31/149 of 20 December 1976 and GA Res 32/9 E of 4 November 1977.

107 GA Res 32/9 E of 4 November 1977. This Resolution was adopted by 120 votes to none, with 7 abstentions.

by the UNCfN, applied for membership in many organisations. Hence, in its last fiscal year (1989), Namibia was a full member of the UNIDO, ILO, FAO, UNESCO, ITU, IAEA, the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, and an associate member in WHO. It also had observer status in the OAU, WMO, WIPO, IMO, WTO and ICAO.[108]

From a legal point of view the admission of the Council to organisations, which reserve membership for 'States',[109] 'Nations'[110] or 'Countries',[111] is of particular interest.

On the basis of the above mentioned Resolutions of the GA,[112] UNCfN decided to apply for full membership in the FAO, and a formal request to this effect was addressed to the Director-General on 27 September 1977.[113] The Council's application was presented to the 19th Session of the FAO Conference. On 14 November 1977 the Conference accepted Namibia's application and admitted it as a full

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108 See UNCfN GAOR 44th Sess Suppl No 24 para 180 seq and 206.

109 See, for instance, arts 3 and 4 of the UN Charter; art 1(2) of the ILO Constitution; arts 3, 5 and 6 of the WHO Constitution; art 2(2) of UNESCO Constitution and art 11 section 2(c) and (d) of the IDA Constitution.

110 See, for instance, art 2 of the FAO Constitution.

111 See, for instance, article of agreement of IMF art 1 sections 1 and 2; IBRD section 2(c), (e) and (f) and IFC art 9 section 2(c) and (d).

112 See GA Res 31/149 and 32/9 E (n106).

113 See E Osieke 'Admission to membership in international organisations: the case of Namibia (1980) 51 BYIL 208.

Member of the Organisation 'represented by the United Nations Council for Namibia'.[114] After the result was announced, the United States delegate explained why the United States had voted against admission. This state took the view that a nation, in the sense in which this term is used in art 2 of the FAO Constitution, means 'a territory controlled by an internationally recognised government located in the territory that it controls or administers'. He continued:

> 'We do not consider it wise for the future of this Organisation or other organisations in the United Nations System to take decisions that create confusion as to the meaning of the concept of State or Nation as it relates to membership in the United Nations Organisation. For this reason, although the FAO's General Committee took pains to underline the exceptional legal nature of the application of Namibia, we cannot agree with the decision taken in favour of its full membership.[115]

The United States believed that Namibia's admittance to associate membership[116] would have been more in keeping with its peculiar status while still allowing the Council to pursue the basic purpose of GA Res 31/149, namely the representation of the people of Namibia. Nevertheless, all

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114 Report of the Conference of the FAO 19th Sess Doc C/77/PV/4. The voting was 112 votes to 4, with 11 abstentions (the required two-thirds majority was 78).

115 The full statement is reprinted in Report of UNCfN GAOR 33rd Sess Suppl No 24 23-4.

116 See arts 2 (3), (4) and (5) of the FAO Constitution.

other speakers welcomed the admission of Namibia.[117]

More problems arose when Namibia applied for admission to membership of the ILO. According to art 1(2) of the FAO Constitution, membership in the organisation is open only to 'States', and the Constitution has no rule for admission as an associate member.[118] During the 64th Session of the ILO Conference, however, the UNCfN decided to apply for full membership.[119] In view of the constitutional difficulties surrounding the Council's application, the Selection Committee of the 64th ILO Conference requested a legal opinion on the possible admission of Namibia. In its opinion, the Legal Adviser of the ILO examined the law and practice of the ILO concerning admission to membership and made the following points.[120] The ILO Constitution contains provisions regarding the rights and obligations of Members, which appear to confirm the need to meet the generally accepted criteria of statehood in international law.[121] The provisions of art 19 presuppose that members of the ILO are capable of concluding treaties and international agreements and are able to make them effective within their territory; art 29 presupposes that

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117 Report of UNCfN (n115) 25-8.

118 Observer status at sessions of the ILO was granted to the Council in 1974.

119 See Report of UNCfN (n115) 79.

120 For full text of the opinion, see Provisional Record No 24 ILO 64th Sess 22-4.

121 The criteria are laid down in art 1 of the Montevideo Convention of 1933 on the Rights and Duties of States. For the provisions of this article, see above (n97).

members of the ILO have standing before the ICJ and art 40 presupposes that each member has a territory and is capable of granting privileges and immunities therein. In the view of the Legal Adviser, the situation in Namibia was comparable to the Free City of Danzig.[122]

The Free City of Danzig had been created in 1919 by the Treaty of Versailles. It had a defined territory, a population and a government. The conduct of its foreign relations, however, was entrusted to the Government of Poland. In 1930, Danzig applied to become a member of the ILO, but the PCIJ held, that because it lacked in competence in foreign relations, it could not comply with all the obligations of a member of the ILO, and could not therefore become a member. On the basis of this analysis, the Legal Adviser concluded, 'the Council for Namibia cannot be admitted as a Member of the ILO'.

Notwithstanding this opinion, Namibia, represented by the UNCfN, was admitted as a full Member of the ILO on 23 June 1978, by a vote of 368 to 0, with 50 abstentions (the required two-thirds majority was 320).[123] The text of this Resolution confirms the above findings in many respects, that is, that the Council was the lawful administrator of the Territory until independence, which included representation in international law:

'(The Selection Committee of the ILO) decides to admit

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122 Free City of Danzig and the ILO 1930 PCIJ Reports Series B No 18 71 seq.

123 Report of UNCfN GAOR 33rd Sess Suppl No 24 102-3.

Namibia to membership in the Organisation, it being agreed that, until the present illegal occupation of Namibia is terminated, the United Nations Council for Namibia, established by the United Nations as the legal administering authority for Namibia is empowered, inter alia, to represent it in international organisations, will be regarded as the Government for Namibia for the purpose of the application of the Constitution of the Organisation.'[124]

The Resolution gave further reasons, why the Selection Committee deviated from the requirements of the ILO Constitution for the admission of new members:

'Noting that Namibia is the only remaining case of a former Mandate of the League of Nations where the former Mandatory Power is still in occupation, considering that an application for membership in terms of article 1 is prevented only by the illegal occupation of Namibia by South Africa, the illegal nature of this occupation having been confirmed by the International Court of Justice in its Advisory Opinion of 21 June 1971,
affirming the International Labour Organisation is not prepared to allow the legitimate rights of the Namibian people to be frustrated by the illegal actions of South Africa,
decides to admit Namibia to membership in the Organisation.'[125]

The admission of Namibia as a full Member of the ILO, however, did not appear to have resulted in a new interpretation of the ILO Constitution or in a change in

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124 ILO Official Bulletin (1978) 61 Series A 188.

125 ILO Official Bulletin ibid.

the meaning generally attributed to the term 'State' for purposes of membership of the Organisation. In fact, the admission would appear to have been based on political expediency.[126]

The admission of Namibia, as represented by the Council, as a full Member in FAO and ILO, was followed by full membership in the UNESCO, UNCTAD, ITU and in the IAEA.

The Council's activities included representation of Namibia in international conferences. Of particular interest was its participation in the Third United Nations Conference on the Law of the Sea (UNCLOS III), where Namibia, 'represented by the Council as the legal administering authority for Namibia', was accepted as a full Member.[127] In this capacity the UNCfN signed the Convention (arts 305(b), 306) on behalf of Namibia.[128]

In conclusion, it may be said that examination of the Council's multilateral activities confirms the finding that the UNCfN, although it lacked de facto control over the Territory and hence could not fulfil all the obligations

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126 The interplay between law, politics and ideology appears to be more in evidence in admission to membership in international organisations than in any other area in international law. When considering the admission of a new Member, existing Members are influenced not only by the rules and procedures of the organisation but also by political considerations, such as the nature of the relations between the applicant and the Member and the extent to which the government of the applicant conforms with the political philosophy or ideologies of the Member State. See Osieke (n113) 189.

127 See Report of UNCLOS III Official Records 6th Sess (New York 23 May - 15 July 1977) vol 7 4.

128 Report of UNCfN GAOR 42nd Sess Suppl No 24 para 742.

imposed by membership of particular organisations, was accepted as the lawful representative of the Namibian people. This result was obviously accepted by all Members of the UN.[129]

(b) Other activities

The Council was also concerned with the dissemination of information and publicity concerning Namibia, educational assistance to Namibians abroad and the issuing of travel documents.

UNCfN made great efforts to disseminate information, doubtless in the hope of putting international pressure upon South Africa. The Council was supported by the GA, which confirmed the necessity

> 'to arouse world public opinion on a continuous basis with a view to assisting effectively the people of Namibia to achieve self-determination, freedom and independence.'[130]

To realise this aim, the GA called upon the Council, in agreement with SWAPO, to:

> (a) 'disseminate publications on political, economic, military and social consequences of the illegal occupation of Namibia by South Africa, on legal matters, on the question of the territorial integrity of Namibia and on contacts between Member States and South Africa;

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129 The voting for admission in the ILO was unanimous.

130 GA Res 32/9 C of 4 November 1974.

(b) produce and disseminate radio and television programmes designed to draw the attention of world public opinion on the current situation in and around Namibia;

(c) produce and disseminate in both the English and the local languages of Namibia, radio programmes designed to counter the hostile propaganda and dissinformation campaign of the racist régime of South Africa.'[131]

The Council (with the approval of the GA) later enlarged its activities, when independence of the Territory was in sight, to:

'(a) monitoring of events and developments in Namibia by all means available including the continuation of financial support to non-governmental organisations for mobilising world public opinion to support the efforts on the Secretary General in ensuring the effective implementation of the independence plan for Namibia;

(b) mobilising the international community for emergency and development assistance to the newly independent Namibia.'[132]

So far as the educational assistance of Namibians abroad was concerned, activities could be divided into two major projects. The United Nations Fund for Namibia was set up to train qualified people for the post-independent period and the Nationhood Programme for Namibia was

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131 GA Res 43/26 D of 17 November 1988.

132 UN-Doc A/AC/131/304 of 22 December 1988. A survey of all public relations activities of the Council was given in the annual report of the UNCfN to the GA. For the last report, see UNCfN GAOR 44th Sess Suppl No 24 paras 245-271.

established to work out a plan for the development of the later independent Namibia. In 1988 one quarter of the budget of 11 507, 187 US$ (US-Dollar) was financed by the GA and three quarters by voluntary contributions of Member States.[133]

Finally, the third field of the non-multilateral activities of the Council was the issuing of travel documents to Namibians. Subsequent to the establishment of the UNCfN, many Namibians applied at the UN Headquarters in New York for UN passports on the ground that the Council would have been responsible as their government.[134] The Council issued passports to the Namibians who qualified under GA Res 2372.[135] In the same Resolution, the GA designated the question of issuing travel documents to Namibians as 'a matter of priority' and established a special Committee with the task to make efforts for the recognition of these documents. The Committee appealed to Member States:

> 'to recognise and accept as valid travel and identity documents issued by the Council to Namibians abroad, subject to its usual visa requirements and to extend its full co-operation to the Council in this regard and afford all necessary assistance normally accorded

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133 Report UNCfN GAOR 44th Sess Suppl No 24 para 322.

134 1967 November UN Monthly Chronicle 28 seq.

