

*copy to Law  
copy to Franck*



LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS UNDER LAW

SUITE 400 • 1400 EYE STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212

CABLE ADDRESS: LAW CIV, WASHINGTON, D.C.

STUDY OF THE FEASIBILITY  
OF ENFORCEMENT IN U.S. COURTS OF  
DECREE NO. 1 FOR THE PROTECTION OF THE  
NATURAL RESOURCES OF NAMIBIA

submitted to

U.N. Council for Namibia  
United Nations  
New York, New York

by

Southern Africa Project  
Lawyers' Committee for Civil Rights Under Law  
1400 'Eye' Street, N.W.  
Suite 400  
Washington, DC 20005

June, 1984



LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS UNDER LAW

SUITE 400 • 1400 EYE STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

STUDY OF THE FEASIBILITY  
OF ENFORCEMENT IN U.S. COURTS OF  
DECREE NO. 1 FOR THE PROTECTION OF THE  
NATURAL RESOURCES OF NAMIBIA

submitted to

U.N. Council for Namibia  
United Nations  
New York, New York

by

Southern Africa Project  
Lawyers' Committee for Civil Rights Under Law  
1400 'Eye' Street, N.W.  
Suite 400  
Washington, DC 20005

June, 1984

## TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY.....	1
II.	INTRODUCTION.....	24
	A. Report Requested by United Nations.....	24
	B. U.S. Corporate Contacts with Namibian Natural Resources.....	26
	C. Presumed Rights Derived From South African Authority to Exploit Namibian Resources.....	30
	1. Mining Legislation, Property Rights, and the Granting of Licenses in Namibia.....	30
	2. Animal Capture, and Karakul Legislation.....	36
	D. History of U.S. Courts Facing Problems Similar to Enforcement of Decree No. 1.....	39
III.	LEGAL STANDING OF THE U.N. COUNCIL OR THE COMMISSIONER FOR NAMIBIA TO BRING SUIT TO ENFORCE DECREE NO. 1 IN U.S. COURTS.....	41
IV.	LEGAL STATUS OF:	
	A. U.N. General Assembly Resolutions 2145 (XXI) and 2248 (S-V).....	45
	B. Advisory Opinion of the International Court of Justice of 1971.....	54
	C. U.N. Security Council Resolutions 283 (1970) and 301 (1971).....	58
	D. Decree No. 1.....	80

V.	BRIEF DESCRIPTION OF THE LEGAL/COURT SYSTEM AND THE PROCEDURES FOR INSTITUTING PROCEEDINGS IN THE COURTS OF THE UNITED STATES.....	87
VI.	LEGAL OBSTACLES COMMON TO ANY POTENTIAL CAUSE OF ACTION.....	90
	A. Justiciability.....	90
	B. The Act of State Doctrine.....	97
VII.	MOST PROMISING PROVISION OF DECREE NO. 1 FOR LEGAL ACTION.....	105
VIII.	ANALYSIS AND ASSESSMENT OF THE STRENGTHS OF THE CASE AND LIKELY OUTCOME.....	107
	A. U.S. Courts Would Not Enforce South Africa's Acts in Namibia Because They Are Acts of a Government Recognized by the U.S. Executive Branch as Unlawful and Therefore They Violate U.S. Public Policy.....	108
	1. Judicial Policy of Deference to the Executive.....	108
	2. The Executive Policy on South Africa's Administration of Namibia.....	109
	3. Judicial Treatment of Laws of De Facto Regimes.....	110
	4. Judicial Treatment of Laws of a Belligerent Occupant.....	116
	B. U.S. Courts Should Give Effect to Decree No. 1 as Positive Law Promulgated by the Sole Authority with Legislating Powers in Namibia.....	122
	1. Judicial Treatment of World War II Governments in Exile.....	122
	2. Judicial Treatment of Decree No. 1.....	130
	Legal Rationale under U.S. Law for Upholding the Decree.....	131

