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INTERNATIONAL CONFERENCE OF EXPERTS FOR THE SUPPORT
OF VICTIMS OF COLONIALISM AND APARTHEID IN SOUTHERN AFRICA

OSLO, NORWAY, 9-14 April 1973

Organized by the United Nations
in co-operation with the Organization of African Unity

NAMIBIA: LEGAL ASPECTS

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(The views expressed are those of the author).

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Until recently the fundamental legal question affecting Namibia was the effect of General Assembly resolution 2145 (XXI) (1966), revoking South Africa's mandate over Namibia. On 21 June 1971, that question was definitively answered by the International Court of Justice, which advised that:

- The occupation of Namibia by South Africa is illegal and should be ended at once;
- Members of the United Nations should recognize the illegality of that occupation and the invalidity of South African acts on behalf of or concerning Namibia and should refrain from any conduct implying recognition of, or lending support or assistance to, the illegal occupation; and
- Non-members should give assistance to actions taken in accordance with the Opinion. 1/

The basic legal question which now confronts the international community, and this Conference particularly, is how to implement that Opinion, so that the illegal occupation of Namibia may be ended. This paper is devoted to suggesting means of achieving that objective or at least of preparing the groundwork for action which will do so.

The discussion is based on the following premises: -

- that it is unrealistic to expect that the United Nations will employ military force to compel South Africa to end its illegal occupation of Namibia;
- that the United Nations must therefore use means which will, over a period of time, make the occupation increasingly difficult, unpleasant, unprofitable, and unpopular and the occupier uncertain, divided, and discontented;
- that the only barrier to employing such means is not their unavailability, but the lack of will, and of energy and patience, on the part of the United Nations as a whole as well as of the States and organizations most vitally concerned;
- that the calling of this Conference indicates that the convenors have recognized that the liberation of Namibia will not be brought about by more denunciations of South Africa, nor by unrealistic demands for military confrontation, but by slow, hard, unspectacular work which will erode the political, economic, and moral standing of the Republic, so that the people of Namibia can win their own freedom.

1/ Legal Consequences for States of the Continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.G.J. Reports 1971, p. 16, at 58 (Para. 133).

It is in the spirit implicit in the calling of this Conference that the following suggestions are made. For convenience they are divided into those addressed to the United Nations as a whole or to one of its organs and those addressed to groups of states.

Suggestions addressed to the United Nations.

1. End all dialogue with South Africa

It is essential to end, once and for all, all forms of dialogue ("negotiations") with South Africa on the subject of Namibia.

The latest dialogue, begun under Security Council resolution 309 (1972), was extended this fall for the incredible purpose of further exploring with South Africa the meaning of the "self-determination" which that government has held out for Namibia in the indefinite future. Yet this could have been determined from South African laws and official pronouncements, all of which are available in New York.

The main political consequence of this dialogue has been to give the Republic fifteen months in which to clamp martial law on Ovamboland, to bring new investment into the Territory, and to create new Bantustans and consolidate old ones while the Security Council waited passively for reports on the progress of the dialogue, and that "progress" included a statement by the Secretary-General's representative that Bantustans were acceptable if called regions! Meanwhile South Africa's trading partners continued to evade their international obligations while privately sneering at the gullibility of those countries which once again had been persuaded to try negotiation.

The legal consequences are far worse. The Opinion of the Court and the principles of international law it applied to Namibia, have been seriously undermined. Despite the reservation of the United Nations' position, the Secretary-General's mission has, by its conduct, appeared to acknowledge that South Africa is in Namibia under some colour of right and has some legal status there.

This mischief should be undone as far as possible and as quickly as possible by terminating all authority to treat with South Africa on any subject other than the modalities of the immediate transfer of the administration of the Territory, as an integral whole, to the United Nations.

2. Clarify status of Council for Namibia.

For structural and political reasons the Council for Namibia has been unable or unwilling to rationalize its own status. Consequently, it has failed to assert itself as the de jure authority in Namibia and to carry out the functions assigned to it by General Assembly resolution 2248 (S-V) (1967) and subsequent resolutions.

It is therefore imperative for the Assembly to take the necessary steps to see that the (now enlarged) Council is recognized as a full-fledged government - or quasi-government-in-exile - and to compel it to conduct itself as such.

To that end, the Assembly should amend the resolution establishing the Council, or substitute a new resolution, to make it clear that, insofar as they can be exercised from outside the Territory, the powers of the Council vis-à-vis Namibia are the same as those rightfully exercised by South Africa in relation to its mandated territory before 1966. ^{2/} The resolution should be carefully drafted, with the assistance of sympathetic legal experts. It should draw, inter alia, on the partially relevant experience of the United Nations administration in New Guinea. It should consider very carefully the legal relationship of the Council, as a government or quasi-government, to the United Nations itself and to the States whose representatives sit on the Council, as well as the relations of the Namibian liberation movements to the Council.

The Assembly should also provide an adequate staff for the Council and Commissioner so that they can carry out their required functions effectively; and it should authorize establishment of an internship programme for qualified Namibians. The Assembly should require an annual accounting of the Council's activities in connection with the Council's budget requests for the following year.