135 GA Res 2372 (XXII) of 12 June 1968. For a legal examination of the issuing of travel documents to Namibians by the UNCfN, see 1967 UN Juridical Yearbook 309 seq and J F Engers 'The United Nations travel and identity documents for Namibians' (1971) 65 AJIL 571 seq.

to the bearers of such documents.'[136]

The majority of Member States complied with this request.[137] In the course of time the Council issued thousands of travel documents to Namibians; in the period from June 1988 to August 1989 not less than 2034 passports were issued and 2149 were extended in the same period.[138]

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136 UN-Doc A/AC/131/10 of 2 July 1968.

137 See Report UNCfN GAOR 32nd Sess Suppl No 24 vol I para 267.

138 See Report UNCfN GAOR 44th Sess Suppl No 24 para 353.

V. THE FIRST DECREE

(1) Introduction

In establishing the UNCfN to administer the Territory, the GA expressly authorised the Council 'to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory'.[1] On 27 September 1974, acting on this basis, the Council adopted Decree No 1 for the protection of the natural resources of Namibia.[2] The Decree was endorsed by the GA in Res 3295 (XXIX) of 13 December 1974.

Following the endorsement, the office of the Commissioner for Namibia undertook a number of measures with a view to the implementation of the Decree. The first was to publish the First Decree in an official form and to give it as wide a circulation as possible. Copies of the Decree were addressed to all Member States as well as companies engaged in the exploitation of Namibian natural resources, including carriers and insurers.[3] Besides this the Commissioner's office organised two conferences with legal experts to discuss the particular legal problems

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1 GA Res 2248 (S-V) of 19 May 1969.

2 Hereinafter called Decree, Decree No 1, or First Decree. For text of the Decree No 1, see Report UNCfN GAOR 29 th Sess Suppl No 24 27-8.

3 See F Rigaux 'The Decree for the protection of the natural resources of Namibia - adopted on 27 September 1974 by the United Nations Council for Namibia' (1976) 9 Revue des droits de l'homme 473.

raised by the Decree.[4] Parallel to these measures, the Commissioner undertook research designed to acquire information on the basis of which legal action could be brought. The result of this research reflected the idea that 'seizure of illegally exported resources' through legal proceedings

> 'will not be an effective remedy in States which do not recognise the power of the General Assembly to revoke the Mandate or to create a subsidiary organ to administer Namibia pending independence as well as those which deny the power of the Council to adopt decrees'.[5]

The Council recognised that even in States whose governments accepted the validity of the decree, local courts were unable or unwilling to validate the seizure of Namibian resources 'since they are not empowered to enforce international law in the absence of domestic enabling legislation.'[6]

(2) Decree No 1 before independence

The Decree, which was addressed directly to persons and

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4 The first was a conference held in New York in May 1975 to consider the implementation of the Decree in Anglophone, common-law jurisdictions; the second was held in December 1975 in Brussels to discuss legal approaches and problems in Belgian and Dutch law and under the rules of the EC.

5 UN-Doc A/AC/131/81 of 18 July 1980.

6 UN-Doc op cit.

entities and not to States, covers all natural resources, animal and mineral.

Paragraph 1 of the Decree provides that: no person or entity, whether a body corporate or unincorporated, may search for, prospect for, explore for, sell, export or distribute any natural resource, situated or found to be situated within the territorial limits of Namibia without the consent and permission of the UNCfN. Paragraph 2 provides that any permission, concession or licence for all or any of the purposes specified in para 1 granted by any person or entity (including any body purporting to act under the authority of the Government of South Africa or the administration of Namibia or their predecessors), is null, void and of no force or effect. In terms of para 3, no animal, mineral or other natural resource produced in or emanating from Namibia may be taken from the Territory by any means whatsoever to any place outside the territorial limits of Namibia. Under para 4, any product mentioned in para 3 which is taken from the Territory without the necessary permission may be seized and forfeited to the Council, which will hold it in trust for the benefit of the people. Paragraph 5 of the Decree states that any vehicle, ship or container found to be carrying animal, mineral or other natural resource produced in or emanating from Namibia shall also be subject to seizure and forfeiture by or on behalf of the UNCfN. Paragraph 6 gave the future Government of an independent Namibia the right and power to hold any person, entity or corporation liable in damages

for a contravention of the Decree.

Decree No 1 was, according to the Council's scope of authority, lawful. On the one hand, it sought to preserve the status quo of the natural resources of the Territory for later independence,[7] and, on the other hand, the Decree fell within the scope of GA Res 2248 (S-V), specifically para II 1(b), which determined the function of the Council.[8] The more important question was to what extent Decree No 1 bound Member States of the UN. The answer depends on the character of the Decree: was it to be treated as an act of internal Namibian legislation or was it an obligation of international law. As an international obligation, the Decree could have direct effect in the internal law of Member States; it could possibly even take precedence over domestic law.[9] Consequently it is necessary to establish the legal character of the Decree with a view to determining its effect.

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7 This task was clearly delegated to the Council by the GA. See Report UNCfN GAOR 44th Sess Suppl No 24 para 136.

8 For the text of the Resolution, see supra IV (1).

9 As, for instance, in Germany. Article 25 of the German Constitution reads (translated): 'The rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory.'

(a) Legal character of the Decree

Theoretically there are three ways in which the Decree could be interpreted:

(i) directly as a binding obligation of international law;

(ii) or indirectly as an obligation of international law in the sense that the Member States were obliged to promulgate national regulations for its execution; or

(iii) as Namibian legislation, which would be binding only in terms of the law of the executing State.

The first two possibilities are based on the legal status of the Council as a subsidiary organ of the GA in terms of art 22 of the UN Charter; the third is based on the Council's status as the 'legal administering authority for Namibia'.[10]

If the provisions of the Decree were to be viewed as binding obligations of international law the Council would have had to be competent to enact binding laws. Such competence would follow from the status of UNCfN as a subsidiary organ of the GA. And, in consequence, the Decree could be treated as a binding decision of the GA. The binding force of GA resolutions, and therewith a competence of the GA to enact binding laws, however, must be denied. The GA has no general legislative power and may act with

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10 GA Res 32/9 F of 4 November 1977.

legal effect only when competent under the Charter.[11] Other decisions and resolutions have no binding force on Member States.[12] If the GA itself cannot bind Member States, it clearly cannot confer such a power on a subsidiary organ. Hence UNCfN had no competence to enact decrees of binding force for Member States.

Besides this, the first two possibilities mentioned above presuppose that Member States would have been the addressees of the Decree. In fact, however, the Decree was aimed, not at Members of the Organisation, but at bodies corporate or unincorporate. Thus there is no basis for obliging Member States to execute the Decree. Even more important is the fact that the Council, as a subsidiary organ of the GA, had no authority to oblige Member States to promulgate national laws for the execution of the Decree.

Certain authors, however, have advanced different arguments to support Member States' obligation to execute the provisions of Decree No 1. One such argument put the Decree on the same level as SC Res 276 (1970), 283 (1970) and 301 (1970).[13] The binding force of these Resolutions

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11 For instance, the admission of new members in terms of arts 4, 5, and 6 of the Charter as well as the elections to non-plenary organs and the adoption of the budget. See also the discussion supra II (3) (d).

12 See H Golsong 'Das Problem der Rechtsetzung durch Internationale Organisationen (insbesondere im Rahmen der UNO) (1971) 10 Berichte der Deutschen Gesellschaft für Völkerrecht 1 seq.

13 These Resolutions called upon all States, particularly those which had economic and other interests in Namibia 'to refrain from any dealings with the

was determined by the ICJ in its Advisory Opinion of 1971.[14] This argument might have been successful if the SC Resolutions had had the same content as the Decree. But Decree No 1 went far beyond the scope of these Resolutions. First, the SC said nothing about the exploitation of Namibian natural resources, and, secondly, the Resolutions of the SC were addressed to States and not to individuals as the Decree No 1 was.[15] [16]

It follows - through elimination of the first two possibilities - that Decree No 1 should be regarded as if it were an enactment of municipal law. Accordingly, the provisions of the Decree can be taken to be internal Namibian administrative acts, and as such domestic

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Government of South Africa'.

14 In this sense, see the statements of M Ahmad and S Verheuls, UN-Doc A/AC/131/SLI/PV3 13-15.

15 See statement of H G Schermers UN-Doc A/AC/131/SLI/PV3 11.

16 Another argument sought to prove that the provisions of the Decree constituted valid customary law. But there is no support for the idea that SC or GA resolutions (or resolutions of a subsidiary organ) outside Chapter VII of the Charter have binding force. On the contrary, two permanent members (France and United Kingdom) and some non-permanent Members of the SC referred expressly to the fact that their consent to the relevant resolutions was dependent on the non-recognition of the binding force of these resolutions. Consequently, because it is impossible to characterise the provisions of the Decree before independence as rules of international customary law, they could not be binding on Member States of the Organisation. For for this argument, see B Conforti Lezione di Diritto Internazionale 163-83.

legislation[17] which could only have extraterritorial effect depending on the internal rules of other States.

(b) Practice of states

This conclusion is confirmed by the practice of States in only some instances. The Federal Republic of Germany took the view that the UNCfN had the right to represent the political interests of the Namibian people within the UN, but that it was not 'das völkerrechtlich endgültige und umfassend vertretungsberechtigte Organ für Namibia'.[18] Furthermore the German State Minister, Hamm-Brücher, maintained that, because the Council lacked de facto control over the Territory it could not exercise the powers reserved for a future independent government. The Council therefore exceeded its competence by adopting Decree No 1,

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17 One has to agree with Booysen & Stephan that there were many factors which made the Decree unacceptable as municipal legislation directly affecting individuals in the State. First, any municipal legislation intended to affect individuals in a particular country should be promulgated in that country. The First Decree had only been promulgated internationally and it is doubtful whether the people of Namibia, with a few exceptions, had even heard about it. Secondly, an act of internal legislation should be promulgated in the language of the country. It could not be said at that stage that English was the mother tongue of the majority of persons who lived in Namibia. See H Booysen & G E J Stephan 'Decree No 1 of the United Nations Council for South West Africa' (1975) 1 SAYIL 67.

18 Cited from the German Minister of State, Hamm-Brücher, in the Session of the German Parliament of 26 June 1980 Bundesanzeiger (1980) 6 27.

and the Decree had no binding force. Consequently, the German Government saw no legal basis for hindering private economic transactions in the Territory nor did it regard itself as obliged to transform the provisions of the Decree into internal law.[19]

In France, the Council was not recognised either de jure or de facto, and the French Government expressed the view that the Council lacked the power to enforce its Decrees:

> 'La France continue à ne pas reconnaitre de valeur obligatoire au décrèt No 1 sur la Namibie. En l'absence de toute décision du conseil de sécurité dans la matière, les sociétés francaises en Namibie ne suraient être considérées comme contrevenant au droit international.'[20]

The United Kingdom's attitude had been expressed on numerous occasions when explaining votes and at meetings with delegations of the Council. All these statements confirmed the United Kingdom's stance: that it did not recognise the validity of GA Res 2145 (XXII) (on termination of the Mandate) and that it considered that the GA lacked the power to establish an administration for Namibia. Consequently, the United Kingdom did not recognise the Council as either the de jure or de facto administering

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19 See Völkerrechtspraxis der Bundesrepublik Deutschland (1985) 24 ZäöRV 727 (BTD 10/5221 of 14 April 1985). This statement confirms the finding that the Council as a subsidiary organ of the GA could not pass binding enactments, but it goes too far when it denies UNCfN's governmental powers in general.