C.	The Likely Outcome of a Suit on Decree No. 1 in U.S. Courts.....	134
IX.	ANALYSIS AND ASSESSMENT OF ALTERNATIVE ACTION/ COMPLEMENTARY ACTION/OR SIMULTANEOUS ACTION TO BE BROUGHT IN THE COURTS OF THE UNITED STATES.....	137
A.	Replevin.....	140
1.	Definition and Description of a Replevin Action.....	140
2.	Jurisdiction over the Chattel and the Defendant.....	142
3.	Right to Possession of Namibian Resources.....	144
4.	Special Procedures in Attachment Actions.....	145
5.	Information Necessary to Initiate a Replevin Action.....	148
6.	Pros and Cons of a Replevin Action.....	149
B.	Conversion.....	150
1.	Property Subject to Conversion Actions and Identification of Property Allegedly Converted.....	153
2.	Jurisdiction.....	154
3.	Law Governing the Cause of Action.....	155
4.	Establishing Title and/or a Right to Possession in the Council.....	156
5.	Remedies.....	158
6.	Entities Potentially Liable for Conversion.	166
(a)	The Conversion Chain.....	166
(b)	Intent.....	167
(c)	Holding Parent Corporations Liable for the Acts of Their Subsidiaries....	169

(1)	Control and Domination.....	172
(i)	Stock Ownership.....	175
(ii)	Common Directorates.....	177
(iii)	Failure to Act Independently.....	181
(2)	Fraud, Wrong or Illegality.....	182
(3)	Proximate Causation.....	186
(4)	Conclusion.....	187
7.	Potential Defendants in a Conversion Action.....	187
8	Pros and Cons of a Conversion Action.....	208
X.	APPROXIMATE TIME FRAMEWORK BETWEEN THE INSTITUTION OF PROCEEDINGS AND THE JUDGMENT OF THE COURT, AS WELL AS OF A POSSIBLE APPEAL BY THE PARTIES.....	215
XI.	APPROXIMATE COST OF THE PROCEEDINGS AND OF AN APPEAL.....	218
XII.	ENFORCEMENT OF THE COURT'S DECISION (PROCEDURE, TIME FRAMEWORK, AND APPROXIMATE COST).....	221
XIII.	RECOMMENDATIONS.....	223

## I. EXECUTIVE SUMMARY

Under its continuing mandate to implement Decree No. 1 for the Protection of the Natural Resources of Namibia, the United Nations Council for Namibia has taken several preliminary steps to implement its provisions, including commissioning studies on the feasibility of instituting legal proceedings to enforce the Decree in the domestic courts of those countries where corporations or individuals are engaged in economic activities concerning Namibia's resources.

This report represents one such study as it pertains to the United States.

The U.N. has asked that the following questions be addressed:

1. Whether, under the domestic law of the United States, the Council or the Commissioner, acting on behalf of the Council, or both, have legal standing to bring action in the domestic courts against those violating Decree No. 1 for the Protection of the Natural Resources of Namibia.

### Conclusion

Under U.S. law, the Council or the Council and the Commissioner, acting on behalf of the Council, would have legal standing to bring an action in U.S. courts against those violating Decree No. 1. (See Section III of this memorandum.)

2. What is the legal status in the United States of the following:

- (a) U.N. General Assembly Resolutions 2145 (XXI) and 2248 (S-V).

#### Conclusion

A U.S. court would accept U.N. General Assembly Resolution 2145 as a valid termination of South Africa's mandate to administer Namibia. (See Section IV.A. of this memorandum.)

It is most probable that a U.S. court would follow the guidance of the U.S. Department of State on the questions of the validity of General Assembly Resolution 2248, the U.N.'s direct and sole authority to administer Namibia and the State Department's assessment that the Council cannot be characterized as "a government, a government-in-exile or an interim government."

- (b) The Advisory Opinion of the International Court of Justice of 1971.

#### Conclusion

A U.S. court would accept and give appropriate effect to the final conclusions of the 1971 International Court of Justice Advisory Opinion on Namibia. (See Section IV.B. of this memorandum.)



- (c) U.N. Security Council Resolutions 283 (1970) and 301 (1971).

Conclusion

It is likely that a U.S. court would conclude that Security Council Resolutions 283 and 301 do not confer rights on private litigants that are enforceable in U.S. courts in the absence of implementing congressional legislation or an executive order. A court may, however, cite these resolutions as authoritative evidence of the expectations of the international community as to the specific consequences of the termination of South Africa's mandate to rule Namibia. (See Section IV.C. of this memorandum.)

- (d) Decree No. 1 for the Protection of the Natural Resources of Namibia.