Once given legal authority, staff, and an adequate budget, the Council should be required by the Assembly to function as a government and not as a mere committee. Thus, inter alia, the members for the Council should make the Council their first priority, giving up any conflicting assignments. They should meet regularly, record their activities in a journal, and conduct their business by some sort of weighted majority vote, rather than by unanimity.

3. Appoint a full-time permanent Commissioner for Namibia.

The General Assembly has for years done a disservice to Namibia by failing to appoint a full-time Commissioner on a permanent basis; and the African States have been remiss in not agreeing on one or more candidates and insisting that the Assembly select one.

A Commissioner whose function is to help the Council assume its proper role in ending South Africa's occupation of Namibia must differ in temperament, attitudes, and talents from a Commissioner conducting a mere holding operation, as up to the present time. Beyond the assumed qualities of integrity, intelligence, and diplomatic skill, a permanent Commissioner should be highly imaginative and inventive (proposing new techniques and concepts to the Council) and should demonstrate enthusiasm and a proven ability to get things done. The position is so important that internal Secretariat and African politics must be eschewed in selecting the candidate.

4. Activities of the Council.

The Council for Namibia, with adequate constitutional authority, staff, and budget, should take action to establish its authority as the de jure government of Namibia, seeking peaceful confrontation with South Africa whenever it is to the advantage of the Council.

^{2/} The Council to exercise such powers subject to the supervision of the General Assembly.

(a) In particular, it should seek to establish its external authority by insisting on the right to represent Namibia in United Nations specialized agencies, at international conferences, and under international conventions. It should seek to be substituted for South Africa in all existing multilateral and bilateral conventions and treaties to which South Africa is a party insofar as Namibian interests are affected. 3/ It should also seek to enter into treaties with friendly states; it might well start with an agreement with Zambia and Botswana to regulate provisionally the Kasungula crossing on the Zambesi where their national boundaries come together.

(b) It should establish its domestic authority, as far as possible, by repealing discriminatory legislation and by enacting laws relating to Namibian land titles, foreign corporations, concessions to exploit natural resources, labour recruitment, taxation of foreign companies, and other vital subjects 4/.

While the Council is unable to implement such laws within the Territory, their mere existence, complete with penalties to be applied in the future for their present contravention - such as the seizure of property for failure to pay taxes levied by the Council - is bound to have a discouraging effect on potential investment in the Territory. The Council may also be able in some cases to achieve a kind of extraterritorial effect for its laws through the initiative of private groups, as, e.g. in the case of a judicial determination in a national court between rival claims to property of Namibian origin where one claim is made under title granted by the Council and one under title derived from the South African government.

(c) The Council should establish, with the help of the United Nations experts, archives to preserve all Namibian materials in the United Nations. The archives should contain copies of all documents, reports, studies etc. of specialized agencies touching on subjects of concern to the Council or to a future free Namibian government. In particular, the Council should seek from the Food and Agriculture Organization all technical data supplied by that agency to the organizing meeting of the International Commission on Southeast Atlantic Fisheries, which FAO sponsored and from which Namibian representatives were excluded.

(d) The Council should issue Namibian postage stamps and call on all members of the International Postal Union to treat as unstamped mail all mail originating in Namibia and bearing South African or South West African, instead of Namibian, postage. The sale of Namibian stamps to philatelists should provide some revenue for the Council and have an educational value as well.

(e) The Council should establish an active research programme, co-ordinated with research done by various other United Nations units and the OAU.

3/ The Secretariat has prepared a list of such registered treaties and conventions.

4/ Detailed recommendations for legislative action were made in "Laws and Practices Established in Namibia Contrary to the Purposes and Principles of the Charter", a study submitted to the Council in October 1972.

(f) The Council and/or the Commissioner should issue regular press releases concerning developments in Namibia, to keep the Namibian point of view before the general public, which is saturated with South African propaganda.

5. Supportive activities of the General Assembly.

The General Assembly should wholeheartedly support the activities of the Council for Namibia designed to assert its rightful authority over Namibia; and it should undertake initiatives to embarrass South Africa and its trading partners for their violations of their international obligations.

(a) One simple method to assist the Council is to reword the annual resolution on the Namibian question: Instead of requesting United Nations specialized agencies for unspecified assistance to the Council, the Assembly should ask them to do specific acts: e.g. to admit the Council to membership or associate membership; to supply the Council with copies of relevant reports, studies, etc.; and to require that South Africa supply them with separate data for the Republic and for Namibia and to refuse to accept data that is not so separated.

(b) The Assembly should direct the United Nations postal authorities to issue special Namibian commemorative stamps this year, not eventually.

(c) The Assembly should direct the Secretary-General to rationalize and co-ordinate Namibian research, which is now split among various parts of the Secretariat and very poorly done by all of them - when it is done at all. Competent research by the Secretariat staff, co-ordinated with that done by the Council, the OAU, and non-governmental organizations, is one of the most important tools for liberation: the weak points of the South African occupation can be uncovered through such research and effective plans made to exploit those weaknesses.