20 Pratique Francaise 1979 (1980) 22 AFDI 947.

authority for the Territory. The United Kingdom stated that:

> 'The Government does not accept as valid the United Nations Council Decree No 1, which purports to prevent the exportation of natural resources in Namibia, since the United Nations General Assembly acted beyond its powers in seting up the Council. The Government therefore has no grounds for interfering with this or any other trade between Namibia and the United Kingdom which does not conflict with any of our international obligations.'[21]

In 1976 the Council for Namibia asked the Canadian Government whether Canada would continue to import Namibian products. The Canadian Foreign Minister answered:

> 'The only sanctions that Canada has accepted within the United Nations system, of course, are the sanctions that applied with regard to Rhodesia, and there have been no such sanctions applied with regard to trade with Namibia.'[22]

Apart from this statement, the Canadian Government indicated that 'an investigation would be made of possible tax concessions obtained by companies operating in Namibia' and that 'codes of conduct' for further investments by Canadians in Namibia would be possible.[23]

The attitude of the United States was similar.

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21 Statement of the British Government spokesman in the course of a debate in the House of Lords on the subject of independence negotiations for Namibia. Printed in G Marston 'United Kingdom materials on international law' (1982) 53 BYIL 391.

22 M D Copithorne 'Canadian practice in international law 1976' (1977) 15 CYIL 346.

23 See L Meret 'Canada and Namibia' (1979) 17 CYIL 321.

Although America supported both GA Res 2145 (XXI) and the 1971 ICJ Advisory Opinion, it did not accept the Council's legislative authority over Namibia, although it made no pronouncement on whether it considered the Council as the de jure authority for Namibia.[24] To the contrary South Africa was regarded as the de facto power with control over the Territory.[25] Even if the United States' position could have been interpreted as recognising the Council de jure,[26] that did not entail recognising the binding force of Decree No 1.

Switzerland took the same stance:

> 'Créé par l'Assembléé Générale de l'ONU, le conseil pour la Namibie est un organe dont les décision n'ont qu'une valeur de recommandation, même à l'égard des états membres, mais ne deploient pas d'éffets juridiques contraignants pas de raison pour que le conseil fédéral prenne des mesures dans le sens proposé' (ban on Namibian uranium).[27]

Of all countries, the Netherlands view on implementing Decree No 1 was the most positive. Before Namibian independence, the Netherlands Government considered South

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24 See Report UNCfN GAOR 35th Sess Suppl No 24 vol I 41-2.

25 Report UNCfN op cit 43.

26 The Council itself took this view when it stated that: 'the United States recognises the authority of the United Nations over Namibia and the Council for Namibia as the lawful representative of the interests of the Namibia people.' See Report UNCfN GAOR 35th Sess Suppl No 24 vol III 66.

27 See L Caflisch 'La pratique suisse en matière de droit international public' (1983) 39 Schweizerisches Jahrbuch für Internationales Recht 204.

Africa's Mandate over Namibia to have been legally terminated by the GA, hence South Africa no longer had legal title to administer the Territory. Consequently the Netherlands did not recognise South Africa's de facto administration over the Territory as legal.[28] According to the Netherlands Government, the legal title to administer Namibia had been transferred to the UN, which had delegated its administrative powers to the UNCfN. From this one could conclude that the Council for Namibia was the de jure administrator for Namibia. The Dutch Government, however, never made any formal statement to this effect. In July 1980, the Dutch Foreign Minister described the attitude of his Government towards Decree No 1 (as it emerged from parliamentary questions) as follows:

> 'The Government, it was said, has recognised that the United Nations Council for Namibia is entitled to make regulations for the exploitation, etc., of the natural resources of Namibia, but it had never recognised that the Council had authority to create direct duties for the Netherlands State which the Government then has to carry out.
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> The Government, it was said, considers that the United Nations Council was competent to take decisions concerning the administration of the Territory of Namibia as such, but not more than that. The Government's position was that GA Res 2248 (S-V) which created the Council, provided that the powers and functions of the Council, which included the making of laws and decrees should be exercised within the Territory. Otherwise they considered the Council might

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28 K S Sik 'Netherlands state practice for the parliamentary year 1970-1971' (1972) 3 NYIL 193-200.

create international legal obligations for United Nations Member States, which would give the Council greater powers than those attributed to the Government of a country. Decree No 1 of the Council could be seen only as an act of governing Namibia.'[29]

An examination of the practice of States regarding to Decree No 1, therefore, confirms the thesis that the UNCfN was the lawful administering authority for the Territory[30] but that the Council's power over Namibia was limited.

(3) Decree No 1 after independence - legal force of the Decree in international law

(a) Introduction

In terms of art 140 of the Namibian Constitution:

'all laws which were in force immediately before independence remain in force until repealed or amended by Act of Parliament or until they are declared

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29 For full text see, UNCfN Report of the Panel for Hearings on Namibian Uranium UN-Doc A/AC/131/L163 of 1980 138; see also R C R Siekmann 'Netherlands state practice for the parliamentary year 1978-1979' (1980) 11 NYIL 205-6.

30 In this regard one has to add that the attitude of the Western European States was based more on an economic than on a legal point of view. For the far-reaching economic interests of the Western European States and the United States and for an interpretation of these states' attitude, see W H Thomas Economic Development in Namiba 134; A D Cooper United States Economic Power and Political Influence in Namibia 1700-1982 66 and Report UNCfN GAOR 44th Sess Suppl No 24 33-4.

unconstitutional by a competent Court.'[31]

Accordingly Decree No 1 is now national Namibian law. As such its international effect cannot be denied by the argument that it was not adopted by elected representatives of the Namibian people or that it was issued by a subsidiary organ of the GA which had no capacity to issue binding decrees for Member States. Furthermore the validity of the Decree cannot be denied by the argument that it was issued by a body which had no de facto control over the territory on whose behalf it claimed to act.

As an internal act of the Namibian Government, to what extent does Decree No 1 have binding force on the international community, in particular on Namibia's trading partners? This leads to a consideration of the principles governing observance of foreign acts of state.

(b) Definition of an act of state

Before embarking on this inquiry, it must be decided whether the Decree qualifies as an act of state.[32] This is a generic term that describes a number of different concepts including not only an executive or administrative

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31 For full text of the Constitution, see A P Blaustein & G H Flanz Constitutions of the Countries of the World vol XI.

32 In English literature the term 'governmental act' is sometimes also used. In French 'acte de gouvernement' and in the German 'staatlicher Hoheitsakt' are the most common terms.

exercise of sovereign power by an independent State (or by its duly authorised agents or officers) but also legislative and administrative acts, such as statutes, decrees, orders, or judgments of a superior Court.[33] Decree No 1, as a legislative act of the Namibian Parliament (under art 140 of the Namibian Constitution), clearly falls within the scope of this definition.

The international legal effect of an act of state is similarly interpreted differently in terms of the Continental 'territorial principle' and the Anglo-American 'act of state doctrine'.[34] And, to confuse the matter, there is considerable controversy in the relevant literature dealing with this concept. The opinions range from a general obligation on States to recognise these acts to a complete refusal to recognise them outside contractual agreements.[35]

The following questions will be examined below: to what extent do the provisions of Decree No 1 (as an extraterritorial act of state) have to be accepted by the

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33 In this sense also see M Zander in L Gross (ed) International Law in the Twentieth Century 411; F A Mann 'The sacrosanctity of foreign acts of state' (1943) 59 LQR 42; H J Schlochauer Die exterritoriale Wirkung von Hoheitsakten nach dem öffentlichem Recht der Bundesrepublik Deutschland und nach internationalem Recht 10; R Heiz Das fremde öffentliche Recht im internationalem Kollisionsrecht 162 and Fedozzi 'De l'efficacité extraterritoriale des lois et des actes de droit puplic' (1929) 27 Académie De Droit International (RDC) 147.

34 For a detailed account on this problem, see infra (3) (e) (ii) 2.

35 For the different opinions on this matter and for references, see Heiz (n33) 15.

international community of States and, in particular, are States obliged to ensure their performance in their own territories?

(c) Recognition of extraterritorial acts of state which are lawful in international law

Is a local judge obliged to recognise or to abstain from recognising the act of a foreign State? Public international law is based on the principle of state sovereignty, and the reality of international relations suggests that a State is unable to invalidate, undo or alter a governmental act of another sovereign State.[36] If it were possible to undo another State's act, the same state of affairs could be regulated by two concurrent acts of state which would make nonsense of the idea of sovereignty.[37]

Instead, Anglo-American state practice, declared and

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[36] This can be inferred from the Roman principle 'par in parem non habet imperium', which is today generally recognised in the community of states. See S Barile Appunti sul valore del diritto pubblico straniero nell' ordinamento nazionale 72 seq, who gives a survey of the historical development of the principle with many references.

[37] An abrogation of an act of state is only possible by the State itself or by an international court: 'un acte public ne peut pas être annulé ou révoqué ou modifié si ce n'est par la même autorité qui l'adressé ou par une autorité supérieure à celle qui l'adressé'. See Fedozzi (n33) 211.

confirmed in many judgments,[38] appeals to the notion of 'Courtoisie' (Comity of Nations). This implies a general obligation to recognise foreign acts of state. From this follows the principle of the 'sacrosancity of foreign acts of state'[39] and the Anglo-American act of state doctrine. According to this doctrine the validity of an act of state may be considered only in terms of its nature as an governmental act but not in terms of its conformity with the rules of international law.[40]

This doctrine, however, cannot be regarded as a general rule of international law, and it is not widely accepted in the practice of states.[41] This is evident in the case of acts of state purporting to expropriate foreign property. These acts were, and are still today, of considerable importance in the literature and state

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38 For examples, see Heiz (n33) 167 seq.

39 See Schlochauer (n33) 56.

40 See Heiz (n33) 170; Schlochauer (n33) 55; Buttes Gas and Oil v Hammer (1981) 3 All ER 616 (HC) and Rumasa SA v Multinvest (1986) 1 All ER 129. Anglo-American Oil Company Ltd v Jaffrate (1952) 1 WLR 246 (discussed by H Lauterpacht 'Public international law - foreign legislation enacted in violation of international law' (1954) 4 Cambridge Law Journal 20 seq and D P O'Connell International Law 804 seq) and the South African Case Basrah Petoleum Co v Saint Nicholas Maritime Co (reported in 1973 Annual Survey of South African Law 45), however, held that the validity of a foreign act of state was dependent on compliance with international law. These decisions do not represent the current view, in Britain at least. For a criticism of the doctrine see also infra (3) (e) c.

41 For a detailed account on the act of state doctrine, see infra (3) (e) (ii) 2.

practice.[42] The extraterritorial effect of such acts of state is normally implicit in expropriation decrees; a literal reading permits no limitation to the territory of the State which passed the decree.[43] Sometimes, however, extraterritorial effect is explicitly mentioned in the decree.[44]

There is no uniform approach to acts of state with extraterritorial effect. German,[45] Austrian,[46] Dutch,[47]

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42 See B A Wortley Expropriation in Public International Law 127 seq.