Conclusion

U.S. courts might treat Decree No. 1 either as positive law of Namibia promulgated by the only authority which can lawfully legislate in that territory, or as a decree of the U.N. body which has de jure authority but lacks de facto control. (See Section IV.D. of this memorandum.)

3. Brief description of the legal/court system and the procedures for instituting proceedings in the courts of the United States.

The court system in the United States comports with its federal system of government generally. In general, there are trial courts and appellate courts. (See Section V of this memorandum.)

The trial courts are the courts where the trial is first held, where the parties appear, witnesses testify, and the evidence is presented.

Once the trial court reaches its decision, the losing party has a right of appeal to an appellate court. Generally, the appellate court can only decide questions of law and its decision in each case is based on the record made in the court below. The federal court system can be described as consisting of three main levels: the Supreme Court of the United States (the highest court), the Courts of Appeals (intermediate appellate courts), and the District Courts (trial courts).

In civil suits, the aggrieved person (the plaintiff) files a complaint with the appropriate court having jurisdiction.

4. Legal obstacles common to any potential cause of action.

### Conclusion

Two preliminary obstacles would first have to be surmounted in any action brought in the courts of the United States to enforce Decree No. 1: (1) whether the nature of the case makes it non-justiciable, and (2) whether the act of state doctrine precludes judicial inquiry into the validity of South Africa's laws in the Territory. (See Section VI of this memorandum.)

#### (a) Justiciability

Central to the question of what is the relevant Namibian law is a determination of sovereignty over Namibia inasmuch as the United Nations' sovereign rights in the Territory are currently disputed by South Africa. The resolution of a territorial dispute between sovereigns (in this case, presumably between South Africa and the United Nations) is a political question of foreign relations which is reserved to the Executive Branch in the context of the U.S. mandated separation of powers between the executive, legislative and judicial governmental functions.

In determining whether a case is justiciable, the court must decide, first, whether the claim presented and the relief sought are of the type which admit of judicial determination and, second, whether the structure of the federal government renders the issue presented a "political question" -- that is, a question which is not justiciable because of the separation of powers mandated by the Constitution.

In the proposed case under consideration, while as a preliminary question the court would have to consider the validity of the termination of South Africa's mandate and the direct administration of Namibia by the U.N. General Assembly, the relevant U.S. foreign policy decisions regarding these questions have already been made. The U.S. Executive Branch recognizes both the power of the General Assembly to terminate South Africa's mandate, as it did by adopting Resolution 2145 (XXI) and the illegality of South Africa's continued occupation of Namibia. Further, the U.S. Executive Branch recognizes that the United Nations lawfully has direct responsibility for the administration of Namibia. Judicial consideration of the title to Namibian resources, therefore, is not precluded by what would otherwise be a necessity to resolve first a non-justiciable issue.

The second aspect of justiciability, however, namely whether a court would deem the issue presented by a suit on the Decree as an inherently political question, is much more problematic.

(b) The Act of State Doctrine

Closely related to the issue of justiciability in this instance is the act of state doctrine, which is a policy of judicial abstention from inquiry into the validity of "public" actions of a foreign government within its own territory and within the scope of its sovereign powers. The doctrine arises out of the U.S. system of separation of powers and the placement of plenary foreign relations powers in the Executive Branch. In a suit brought by the Council for Namibia against a corporate violator of Decree No. 1, presumably the defendant would base its defense on rights derived from South Africa to do business in Namibia.

The three exceptions to the doctrine, however, may have clear application to the case under consideration. These are that the doctrine: (1) may be waived by an expression of executive policy; (2) does not bar judicial inquiry into the legality of actions by foreign sovereigns where those actions purport to have effect outside its legitimate borders; and (3) does not apply to acts of regimes not recognized by the United

States. The Executive Branch has already made statements that imply that judicial examination of the validity of South Africa's acts in Namibia would not be inconsistent with the foreign policy interests of the United States. The extraterritorial exception also has application here and, finally, South Africa is not recognized as the de jure government of Namibia.

5. Which provision of Decree No. 1 would appear to be the most promising point of departure for legal action in the national courts of the United States?

#### Conclusion

Paragraph 4, which authorizes the seizure and forfeiture of Namibian natural resources exploited in violation of the Decree, appears to be the most promising provision for legal action. (See Section VII of this memorandum.)

6. Analysis and assessment of the strength of the case and likely outcome of the proceedings.

#### Conclusion

Presumably, in bringing an action based on Decree No. 1, the plaintiff would be asking the court to treat the Decree as the law of a foreign country, that is, Namibia. The extent to which a U.S. court will adjudicate an action based on

foreign law depends both on considerations of comity and on a three-fold judicial policy regarding the enforcement of foreign law requiring that (1) the law not be repugnant to the public policy of the forum, (2) the law not be penal, and (3) most significantly, the law be that of a government recognized by the Executive. The foreign law of possible relevance in such an action would be not only that of the Council for Namibia but that of South Africa. (See Section VIII of this memorandum.)

(a) Judicial Enforcement of South Africa's Acts  
Alienating Namibian Resources

U.S. courts would not enforce South Africa's acts alienating Namibian resources because they are acts of a government recognized by the U.S. Executive Branch as unlawful and therefore they violate U.S. public policy. (See Section VIII.A. of this memorandum.)

By reason of the judicial policy of deference to the Executive, courts in the United States, with respect to non-recognized governments and belligerent occupants, have followed policies that are in accord with this unique feature of our constitutional system. Basic decisions of the Executive Branch, such as the recognition or non-recognition of governments, will usually be dispositive of the way in which the courts will treat the decrees, laws or acts of those recognized or non-recognized governments.

The U.S. Government has consistently denied recognition of any right of South Africa to administer Namibia and persistently characterized South Africa's presence in the Territory as that of an illegal occupant. Therefore in assessing the validity or invalidity of South Africa's acts in Namibia we must consider how U.S. courts treat the laws of unrecognized regimes which are in de facto control or which are in belligerent occupation of a territory.

U.S. courts have only been willing to enforce laws or acts of unrecognized de facto regimes which are necessary for the maintenance of public order, health and safety. The alienation of Namibian resources by South Africa could not be characterized as necessary for the maintenance of public order, health or safety in Namibia.

The validity of private rights generated by South Africa's alienation of Namibian resources must also be considered. Entitlements granted by the South African Government to private entities to exploit the natural resources of Namibia are inextricably related to the illegality of the South African occupation of that Territory.

In general, U.S. courts have adopted the policies and rules established by international law to determine which exercises of authority over illegally occupied territory it



will respect. Courts will give effect only to a very limited range of actions by the belligerent occupant. These do not include the exploitation of the natural resources or the grant of licenses, franchises, concessions or contracts for such exploitation.

The substantive basis of the customary law of belligerent occupation governing property rights is provided by the Hague Regulations of 1907. Under these rules an occupant may act only as a "usufructuary" in relation to state-owned natural resources. Even where limited use of public property is allowed, excessive or abusive exploitation is characterized as "waste" and will be forbidden. With respect to private property, apart from military necessity, property interests are not to be exploited to enrich the occupying state, nor is property from the occupied territory to be exported for commercial profit or to fulfill the needs of the occupant's home economy. In any case, property may not be taken without compensation.

Therefore, the purported grant by South Africa (whether regarded as a de facto authority or belligerent occupant) of rights to exploit Namibian resources should be held null and void.

(b) Judicial Treatment of Decree No. 1

This issue must be viewed in two ways: from the standpoint of an appropriate legal rationale for giving effect to Decree No. 1; and from the standpoint of the likely outcome, should a suit be filed on Decree No. 1 in the courts of the United States. (See Section VIII.B. of this memorandum.)

Legal Rationale for Suit on Decree

U.S. courts should give effect to Decree No. 1 as positive law promulgated by the sole authority with legislating powers in Namibia.

However one chooses to characterize the Council for Namibia, it is indisputable that it is the de jure authority for Namibia. Because of South Africa's illegal occupation, the Council is an extraterritorial governing authority and has international status within which it exercises authority. There are notable similarities between the situation of the Council and the situation experienced by the many exiled governments functioning during the period of German aggression of World War II.

By drawing analogies from these cases involving governments temporarily in exile or governments forced into flight during World War II, U.S. courts could draw on legal principles

giving effect to decrees of these governments in certain specific types of cases where these governments have been recognized by the U.S. Executive Branch. The legal consequences in the judicial sphere attendant upon recognition of those exiled governments included giving effect to laws of the exiled governments which sought to control assets of their nationals when those assets were located in the United States. It was determined also that certain decrees of the exiled governments applicable to events in the occupied territory itself were given effect in the municipal courts of the recognizing states.