43 G White Nationalisation of Foreign Property 103. See, for instance, the Czechoslovakian Nationalisation Decree of 24 October 1945, the Yugoslavian Nationalisation Decree of 5 December 1946 and the Hungarian Nationalisation Decree of 28 December 1949. For full text of these Decrees, see W Birke Die Konfiskation ausländischen Privatvermögens im Hoheitsbereich des konfiszierenden Staates 100-11.

44 Examples are the Egyptian Decree No 285 of 26 July 1956 concerning the nationalisation of the Suez Canal Company and the Austrian Nationalisation Decree of 26 July 1946. Article 1 of the Egyptian Decree reads: 'La Compagnie Universelle du Canal Maritime de Suez est nationalisée. Tous les biens et droits qu'elle possée et les obligations qu'elle a sont transferés à l'État. Article 1 of the Austrian Decree reads: 'Mit Inkraftreten dieses Bundesgesetzes gehen die Anteilsrechte an den in der Anlage genannten Gesellschaften und die dort angeführten Unternehmungen und Betriebe in das Eigentum der Republik Österreich über.'

45 Judgment of the Reichsgericht of 7 June 1921 (1921) 102 RGZ 251; Judgments of the Bundesgerichtshof of 11 Februar 1953 (1953) 9 BGHZ 38 seq; of 12 April 1954 (1954) 13 BGHZ 108 seq; of 30 January 1956 (1956) 20 BGHZ 12 seq and of 11 July 1957 (1957) 25 BGHZ 134 seq.

46 Judgments of the Supreme Court of Austria of 9 July 1948 and 3 February 1954. Amtliche Sammlung der Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivilsachen (1946-48) 21 Nr 114 and (1954) 27 Nr 117.

Swiss[48] and French[49] courts have refused to recognise such acts and have declared that they have no effect within their territories. American and British courts, on the other hand, according to their act of state doctrine, normally recognise foreign acts of state,[50] but even their practice is not uniform. Some American[51] and some British[52] decisions have indicated that foreign acts of state are limited to the territory of the issuing State.

There is also no uniform view in the literature. Certain authors consider that there is no rule in international law obliging States to recognise foreign acts of state.[53] Others take the view that a foreign act is an expression of the State's sovereignty, and that another State has no right to sit in judgment on this act.[54] But

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47 Judgment of the Dutch Supreme Court of 12 May 1952 (1954) 81 Journal du Droit International 480 seq.

48 Judgments of the Supreme Court of Switzerland (1958) 64 SBGE 97 seq and (1965) 71 SBGE 136 seq.

49 See (1953) 59 Revue de Droit Public et de Science Politique en France et à l'Étranger 334 seq.

50 For examples, see M Singer 'The act of state doctrine of the United Kingdom: an analysis with comparisons to United States practice' (1981) 75 AJIL 283 seq; M Zander 'The act of state doctrine' (1959) 53 AJIL 826 seq and H F v Panhuys 'The borderland between the act of state doctrine and questions of jurisdictional immunities' (1964) 13 ICLQ 1193 seq.

51 For examples, see Schlochauer (n33) 61.

52 For examples, see Schlochauer (n33) 62.

53 See M Beitzke 'Exterritoriale Wirkung von Hoheitsakten' in K Strupp (ed) Wörterbuch des Völkerrechts vol I 505 seq for more references.

54 For instance, Singer (n50) 283 seq.

even the first view accepts in special cases (for instance, in the case of expropriation with just compensation or nationalisation of companies)[55] the extraterritorial effect of foreign acts of state.

In the light of the diversity of opinion on the extraterritorial effect of foreign acts of state, it is impossible to extrapolate a general obligation on States to recognise such acts. Rather it may be said that States are free to recognise foreign acts of state, treaty obligations aside.

(d) Execution of extraterritorial acts of state which are lawful in international law[56]

The notion that States have no obligation to recognise foreign acts of state implies that they are not obliged to execute them in their own territory. Although some authors are of the opinion that such an obligation exists, it cannot be seen as a rule of customary international law.[57]

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55 See, I Seidl-Hohenveldern Internationales Konfiskations- und Enteignungsrecht 132 seq and White (n42) 62 seq.

56 This examination is of particular interest with a view to paras 4 and 5 of Decree No 1 because these provisions are - contrary to paras 1-3 and 6 - not self-executing. Accordingly they require execution in the internal legislation of the State concerned.

57 See G Dahm Völkerrecht vol I 261; A Verdroß Universelles Völkerrecht 775; F A Mann 'Völkerrechtliche Enteignungen vor nationalen Gerichten'(1961) 16 NJW 705 seq.

Hence, a State may (without violation of public international law or another State's rights) make execution dependent on various preliminary examinations.[58]

The preliminary examination takes place at three levels. First, a national court may assess the act in terms of its conformity with the legislation of the issuing State. The result of this assessment - a startling one in view of the principle of the sovereignty of state - is that a foreign court may advise a national court on the application of its own law. Moreover, it is no easy matter for a judge to evaluate an act of state when his knowledge of the foreign law is limited; for this reason American courts refuse to undertake this type of examination.[59] Regardless of this problem the Continental courts continue to adhere to this practice.[60]

Secondly, a national court may assess the foreign act of state in terms of its internal 'ordre public' or 'public policy'.[61] This principle provides that no State is

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58 The practice of states shows that many states do this. See, I A E Insley & F Wooldridge 'The Butter Case: the final chapter in the litigation' (1983) 32 ICLQ 62 seq; J Crawford 'Decisions of British courts during 1982 involving questions of public and private international law' (1982) 53 BYIL 253 seq and Singer (n50) 283 seq.

59 For examples, see Heiz (n33) 171-2.

60 See Fedozzi (n33) 200 seq; W Delbrück Völkerrecht vol I 486 and D F Mann 'Problems of public international law' (1965) 26 JZ 96 seq.

61 A useful definition of the term 'public policy' or 'ordre public' is given by the Court de Bruxelles RCDIP (1939) 43 316: 'Cette notion est composée de certaines règles ou conceptions morales, économiques et aussi politiques dont l'observation dans un État

obliged to subordinate its own fundamental rules and policies to the legislation or administrative acts of another State. Consequently a State may examine foreign acts of state to determine their compatibility with its internal policies and moral attitudes.[62]

Finally, a national court may examine the governmental act to determine its compliance with principles of public international law. This power is self-evident in so far as the law of nations takes precedence over any internal

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déterminé est considérée comme indispensable pour la subsistance paisible de la communauté sur le territoire.'

62 The options of American and British courts are limited according to the act of state doctrine. For some exceptional cases, see J Cohn British Courts and Public Policy 57 seq and A Spickhoff Der ordre public in internationalen Privatrecht 127 seq who gives a survey of the historical development of public policy in Anglo-American law. Nearly all European countries have made express provision for the principle of 'ordre public' in their legal systems. Article 6 of the German EGBGB reads: 'Eine Rechtsnorm eines anderen Staates ist nicht anzuwenden, wenn ihre Anwendung zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts unvereinbar ist. Sie ist insbesondere nicht anzuwenden, wenn die Anwendung mit den Grundrechten unvereinbar ist.' Switzerland provides in art 17 'Schweizerisches Bundesgesetz über das internationale Privatrecht' of 18 December 1987: 'Die Anwendung von Bestimmungen eines ausländischen Rechtes ist ausgeschlossen, wenn sie zu einem Ergebnis führen würde, das mit dem schweizerischen ordre public unvereinbar wäre. Austria provides in art 6 of its 'IPR-Gesetz' a very traditional understanding of ordre public: 'Eine Bestimmung des fremden Rechtes ist nicht anzuwenden, wenn eine Anwendung zu einem Ergebnis führen würde, das mit den Grundwertungen der österreichischen Rechtsordnung unvereinbar ist.' Ordre public clauses can also be found in art 6 of the Polish, para 7 Hungarian, art 4 of the Yugoslavian IPL Codes and in art 5 of the Turkish private law code, art 12(3) of the Spanish and art 22 of the Portuguese civil codes.

legislation.[63] (And, as a result, some authors hold the view that a State is obliged to assess foreign acts of state on these grounds).[64]

The above discussion shows that States are free to recognise (in case of self-executing acts of state) or to execute (in case of non-self-executing acts of state) foreign acts of state in their own territory. In other words, there is no provable obligation in international law on States to react on these governmental acts. Nevertheless, an investigation of the practice of states reveals that (particularly regarding European countries) the enforcement or application of a foreign act of state is usually dependent on a series of preliminary tests. Even if the act of state passed these tests, however, the State would still be free to refuse to recognise or execute it. Hence it follows that if these findings are applied to paras 4 and 5 of Decree No 1, as non-self-executing acts of state, other States have no obligation to execute them. The same applies to paras 1, 3 and 6 of the Decree, as self-executing acts of state.

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63 See F Morgenstern 'Validity of the acts of the belligerent occupant' (1951) 28 BYIL 291 seq and Verdroß (n57) 777.

64 For instance A Drucker 'Foreign property legislation' (1953) 2 ICLQ 391-6 and G Dahm Recognition of foreign acts of state 71 seq.

(e) The problem of observance of acts of state which are illegal in international law

(i) Ascertainment of illegality

Before one can discuss the effects of the illegality of a foreign act of state, one has to answer two questions: who has the competence to determine the illegality, and in what circumstances may a foreign act of state be characterised as illegal?

Ideally these questions should be submitted to an international court or a commission, which would be established specially for each case.[65] The law of nations, however, is poorly developed in this area.[66] The only possibility in the circumstances is that a concerned State itself must undertake the examination. At first sight, bearing in mind the principle of sovereignty of states, it seems dubious whether a State may judge the act of another independent State; but when looked at more closely, these scruples appear to be unfounded. A State has to observe international law when issuing its governmental acts. Thus there is no obvious reason why a state should not evaluate the acts of foreign states (when they concern its territory) in terms of their conformity with rules of public international law. Such an examination is even unavoidable for States which have incorporated the rules of

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65 See P Pugh Legal Aspects of Foreign Investment 734.

66 See Heiz (n33) 186.

public international law into their internal law.[67] In these States the local judge would - by observing the illegal foreign act of state - violate his own legal order.

In what circumstances may an act of state be characterised as illegal in international law? Typical cases have involved expropriation of foreign property.[68] One of the first issues concerned the nature of the property expropriated: what did the term 'foreign' property imply? It is agreed that the property need not belong to a foreigner who actually resided in the expropriating State. It was sufficient that his property was situated in a country other than the one in which he resided.[69] The meaning of 'property' is not so easy to determine because the law of property is a matter of municipal law and so can vary greatly even within a single system. Hence it is not surprising that international law does not have its own definition of the term.[70] Any international definition of property that there is must derive from the practice of states and the jurisprudence of international tribunals.

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67 For instance art 25 of the German Constitution; arts 26 and 28 of the French Constitution (of 27 October 1947); and art 10 of the Italian Constitution (of 22 December 1947). For further examples, see Heiz (n33) 186.

68 For other apperances of illegality, see M Roth The Minimum Standard of International Law applied to Aliens 55 seq; H Lauterpacht International Law and Human Rights 146 seq; Heiz (n33) 187 seq and L Schindler Gleichberechtigung von Individuen als Problem des Völkerrechts 147 seq.