It was pivotal in the World War II cases that the decrees were the acts of governments continued to be recognized by the U.S. Government despite their exiled status and that the U.S. State Department had taken official cognizance of the decrees.

Critical elements were that: (1) the situs of the property was the United States; (2) the property belonged to persons within the occupied territory; and (3) the claims of persons with respect to the property arose outside the United States.

Two other considerations are also relevant. First, these decrees of governments not exercising territorial control have arisen under circumstances where the natural order of

things had been suspended by operation of force and extraordinary measures were considered both to have been legitimately invoked and to be reasonable exercises of emergency power by the legitimate governing authority. Second, where the Executive recognizes this governing authority as the legitimate one, public policy militates toward giving effect to its decrees.

From the standpoint of an appropriate legal rationale for giving effect to Decree No. 1, it is demonstrable that Decree No. 1 satisfies the critical elements posited by the courts for giving effect to the laws or decrees of extraterritorial governing authorities.

Further, Decree No. 1 by its terms is conservatory both in nature and purpose. It is commensurate with those modern international norms which have recognized (1) the need for protective legislation or rules governing natural resources of disadvantaged territories, (2) the fundamental status in law of the principles pertaining to a people's right to self-determination, and (3) the now-established principle of permanent sovereignty over natural resources.

(c) Likely Outcome of a Suit on Decree No. 1  
In U.S. Courts

A realistic appraisal has led to the conclusion as regards the likely outcome of an action on the Decree that, although there is a respectable legal rationale for judicial action giving effect to the Decree, there is a high probability that preliminary issues would enable the court to avoid examining the merits of the case. Since such a case would touch on matters of foreign policy, a court would probably find the case non-justiciable as involving political questions not appropriate for judicial determination, and similarly, the act of state doctrine might be applied to bar the court's consideration of the illegality of South Africa's acts in Namibia. (See Section VIII.C. of this memorandum.)

7. Analysis and assessment of alternative action/complementary action/or simultaneous action to be brought in the courts of the United States.

Conclusion

Two alternative litigation strategies that the Council might pursue are replevin and/or conversion actions. It should be noted that both actions may be maintained simultaneously. (See Section IX of this memorandum.)

is a possessory action at law for the recovery of specific personal chattel, which was wrongfully ~~detained~~, or simply wrongfully detained. The basis for a ~~possessory~~ action by the Council would be the wrongful taking ~~and/or~~ detention, by the defendants, of Namibian natural resources to which the United Nations had a right of immediate possession. The Council would have to show, at a minimum, that it, or the United Nations acting through it, had some interest entitling it to immediate possession. The argument would be that the Council for Namibia has the superior right to possess the resources of Namibia, or at the least, a sufficient interest to defeat the purported title of any defendant.

Any property sought to be replevied must be (a) identifiable, (b) capable of delivery, and (c) located within a geographical area where the court has jurisdiction over the property and the defendant is in possession of the property. The remedy is recovery of the wrongfully detained property. Money damages may also be awarded, however, for injury resulting from the wrongful taking or detention.

Conversion is defined as any unauthorized assumption of dominion or ownership over personal property, belonging to another, to the exclusion of the owner's rights. The argument in the instant case would be that the United Nations has been

injured by the acts of dominion or ownership exercised by the defendant over Namibia's natural resources because it has a superior right to Namibia's resources and defendants' acts have been inconsistent with the U.N.'s rights in the property. Therefore, if property can be identified and proven to have belonged to the United Nations at the time of its alleged conversion, an action may be maintained for damages, even if the property has already been sold or otherwise disposed of.

Pursuing either or both alternative actions would preclude the need to rely solely on Decree No. 1 inasmuch as the superior right of the Council to exercise dominion over the natural resources of Namibia flows directly from U.N. General Assembly Resolutions 2145 and 2248. To reach this conclusion, the court would need only to accept and to give effect to the termination of South Africa's mandate over Namibia and to the U.N.'s authority as the administering authority over the Territory and as trustee for the people of the Territory. This leads directly to the conclusion that the Council has a superior right to possess the goods. Since the relevant U.S. foreign policy determination regarding these actions has already been made, justiciability problems that could defeat the action, if predicated solely on the Decree, would largely be eliminated.