69 See J H Herz 'Expropriation of foreign property' (1941) 35 AJIL 243.

70 See White (n43) 48.

According to a great array of diplomatic and judicial cases[71] and according to the great majority of authors,[72] foreign property comprises 'all movable and immovable property, whether tangible or intangible, including industrial, literary and artistic property, as well as rights of interests of any kind in property such as rights arising from contracts of concessions, purchases, loans etc.'[73]

Having defined 'foreign property', in what situations is its expropriation lawful under international law? First, a lawful expropriation must have a public purpose. This view is adopted in many international judicial and arbitral decisions and can be seen as a generally accepted rule of international law.[74] Secondly, there must be no

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71 For references, see Herz (n69) 244 and H Mosler Wirtschaftskonzessionen bei Änderung der Staatshoheit 138 seq.

72 See, for instance, G Kaeckenbeek 'La protection internationale des droits acquis' (1937) 59 Academié de Droit International (RdC) 322 seq; G Schwarzenberger 'The protection of British property abroad' (1952) 5 Current Legal Problems 295 seq; Heiz (n33) 192-3; A Verdroß 'La propriété privée et les limites de ce droit' (1931) 37 Academié de Droit International (RdC) 373 seq. See also a proposal of experts of the Havard Law School of 1 June 1961 'Convention on the international responsibility of states for injuries to aliens' Draft No 11 art 10(7), published in K H Böckstiegel 'Enteignungs- und Nationalisierungsmaßnahmen gegen ausländische Kapitalgesellschaften' Berichte der Deutschen Gesellschaft für Völkerrecht (1974) 13 103.

73 S Friedmann Expropriation in International Law 148.

74 For examples, see: White (n43) 145 seq; Verdroß (n57) para 1217; I Seidl-Hohenveldern 'Die Enteignung niederländischer Plantagen in Indonesien' (1959) 12 AWBB 103 seq and A F Schnitzer 'Mindeststandard im Völkerrecht' in K Strupp Wörterbuch des Völkerrechts

discrimination against foreigners, either between groups of foreigners or between foreigners and nationals:

> 'Under established principles of international law, measures taken against the rights and property of foreign nationals which are arbitrary, discriminatory, or based on considerations of political reprisal and economic coercion are invalid and not entitled to recognition by other States.'[75]

Thirdly, a State must pay compensation.[76] The questions of amount, form and time of the compensation are amongst the most controversial issues in this branch of law with fundamental disagreement between developed and developing States.[77] No subject of international law seems to have aroused as much debate as the question of the standard for payment of compensation when foreign property is

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vol I 538.

75 Statement of the United States in response to one of several Libyan nationalisations, in 1973, which were thought to be motivated by political opposition to the United States policies in the Middle East. Quoted in R B v Mehren & P N Kourides 'International arbitrations between states and foreign private parties: the Libyan nationalisation case' (1981) 75 AJIL 486. The same view is taken by the majority of authors; see White (n43) 119 seq for further references.

76 See Z Kronfol Protection of Foreign Investment 110; H T Hu 'Compensations in expropriations: a preliminary economic analysis' (1979-80) 20 VJIL 61 seq; Corfu Channel Case 1949 ICJ-Reports 244 seq; W L Rodgers 'The amount of compensation' (1923) 17 AJIL 393 seq; R L Bindschelder Verstaatlichungsmaßnahmen und Entschädigungspflicht nach Völkerrecht 54-7 and M Dawson 'Prompt, adequate and effective: a universal standard of compensation?' (1962) 30 Fordham Law Review 728-9.

77 I Foighel Expropriation - a Study in the Protection of Alien Property in International Law 130 seq.

expropriated. The long-standing view of many developed States was expressed in the 'Hull formula' used by the Secretary of State Hull in 1938 in his notes to the Mexican Government claiming compensation for expropriated agrarian lands owned by US nationals:

> 'the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement.'[78]

Since that time the US Government has always maintained that 'prompt, adequate and effective compensation' is required by international law. This appears, for instance, in the draft articles of the American Law Institute's Restatement of the Foreign Relations Law of the United States (Revised). Section 712 provides that 'a State is responsible under international law for injury resulting from a taking by the State of the property of a national of another State when provision is not made for just compensation'.[79] In the comments that follow this section, the draft Restatement refers to the principle of section 712 as an expression of the traditional rules on expropriation. The comments also acknowledge that the United States has consistently maintained that just compensation means prompt, adequate and effective

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78 Cited in D J Harris Cases and Materials on International Law 543.

79 Restatement of Foreign Relations Law of the United States (Revised) §712 Draft No 3 1982.

compensation.[80]

The United Kingdom takes the same view in its memorial in the Anglo-Iranian Oil Co Case[81]:

> 'it is clear that the nationalisation of the property of foreigners, even if not unlawful on any other ground, becomes an unlawful confiscation unless provision is made for compensation which is adequate, prompt and effective.'[82]

Many of the developed States still keep to the 'Hull formula', and make the the legality of an expropriation conditioned upon it.[83]

Developing States now contest the 'Hull formula' as a customary rule of compensation of general application. In

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80 Restatement of the Foreign Relations Law of the United States op cit Comment e.

81 Anglo-Iranian Oil Co Case 1952 ICJ Reports 93 seq.

82 Anglo-Iranian Oil Case op cit 105. This case is of a particular interest because it is one of the very few dealing with the meaning of adequate, prompt and effective. By adequate compensation is meant 'the value of the undertaking at the moment of dispossession, plus interest to the day of payment'(see Chorzów Facoty Case 1928 PCIJ Reports Series A No 17 46). The compensation is considered prompt in accordance with the rules of international law if: the total amount to be paid is fixed promptly; allowance for interest for late payment is made; the guarantees that the future payments will in fact be made are satisfactory, so that the person to be compensated may, if he so desires, raise the full sum at once on the security of the future payments. The third requirement 'effective' means that the recipient of the compensation must be able to make use of it. He must, for instance, be able, if he wishes, to use it to set up a new enterprise to replace the one that has been expropriated or to use it for such other purposes as he wishes.

83 See for examples, K H Böckstiegel Die allgemeinen Grundsätze des Völkerrechts über Eigentumsentziehung 75; Harris (n77) 544.

this regard the GA Resolution on Permanent Sovereignty over Natural Resources[84] and the Charter of Economic Rights and Duties of States[85] express the view of the developing States. Article 2 (2)(c) of the Charter reads:

> 'Each State has the right to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.'

Clearly, the 1974 Charter favours the view of developing States. It does not mention any public purpose limitation upon the power to expropriate nor does it mention international law standards. It clearly contradicts the views of developed States, and almost certainly does not reflect current law.[86] Brownlie states:

> 'It is fairly clear that the Charter does not purport to be a declaration of preexisting principles and overall it has strong programmatic, political and

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84 GA Res 1803 (XVII) of 14 December 1962. The Res was adopted by 87 votes to 2, with 12 abstentions.

85 GA Res 3281 (XXIX) of 1974. The Res was adopted by 120 votes to six, with 10 abstentions.

86 See Texaco Overseas Petroleum Co and California Asiatic Oil Co v Libya 53 ILR 389 (1977).

didactic flavour. Nonetheless, there can be little doubt that Article 2 (2)(c) is regarded by many States as an emergent principle....'[87]

Resolution 1803 (XVII), on the other hand, does not go as far as the Charter. It declares that nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest and that in such cases the owner shall be paid appropriate compensation in accordance with international law. The Resolution has been accepted in a number of arbitration awards as reflecting customary international law.[88] The Aminoil Case[89] in particular is a notable example of the increasing use by tribunals of the 'appropriate compensation' formula in Res 1803 (XVII) as the standard of compensation required by international law. In this case 'appropriate compensation' was used as a standard that permitted by its generality a flexible and equitable response to the legitimate expectations of the parties, taking into account, on the facts of that case, the history of the particular investment. The Iran-United States Claims Tribunal interpreted 'appropriate compensation' in a way that approximates more closely the

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87 I Brownlie 'Legal status of natural resources in international law' (1979) 162 Académie de Droit International (RdC) 268.

88 See Kuwait v American Independent Oil Co 21 ILM 976 (1982) and Texaco Overseas Petroleum Co and California Asiatic Co v Libya (n85) 548.

89 See Kuwait v American Independent Oil Co op cit. For a detailed account on this case, see F A Mann 'The Aminoil Arbitration' (1983) 54 BYIL 213 seq.

views of Western States than those of developing States. In the Sola Tiles Case[90] for instance, the Chairman of Chamber One, having settled on the 'appropriate compensation' formula as 'having achieved widespread use in recent years', interpreted it as the equivalent of adequate compensation and regarded Res 1803 (XVII), which incorporated the appropriate compensation formula, as intending 'no break with prevailing customary law'. In another case,[91] Lagergren, an earlier Chairman of Chamber One, raised the question whether the standard of appropriate compensation may have replaced the Hull formula:

> 'Whether this standard is more correctly characterised as an exception to a still subsisting - though admittedly shrinking - Hull doctrine, or as evidence of a more general tendency towards the wholesale displacement of that doctrine as the repository of the opinio juris, is still the subject of debate. But the latter view appears by now to have achieved a rather solid basis in arbitral decisions and in writings.'[92]

The above discussion shows that the standard for the payment of compensation ('appropriate' as opposed to 'prompt, adequate and effective') for nationalisations and expropriations is still a controversial issue. For the present argument, however, it is sufficient to say that a State has to pay compensation for expropriation of foreign

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90 14 Iran-USCTR 223 (1987).

91 INA Case 8 Iran-USCTR 373 (1987).

92 INA Case op cit 387.

property. Certainly, an expropriation without paying compensation is illegal in international law.

(ii) Effects of the illegality

1. Continental territorial principle

The European countries (except the United Kingdom) follow the territorial principle, according to which the competence of States is limited by international law, ie competence must end where it is contrary to customary international law. According to this principle an act of state which is illegal in international law need not be observed or executed within other States. However, the majority of the European countries observe or execute a foreign act of state only on the understanding that it passed the three tests mentioned above, and one of these tests was an examination of the foreign act for its compliance with generally recognised principles of international law.[93] If the act was in conflict with one of these principles, observance or execution is usually denied.[94]

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93 See supra V (3) (d).

94 For judgments of almost every European high court, see F A Mann 'Völkerrechtswidrige Enteignungen vor nationalen Gerichten' (1961) 16 NJW 707. See also, Verdroß (n59) para 1187; H W Bayer 'Die Enteignungen auf Kuba vor den Gerichten der Vereinigten Staaten' (1965) 25 ZaöRV 35; H E Folz Die Geltungskraft fremder Hoheitsaüßerungen 16 and K König Die Anerkennung

2. The Anglo-American act of state doctrine

Since its inception, the act of state doctrine has been a source of confusion.[95] Historically, the doctrine has been attributed to or compared with the principles of comity[96] and sovereign immunity.[97] Another view is that the act of state doctrine had its origin in traditional conflict of law rules,[98] according to which, domestic courts should defer to the acts of foreign sovereigns only to the extent that these acts are consistent with international legal

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ausländischer Verwaltungsakte 123.

95 Commentary and debate on the act of state doctrine are voluminous. See generally, R Delson 'The act of state doctrine - judicial deference or abstention? (1972) 66 AJIL 82 seq; A Henkin 'Act of state today: recollection in tranquility' (1967) 6 CJTL 175 seq; M Zander 'The act of state doctrine' (1959) 53 AJIL 826 seq and J W Note 'Rehabilitation and exoneration of the act of state doctrine' (1980) 12 NYUJILP 599 seq.

96 In Oetjen v Central Leather 246 US 303-04 (1918), the Supreme Court of the United States stated that its refusal to inquire into the validity of a sovereign act was based on 'the highest consideration of international community and expediency'.

97 The rules on sovereign immunity determine when a domestic court has jurisdiction over a foreign state. For a discussion of the relationship between the act of state doctrine and the concept of sovereign community, see Note (n95) 599 seq.

98 Conflict of laws is that area of law which, recognising that the world is composed of territorial states having separate and differing systems of law, uses rules and methods for the resolution of issues that have a relationship to more than one state. According to this theory, the act of state doctrine is a 'special rule' that modifies the ordinary conflicts rules when the conduct of a foreign nation is at issue. See, Henkin (n95) 178 and H Kirgis 'Act of state exceptions and choice of law' (1972) 44 UCLR 173 seq.

norms. The conflict theory, however, has not been accepted by British or United States courts, with the result that today there is no clarity about the proper scope of the doctrine in international law.[99]

a. History and development of the act of state doctrine

At the outset it is helpful to trace the origin of the act of state doctrine in order to understand more fully the meaning and validity of its present formulation. The doctrine originated in the sixteenth century in England. In 1673 Lord Nottingham granted a permanent injunction to prevent an action against a Danish citizen who had seized goods of the plaintiffs on the ground that they were infringing patent rights granted him by the King of Denmark. The Lord Chancellor stated:

> 'Now after all this to send it to a trial of law, when either the court must pretend to judge the validity of the King's letters patent in Denmark or of the exposition and meaning of the articles of peace, or that a common jury should try whether the English have a right to trade in Iceland is monstrous and absurd.'[100]

Already at this stage, therefore, the courts had the gravest misgivings as to the propriety of an action against

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99 See, S Jacobs & R H King 'The act of state doctrine: a history of judicial limitations and exceptions' (1977) 18 HILJ 677 seq.

100 Blade v Bamfield and Others 3 Swans 603 (1674). Cited in Folz (n94) 19.

a foreigner who maintained a defence based on a foreign act of state.

The case of Duke of Brunswick v King of Hanover[101] involved the additional problem of impleading a foreign sovereign. The appellant, the formerly reigning Duke of Brunswick who, by an instrument executed in 1833 by King William IV and confirmed by the German Diet, had been put under guardianship, claimed against the respondent, the reigning King of Hanover who was his guardian, that the instrument of 1833 should be declared null and void and that the respondent should be accountable to him. The appellant failed. The House of Lords expressly disclaimed any intention of dealing with the question of whether the respondent was entitled to personal immunity or whether the fact of his presence in England and of his being a British peer deprived him of the privilege. Instead the House based its decision on the ground that, in the words of Lord Cottenham:

> 'A foreign sovereign coming into this country cannot be responsible for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution or not, the courts of this country cannot sit in judgment upon an act of a foreign sovereign effected by virtue of his sovereign authority abroad.'

And later Lord Cottenham continued:

> 'It is true, the bill states that the instrument was

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101 (1848) 2 HCL 1. For a detailed discussion of this case in terms of its authority for the development of the act of state doctrine, see F A Mann 'The sacrosanctity of the foreign act of state' (1943) 59 LQR 47 seq.

> contrary to the law of Hanover and Brunswick but, notwithstanding that it is so stated, still if it is a sovereign act, then, whether it be according to law or not according to law we cannot inquire into it. No court in this country can entertain questions to bring sovereigns to account for their acts done in their sovereign capacity abroad'[102]

Although the case did not make it clear whether the House of Lords intended to establish a general rule of immunity for the foreign act of state (so that the result would have been the same if the respondent had not been a foreign sovereign) it exercised a great influence upon a number of American decisions.[103]

In the United States the act of state doctrine originated in a decision of the Supreme Court in Waters v Collot.[104] In this case, which was an action in tort against the former Governor of Guadaloupe for acts done in his official capacity, the Attorney General of the United States made the following statement concerning the merits of the defendant's position:

> 'I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested at him as Governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers; and

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102 The statement of Lord Cottenham is cited in Folz (n94) 29-30.

103 See Folz (n94) 39.

104 2 Dall 247 US (1796).

that the extent of his authority can, with propriety or convenience, be determined only by the constituted authorities of its own nation.'[105]

The leading decision of the Supreme Court at this stage, however, was Underhill v Hernandez.[106] In the course of a revolution in Venezuela the plaintiff, an American citizen resident in Bolivar, was, during a period of about eight weeks, refused a passport and permission to leave the country under orders of the defendant, a general in command of the revolutionary forces occupying Bolivar. Later the defendant came to New York where the plaintiff served him with a writ claiming damages for detention, confinement to his own house, and similar matters. There was in this case an additional problem: judgment against the defendant would in effect have been a judgment against the Venezuelan Government. As in the case Waters v Collot, the Court was reluctant to adjudicate upon the acts of agents of government or officials acting within the scope of their governmental authority. Consequently it is not surprising that the Court refused to rule on the validity of the acts in question. But the judgment has been interpreted as laying down a principle much wider than the facts of the case required. Chief Justice Fuller enunciated the classic and often repeated dictum:

'Every sovereign State is bound to respect the independence of every other sovereign State and the Courts of one country will not sit in judgment on the

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105 Cited in Folz (n94) 22.

106 168 US 250 (1897).

> acts of the Government of another done within its own territory.'[107]

He continued:

> 'The immunity of individuals from suits brought in foreign tribunals for acts done within their own States in exercise of governmental authority must necessarily extend to the agents of governments ruling by paramount force as a matter of fact. We think that the Circuit Court of Appeals was justified in concluding that the acts of the defendant were acts of the Government of Venezuela and as such not properly the subject of adjudication in the Courts of another Government.'[108]

Unfortunately, the Court did not expound on the theoretical basis of its decision which would have given guidance to the lower courts. The lack of a clearly articulated premise became the source of much controversy over the proper role of the act of state doctrine in American jurisprudence.[109]

b. The Sabbatino Case

The starting point for an analysis of the modern act of state doctrine is the US Supreme Court decision in Banco

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107 Underhill v Hernandez op cit 252. This formulation is frequently referred to as the 'classic American statement of the act of state doctrine'. See L Mathias 'Reconstruction of the act of state doctrine: a blueprint for legislative reform' (1980) 12 LPIB 372.

108 Underhill v Hernandez (n106) 252.

109 See Zander (n95) 826 seq.

Nacional de Cuba v Sabbatino.[110] The judgment of the Court is clearly a significant one, for it raised many issues, in particular the scope and the interpretation of the American act of state doctrine. A leading authority, Professor Richard Falk, has written that 'no international law case in United States judicial practice has aroused such widespread interest among members of legal profession' and 'that it is almost certain that Sabbatino will become a landmark decision in the field of international law'.[111]

The facts of the Sabbatino Case can be summarised as follows: in February and July 1960, a New York commodity broker contracted to purchase sugar from Compania Azucarera Vertientes-Camaguey de Cuba (CAV), a Cuban corporation owned almost by American nationals. When, on 6 July 1960, the United States Congress amended the Sugar Act of 1948 to permit the President to reduce the sugar quota allotted to Cuba, the Cuban Council of Ministers responded by expropriating American property in Cuba.[112] Pursuant to this decree, the Cuban Government promulgated a Resolution expressly nationalising CAV and its subsidiaries. As a condition of permitting the sugar to be transported from Cuba, the government exacted a second purchase contract from the broker, which it then assigned to Banco Nacional,

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110 376 US 398 (1964).

111 R A Falk 'The complexity of Sabbatino' (1964) 58 AJIL 951.

112 Cuba Gaceta Oficial 7 July 1960 Folletos de Divulgacón Legislativa 29. English translation in (1961) 55 AJIL 822-3.

a Cuban governmental agency. When the broker resold the sugar, a New York state court, finding CVA to have been the rightful owner, awarded the proceeds to a New York receiver appointed to manage the assets of CVA. Banco Nacional then brought an action in a federal district court against both, the broker and the receiver, alleging conversion of the sale proceeds. The broker defended the action by challenging Cuba's claim of title to the sugar, arguing that the purported expropriation failed to pass title to the Cuban Government because the taking violated international law. Banco Nacional, relying on the act of state doctrine, asserted that American courts could not question the validity of its title obtained by expropriation. The district court ruled that, while the doctrine precludes courts from testing the validity of the seizure under Cuban law or under the forum's public policy, it does not prevent such examination under principles of international law. Having found the taking to be invalid under international law, because it was discriminatory, confiscatory, and retaliatory, the court granted summary judgment for the defendants.[113] The Court of Appeals for the second circuit confirmed this ruling, holding that Cuba's expropriation violated international law on the ground that the taking was not for a public purpose, but was designed instead to discriminate against the United

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[113] See D J Dimock 'Judicial decisions- Banco Nacional de Cuba v Sabbatino' (1961) 55 AJIL 741 seq.

States and its nationals.[114] The Supreme Court reversed this decision, holding that the act of state doctrine precludes judicial review of foreign acts of state regardless of any violation of international law:

> 'Therefore, rather than laying down or reaffirming an inflexible rule and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a sovereign government, extant and recognised by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complainant alleges that the taking violates customary international law.'[115]

The Supreme Court's interpretation of the act of state doctrine immediately became the subject of debate.[116] In the eight months following the decision, an intensive lobbying effort (initiated by the international business community) led to the enactment of legislation aimed at superseding the Sabbatino judgment.[117] The legislation, known as the Sabbatino amendment, required domestic courts to adopt an international law exception to the act of state

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114 See J Waterman 'Banco Nacional de Cuba v Sabbatino - US Court of Appeals second circuit' (1962) 56 AJIL 1085 seq.

115 See Banco Nacional de Cuba v Sabbatino (n110) 428. The court concluded 'that there are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.'

116 For a survey, see P A Longo 'Limiting the act of state doctrine: a legislative initiative' (1982-83) 23 VJIL 103.

117 See W Delbrück Völkerrecht vol I 489.

doctrine.[118] The provisions of the amendment, however, were narrowly construed by the courts and so have had only a limited effect.[119]

There are several reasons for the limited application of the amendment. First, the amendment applies only to cases in which 'a claim of title or other rights to property is asserted'.[120] Therefore, courts have held that it does not apply to contractual claims.[121] Secondly,

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118 The Sabbatino amendment (frequently referred to as the Hickenlooper Amendment) provides:
'Notwithstanding any other provision of law, no Court of the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: provided, that this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right acquired pursuant to an irrevocable letter of credit of not more than 180 days duration, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on this behalf in that case with the court.' Cited from R E Hollweg 'The Sabbatino amendment: congressional modifications of the American act of state doctrine' (1969) 29 ZaöRV 316 seq. For a general discussion of the amendment, see M Cardozo 'Congress versus Sabbatino: constitutional considerations' (1966) 4 CJTL 297 seq.

119 See W Delbrück (n117) ibid.

120 See Sabbatino amendment (n118).

121 See Mendenez v Sacks & Co 485 F2d 1355 (1973). In this judgment the court stated: 'We are persuaded by the legislation history, and in particular by Congress's

courts have read the amendment to imply that in the case of a foreign expropriation, property must find its way back into the United States before a court can decline to apply the act of state doctrine.[122] Thirdly, courts have interpreted the amendment not to apply to a foreign State's own nationals.[123] Finally, under the terms of a proviso to the amendment, the President retains the right to raise the act of state doctrine as a bar to adjudication of expropriation cases that would otherwise fall within the provisions of the legislation.[124]

The Sabbatino amendment was followed by judicial efforts to limit the effects of the Sabbatino Case in domestic courts. The Supreme Court had its first opportunity to reconsider the Sabbatino judgment in First

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insertion in 1965 of the words to "property" immediately after the phrase "claim of title or other right" that the intent was to exclude all contract claims from the Sabbatino amendment.'

122 See Banco Nacional de Cuba v First National City Bank 431 F2d 394 (1970).

123 See F Palicio y Compania S A v Brush 256 F Supp 481 (1966). In this case the court observed that 'acts of a state directed against its own nationals do not give rise to question of international law'. It then concluded that 'confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law. Thus, the acts of the Cuban Government come not within the purview of the Hickenlooper amendment but rather within the specific exception excluding application of the amendment in any case in which an act of state of a foreign state is not contrary to international law.'

124 See Sabbatino amendment (n118).

National City Bank v Banco Nacionale de Cuba.[125] In response to Cuba's seizure of Citibank's Cuban branches, Citibank sold loan collateral that had been pledged by the Cuban bank. Banco Nacional's rejoinder was to sue in the Federal district court to recover the excess proceeds of the sale. Citibank counterclaimed to recover damages from the expropriation. The issue posed in the Citibank Case was whether the act of state doctrine barred assertion of the counterclaim. The Supreme Court allowed the counterclaim.[126] Justice Rehnquist based his decision on assurances by the executive branch that adjudication in this case would not interfere with the conduct of foreign relations.[127] Justice Powell, in a separate opinion, declined to adopt an overly broad interpretation of the Sabbatino Case. He concluded that the federal courts must adjudicate this type of case 'unless it appears that an

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125 406 US 759 (1972).

126 First National City Bank v Banco Nacional de Cuba op cit 761 seq.

127 First National City Bank v Banco Nacional de Cuba (n125) 768. Reliance on executive assurances to avoid application of the act of state doctrine is commonly known as the 'Bernstein exception'. The exception holds that abstention is appropriate when the executive branch communicates to the judiciary that application of the act of state doctrine is not called for in a particular case. Bernstein v N V Nederlandsche-Amerikaansche Stoomvaart-Maatschappij 210 F2d 375 (1954). On the Bernstein exception and the effect of executive action in act of state cases, see W J Bogaard 'The act of state doctrine after Sabbatino' (1964-65) 63 MLR 528 seq; M Leigh 'The Supreme Court and the Sabbatino watchers' (1972-73) 13 VJIL 41 seq and S D Metzger 'The State Department's role in the judicial administration of the act of state doctrine' (1972) 66 AJIL 94 seq.

exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches'.[128] As no such conflict had been shown, Justice Powell asserted that 'the courts have a duty to determine and apply the applicable international law'.[129] Finally, Justice Douglas, in a concurring opinion, drew an analogy with an earlier case on sovereign immunity and based his decision on equitable considerations.[130] He concluded:

> 'To allow recovery without more would permit Cuba to have its cake and eat it too. Fair dealing requires allowance of the set-off to the amount of the claim on which this suit is brought.'[131]

The dissenting opinion in the Citibank Case fiercely criticised the majority's view of the act of state doctrine. Justice Brennan asserted that 'Sabbatino held that the validity of a foreign act of state in certain circumstances is a "political question" not cognisable in our courts'.[132] Consequently, 'the executive branch, however extensive its powers in the area of foreign

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128 First National Bank City Bank v Banco Nacional de Cuba (n125) 775.

129 ibid.

130 Justice Douglas drew an analogy with National City Bank v Republic of China 348 US 356 (1955). In this case the court decided that when a foreign sovereign invokes the jurisdiction of US courts, it shall not be permitted to assert sovereign immunity as a defence to counterclaims to the extent of the sovereign's own claims.

131 First National City Bank v Banco Nacional de Cuba (n125) 772.

132 First National City Bank v Bano Nacional de Cuba (n125) 787-8.

affairs, cannot by simple stipulation change a political question into a cognisable claim'.[133] By equating the 'political question' and the act of state doctrine, Justice Brennan took a step that even the Court in the Sabbatino Case did not take.[134] While the Citibank Case indicates a retreat from the extreme position taken in the Sabbatino Case,[135] it also reveals a divergence of opinion among the members of the Court about the best way to limit the effect of Sabbatino. The Citibank Case can be seen as an important illustration of a growing inability, in the wake of Sabbatino, to interpret the act of state doctrine in a consistent and predictable manner.[136]

The next effort of the Supreme Court to limit the wide application of Sabbatino was in Alfred Dunhill of London Inc v Republic of Cuba.[137] The case arose when the Cuban Government confiscated several Cuban cigar companies, and agents (called 'interventors') appointed to take over these enterprises received the proceeds of preconfiscation sales.[138] The issue in the Dunhill Case was whether the interventors' refusal to return the mistakenly remitted

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133 ibid.

134 See Folz (n94) 155.

135 See R B Lillich 'The proper role of domestic courts in the international legal order' (1971-72) 11 VJIL 9 seq.

136 See Folz (n94) 155-6.

137 425 US 682 (1976).

138 For a detailed account on the facts of the case, see Jacobs & King (n99) 680 seq.

funds constituted an act of state, and was thus immune from judicial action by a US court. The court refused to extend the act of state doctrine to the purely commercial transactions of a sovereign. Therefore, the Court ruled that a United States tribunal could consider the interventors' refusal to repay the disputed proceeds.[139] This commercial activity exception, however, was adopted only by a majority of the Court.[140] Two reasons were given for adopting the commercial activity exception. First, not recognising the commercial conduct of a foreign sovereign as an act of state risks little embarassment to the executive branch in its conduct of foreign relations.[141] Secondly, treating purely commercial transactions as acts of state:

> 'would undermine the policy supporting the restrictive view of sovereign immunity, which is to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever posssible.'[142]

In conclusion it may be said that, while the Sabbatino Case (and its aftermath) endorses the act of state doctrine, it does not formulate an absolute rule that even though the foreign act of state violates international law

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139 Alfred Dunhill of London Inc v Cuba (n137) 706.

140 The decision was taken by a 5-4 majority. See, for the dissenting opinions of Justices Brennan, Stewart, Marshall, and Blackmun, Alfred Dunhill of London Inc v Cuba (n137) 682 seq.

141 Alfred Dunhill of London Inc v Cuba (n137) 710.

142 Alfred Dunhill of London Inc v Cuba (n137) 699.

an American court is powerless to act. It holds that, while American courts may not review the validity of expropriations under customary international law, they may review all governmental acts, including expropriations, that violate 'a treaty or other unambiguous agreement'.[143] Besides this, Sabbatino urges courts to use the act of state doctrine flexibly, which encourages courts to consider whether the policies underlying the doctrine would be served by its application in the particular case.[144] Even when the specific requirements for the application of the act of state doctrine are fulfilled, an American court may continue its procedure if it determines that a consensus of the community of nations exists supporting the customary rule violated by the act in question and that the case has no important bearing on the conduct of foreign relations.[145] Therefore, the Sabbatino rule seems to be in the mainstream of policy-oriented jurisprudence.[146]

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143 Banco Nacional de Cuba v Sabbatino (n110) 428.

144 See Banco Nacional de Cuba v Sabbatino (n110) 430 and R A Falk 'Toward a theory of the paticipation of domestic courts in the international legal order: a critique of Banco Nacional de Cuba v Sabbatino' (1961-62) 16 Rutgers Law Review 1 seq.

145 See H W Bayer 'Die Enteignungen auf Kuba vor den Gerichten der Vereinigten Staaten' (1965) 25 ZaöRV 48.

146 See Folz (n94) 185.

c. Criticism of the doctrine

The main point of criticism of the act of state doctrine goes to the rationale laid down in the Supreme Court's decision in Sabbatino;[147] that the doctrine should regulate relations between the political and judicial branches of government. This rationale has led to much uncertainty over the appropriate use of the doctrine.[148] The lower courts interpreted the Sabbatino judgment to require deference to all sovereign conduct, thereby denying many litigants meaningful access to domestic forums.[149]

More important, however, is the subversive effect the doctrine has on international law. The supremacy of international law is, or should be, the cornerstone of any legal system that values the world order. In other words,

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147 It should be mentioned that this criticism did not start with the Sabbatino Case. In May 1959, at the annual meeting of the Bar Association of the City of New York, the Committee on International Law presented a resolution recommending that any American court be free to judge upon the validity of any act of state of a foreign country when the effect of that act of state on legal rights is an issue in a case pending before the American court. For text and discussion of the resolution, see J N Hyde 'The act of state doctrine and the rule of law' (1959) 53 AJIL 635 seq and for criticism of the resolution, see W H Reeves 'The act of state doctrine and the rule of law - a reply' (1960) 54 AJIL 141 seq.

148 In theory, Sabbatino requires courts to determine, in each case involving the act of a foreign sovereign, whether foreign policy implications warrant application of the act of state doctrine. See Banco Nacional de Cuba v Sabbatino (n110) 423-8.

149 Illustrative examples are: Empresa Cubana Exportadora Inc v Lamborn & Co 652 F2d 231 (1981) and IAM v OPEC 649 F2d 1354 (1981).

it should be unthinkable for any judge to apply a law which is, and is known to be, contrary to international law and therefore a wrong.[150]

Another effect of the act of state doctrine is the restriction it imposes on the courts' participation in the development of international law. Sabbatino limited the competence of domestic courts to ascertain and apply principles of international law in resolving act of state cases. The Supreme Court concluded that courts should not apply international law where there is no clear evidence that an international consensus exists on the matter in question.[151] This limitation ignores the commitment of any court to the application and development of international law.[152] And although many areas of international law are

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150 See Mann (n94) 708. 'Es ist eben die Pflicht und das Priveleg des Richters das Recht - einschließlich des Völkerrechts - zu wahren. Er verläßt den Boden des Rechts und wird seiner Aufgabe untreu, wenn er Politik, sei es auch nur Wirtschaftspolitik, treibt.' He continues: 'Völkerrechtsverletzungen sind immer absolutes Unrecht. Sie sind unverzeihlich und können in den Augen des verantwortungsbewußten Juristen nie Recht schaffen.' In this sense also the Supreme Court of Germany held: 'das Völkerrecht steht als unantastbarer Kernbereich des Rechts über jedem innerstaatlichen Recht, und wenn zum Beispiel eine Maßnahme gegen allgemeine Regeln des Völkerrechts verstößt, so müssen die inländischen Gerichte mit Wirkung für den Einzelnen ihre Unrechtmäßigkeit zugrunde legen.' (1951) 1 BGHSt 391.

151 Banco Nacional de Cuba v Sabbatino (n110) 423-4.

152 See dissenting opinion of Justice White in Banco Nacional de Cuba v Sabbatino (n110) 458. That judicial decisions of national court systems are important to the development of international law was recognised by the International Rule of Law Act which was introduced by Senator Mathias as a bill in the US Congress. The purpose of this legislation was twofold. First it sought to provide victims of international wrongs with

unsettled, universal principles will only be derived through repeated application and refinement:

> 'Domestic court decisions are a patchwork process and often conflict with each other, but from such stuff is customary international law made and modified. Indeed, by refusing to clarify and apply the relevant international law standards, the Court actually perpetuates the supposed lack of consensus so damaging to customary international law.'[153]

The lack of international law standards can only be remedied by allowing courts to participate in the formation of international legal principles.[154]

In summary it may be said that the American act of state doctrine needs to be reformed to end the confusion

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a forum in which to litigate their claims. Secondly, it encouraged domestic courts to become involved in the development of international law and consequently to participate in the international legal system. See 97th Congress 1st Sess 127 Congress Record S7120-1.

153 Lillich (n135) 32-3.

154 See Verdroß (n57) 778 and Dahm (n57) 491. That domestic courts are capable of making objective determinations of international law can be illustrated, even in American practice, in the case of Banco Nacional de Cuba v Chase Manhattan Bank 658 F2d 875 (1981). Chase Manhattan Bank, like Citibank, brought a counterclaim to recover damages for Cuba's seizure of the bank's Cuban branches. The court lifted the act of state bar and was therefore free to determine the applicable international standards of compensation for expropriation. Despite the lack of consensus in this area of international law, the court surveyed authoritative sources in an effort to obtain objective standards. It then applied the rule it considered most representative of customary international law on this point. In doing so, the court made a valid contribution to the development of international law. More importantly, it demonstrated the ability of US courts to determine and apply principles of international law in a responsible manner.

presently surrounding its judicial use and the scope of its application.[155]

(f) Conclusion

From the above it follows that paras 1, 2, 3, and 6 of Decree No 1 (as self-executing acts of state) need not be recognised by any other State. And there is no rule in international law which would oblige other States to execute paras 4 and 5 (as non-self-executing acts of state). The most fundamental principle of international law is the sovereignty of States which implies that one State is never obliged to execute the acts of another State.

More complex is para 2 of the Decree because this provision violates rules of customary international law. It states that all concessions, permissions, or licences whenever granted under the authority of the Government of South Africa are null and void, but contains no provision

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155 For the existing uncertainty about the judicial use and scope of the act of state doctrine, see US case of Republic of Philippines v Marcos 808 F2d 344 (1986) where the court considered how far the act of state doctrine is applicable to acts of former governments. See also, Clayo Petroleum Corporation v Ocidental Petroleum Corporation 712 F2d 404 (1983) and particularly the criticism of F A Gevurtz ' Using the antitrust laws to combat overseas bribery by foreign companies: a step to even the odds in international trade' (1986-87) 27 VJIL 211 seq. It is still an open question whether the act of state doctrine is applicable in cases concerning violation of human rights. For that problem, see Filartiga v Pen-Irala 630 F2d 876 (1980) and R G Haron 'Alien Tort Claims Act' (1986-87) 27 VJIL 433 seq.

for paying compensation for the expropriation of the foreign property.[156] In so far as the Namibian Government adopted Decree No 1 in its Constitution, para 2 is now an act of the Namibian State illegal under international law.

The observance of illegal acts of state is dependent on the way in which this matter is approached. Whereas para 2 of the Decree will most probably not be observed in the countries which follow the territorial principle, ie the Continental jurisdictions (because para 2 will not pass the preliminary test as to whether it complies with principles of public international law), the situation is not as clear in terms of the Anglo-American act of state doctrine. Because of the confusion surrounding the application of the doctrine in America, one can only speculate on what an American court's approach to a case based on para 2 of Decree No 1 would be.

The doctrine would be applied by the court only on the understanding that, first, Decree No 1 does not fall within the scope of the commercial activity exception, and, secondly, that the State Department decides that application is not contrary to the foreign policy interests of the United States. The commercial activity exception, introduced by the Supreme Court in Alfred Dunhill of London Inc v Republic of Cuba,[157] denies the extension of the act of state doctrine to purely commercial transactions. Hence,

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156 Concessions fall into the definition of foreign property. See supra V (3) (d).

157 425 US 682 (1976).

if the Decree is such a transaction, the doctrine would not be applicable. Decree No 1, however, was issued by the UNCfN (and later incorporated into the Namibian Constitution) to preserve the natural resources of the Territory for the Namibian people. Hence it is arguably an emanation of the right of economic self-determination and not a purely commercial activity.[158]

Assuming a determination of the State Department had been made that the application of the Decree is not contrary to foreign policy interests, the court would be free to apply the doctrine in the particular case. In the case of a claim by an American national who had lost property under para 2 of the Decree (because the Namibian Government confiscated permissions, licences, or concessions), it is likely that the court would judge in favour of the plaintiff. The modern practice of American courts shows that they usually deny application of the doctrine when it appears that a violation of customary international law had occurred,[159] and expropriation without paying compensation is contrary to generally recognised principles of international law.[160] Besides

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158 The right of economic self-determination is part of the general right of self-determination of every nation; it is accepted in international customary law and laid down in GA Res 1803 (XVII) of 14 December 1962.

159 See H W Bayer 'Die Enteignungen auf Kuba vor den Gerichten der Vereinigten Staaten' (1965) 25 ZaöRV 33 seq.

160 See K H Böckstiegel Die allgemeinen Grundsätze des Völkerrechts über Eigentumsentziehungen 75.

this, the court would take into consideration the policies underlying the act of state doctrine. First there is the question whether the court's decision would infringe on the executive's conduct of foreign relations. This would seem unlikely given the current relations between America and Namibia. Namibia is dependent on America's support in the form of development aid and America is one of Namibia's most important trading partners. More important, however, is the tendency in the practice of states since the Second World War to settle problems arising from expropriations or confiscations, even after a court's judgment, by agreements which are based on a compromise between the concerned parties, and which allow the maintenance of friendly relationship between States.[161]

Hence one can assume that an American court would not apply the act of state doctrine in terms of para 2 of Decree No 1, but would instead judge against the Namibian Government to pay compensation for the confiscation because its act violates customary international law.

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[161] For examples, see I Foighel Nationalisation - a Study in the Protection of Alien Property in International Law 127.

Appendix I

Decree No 1 for the Protection of the Natural Resources of Namibia

Conscious of its responsibility to protect the natural resources of the people of Namibia and of ensuring that these natural resources are not exploited to the detriment of Namibia, its people or environmental assets, the United Nations Council for Namibia enacts the following decree:

DECREE

The United Nations Council for Namibia

Recognising that, in the terms of General Assembly Resolution 2145 (XXI) of 27 October 1966 the Territory of Namibia (formerly South West Africa) is the direct responsibility of the United Nations,

Accepting that this responsibility includes the obligation to support the right of the people of Namibia to achieve self-government and independence in accordance with General Assembly Resolution 1514 (XV) of 14 December 1960,

Reaffirming that the Government of the Republic of South Africa is in illegal possession of the Territory of Namibia,

Furthering that the decision of the General Assembly in Resolution 1803 (XVII) of 14 December 1962 which declared the right of the peoples and nations to permanent sovereignty over their national wealth and resources,

Noting that the Government of the Republic of South Africa has usurped and interfered with these rights,

Desirous of securing for the people of Namibia adequate protection of the natural wealth and resources of the Territory which is rightfully theirs,

Recalling the advisory opinion of the International Court of Justice of 21 June 1971,

Acting in terms of the powers conferred on it by General Assembly Resolution 2248 (S-V) of 19 May 1967 and all other relevant resolutions and decisions regarding Namibia,

Decrees that

1. No person or entity, whether a body corporate or unincorporated, may search for, prospect for, explore for, take, extract, mine, process, refine, use, sell, export, or distribute any natural resource, whether animal or mineral situated or found to be situated within the territorial limits of Namibia without the consent and permission of the United Nations Council for Namibia to any person authorised to act on its behalf for the purpose of giving such permission or such consent;

2. Any permission, concession or licence for all or any of the purposes specified in paragraph 1 above whensoever granted by any person or entity, including any body purporting to act under the authority of the Government of the Republic of South Africa or the 'Administration of South West Africa' or their predecessors, is null, void and of no force or effect;

3. No animal, mineral, or other natural resource produced in or emanating from the Territory of Namibia may be taken from the said Territory by any means whatsoever to any place whatsoever outside the territorial limits of Namibia by any person or body, whether corporate or

unincorporated, without the consent and permission of the United Nations Council for Namibia or of any person authorised to act on behalf of the said Council;

4. Any animal, mineral or other natural resource produced in or emanating from the Territory of Namibia may be taken from the said Territory by any means whatsoever to any place whatsoever outside the territorial limits of Namibia by any person or body, whether corporate or unincorpotated, without the consent and permission of the United Nations Council for Namibia or of any person authorised to act on behalf of the said Council;

5. Any animal, mineral or other natural resource produced in or emanating from the Territory of Namibia which shall be taken from the said Territory without the consent and written authority of the United Nations Council for Namibia or any person authorised on behalf of the said Council may be seized and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

6. Any vehicle, ship or container found to be carrying animal, mineral or other natural resources produced in or emanating from the Territory of Namibia shall also be subject to seizure and forfeiture by or on behalf of the United Nations Council of Namibia or of any person authorised to act on behalf of the said Council and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

7. Any person, entity or corporation which contravenes the present decree in respect of Namibia may be held

liable in damages by the future Government of an independent Namibia;

8. For the purpose of the preceding paragraphs 1, 2, 3, 4, and 5 and in order to give effect to this decree, the United Nations Council for Namibia thereby authorises the United Nations Commissioner for Namibia, in accordance with Resolution 2248 (S-V), to take the necessary steps after consultations with the President.

Appendix II

Covenant of the League of Nations

Article 22

1. 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.

2. 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.

3. 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.

4. 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.

5. Other peoples, especially those of Central Africa, are at such 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.

6. There are territories, such as South West Africa and certain South Pacific Islands, which, owning 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 safeguards above mentioned in the interests of the indigenous population.

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

8. 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.

9. 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.

Appendix III

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 aforementioned 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 public works and services, and than 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.

Appendix IV

Charter of the United Nations

Chapter V: The Security Council

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Chapter VI: Pacific Settlement of Disputes

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiations, enquiry, meditation,

conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Chapter VII: Action with respect to Threats to the Peace Breaches of the Peace, and Acts of Aggression

Article 41

The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Chapter IX: International Economic and Social Co-operation

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.

Chapter XI: Declaration regarding Non-Self-Governing Territories

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and

accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

a. to ensure with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialised international bodies with a view to a practical achievement of the social, economic, and scientific purposes set forth in this Article, and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories of which they are respectively responsible other than those territories to which Chapter XII and XIII apply.

ARTICLE 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good neighbourliness, due account being taken of the interests

and well-being of the rest of the world, in social, economic, and commercial matters.

Chapter XII: International Trusteeship System

ARTICLE 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred as trust territories.

ARTICLE 76

The basic objectives of the trusteeship system, in accordance with the purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

a. to further international peace and security;

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing

objectives and subject to the provisions of Article 80.

ARTICLE 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:
a. territories now held under mandate;
b. territories which may be detached from enemy states as a result of the Second World War; and
c. territories voluntarily placed under the system by states responsible for their administration.
2. It will be the matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

ARTICLE 79

In terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

ARTICLE 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Article 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any

peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

ARTICLE 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organisation itself.

ARTICLE 85

1. The function of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.
2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

Chapter XIV: The International Court of Justice

ARTICLE 94

1. Each Member of the United Nations undertakes to comply with the decisions of the International Court of Justice in any case to which it is a party.
2. 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.

Statute of the International Court of Justice

ARTICLE 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

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