(d) The Assembly should give unfavourable publicity to actions by states which violate the international obligation to refrain from lending assistance or support to South Africa's illegal occupation of Namibia. A particularly shocking example was the United States' refusal to assist the Council in obtaining information on the labour practices of two United States corporations doing business in Namibia; another was the failure of Japan and Spain to support the admission of Namibian representatives to the organizing meeting of the International Commission on Southeast Atlantic Fisheries, which dealt mainly with fish resources in or adjoining Namibian waters.

Such conduct should not be concealed. It should be made the basis of a valid publicity campaign to bring about an end of such actions through the pressure of international opinion.

Suggestions addressed to States

(These suggestions are addressed, firstly, to all States, indicating minimal conduct required in accordance with the International Court's Opinion, and, secondarily, to the concerned States which wish to exert additional pressure on South Africa to end its illegal occupation of Namibia).

1. Actions required under Advisory Opinion

(a) State authorities should refuse to apply to Namibian persons or matters bilateral treaties with South Africa (e.g. extradition or double taxation treaties) even if such treaties were lawfully extended to the Territory before revocation of the mandate.

(b) State officials (including judicial officials) should refuse to honour titles or claims relating to Namibia which are directly or indirectly derived from South Africa. Such titles or claims may arise under: judgments or administrative decisions, findings, or awards of South African or territorial courts, judges, or officials if they affect Namibian persons, goods, products, or causes of action; documents of title to minerals, furs, fish, or other Namibian products if obtained under government concession; official certificates or documents, such as certificates of weight, measure, content, safety, origin, etc.; public records; deeds, or notarial documents; officially certified copies of private documents; bills of lading issued by publicly owned transportation companies; government bonds etc.

2. Terminology: "de facto government"; "unlawful occupier"

Members of the United Nations should not refer to South Africa as the "de facto government" of Namibia since that term ascribes to the Republic a status which it is not entitled to under international law: A de facto government must have some claim of right; and South Africa, like a common brigand or like the Nazi in Norway some thirty years ago, has no right whatsoever in Namibia. Members of the United Nations should use the correctly descriptive term "unlawful occupier" when referring to South Africa acting vis-à-vis Namibia.

3. Selection of Judges of International Court

It would be helpful if questions as to the obligations of states in specific circumstances - e.g. whether states have an obligation to treat as unenforceable contracts made in Namibia under Namibian law - could be referred to the International Court with some assurance that they would be decided by judges who are in sympathy with the 1971 Advisory Opinion on Namibia.

The African states apparently failed to seize their opportunity last spring to influence the present Court's attitudes by nominating five judges attuned to the problems of the second half of the twentieth century. Consequently, it is now unwise to refer Namibian questions to the court unless a careful study shows that the judges elected in the fall are at least as sympathetic as the judges they replaced.

It is urgent that the Third World States plan now to nominate their own slate of five judges for the spring of 1975. These states can, if they are united, prevent the election of any judicial candidate of whom they disapprove. If they select candidates who are both sympathetic to their problems and recognized internationally as leading jurists, they should be able to attract enough support to elect all their candidates. It will then be possible to use the

judicial arm of the United Nations much as civil rights activists have used the judiciary of the United States, to advance the cause of Namibia.

Third World States must be prepared to continue to nominate and elect a slate of judges every three years; if they do this only once and then ignore succeeding elections, their temporary advantage will be quickly dissipated.

4. Treaties with Council for Namibia

Friendly states should enter into treaties with the Council to help it establish its international personality. The content of such treaties is of secondary importance.

5. Limited boycotts and related actions

It is a mistake for opponents of South Africa to announce and undertake actions which they cannot carry through. The various measures proposed here are modest enough to be feasible but can nevertheless have a real impact - economic and/or psychological - on the Republic.

(a) The African states should carefully select the most vulnerable investor in Namibia - i.e. a company which has far more important investments in free Africa than in Namibia and which the free African States can afford to nationalize or expel - and then jointly threaten specific collective action against that company unless it pulls out of Namibia. Such action can be repeated against one company at a time, always choosing the most vulnerable one.

(b) The African states should refuse visas to tourists travelling in group tours if the planned tour includes South Africa or Namibia. Since most organized tours to the continent spend far more time outside the Republic and the Territory than in them, a refusal of visas under these circumstances will not place an undue financial burden on the free African states although it will seriously affect tourism in South Africa 5/. Refusal to issue visas would serve an additional educational function, alerting non-political tourists to the Namibian problem.

(c) The world's oil producing countries should stipulate that no oil be shipped to South Africa or Namibia in any ship sailing out of their ports, under threat that the ship concerned will be seized by any of the states joining in the stipulation. Such a limited boycott would not, of course, prevent South Africa from obtaining oil, since it could be transhipped to the Republic in other ships; but transshipment would increase the price of the delivered oil substantially and thus cut into South African profits.

6. Negotiating with Western Powers

The African States have not begun to exploit their negotiating powers in the United Nations to gain concessions on Southern Africa.

5/ Such a boycott would be somewhat difficult to enforce, as tour agencies would undoubtedly try to make informal arrangements with other (possibly South African) agencies to cover the forbidden part of the scheduled trip; but the African States would retain the ultimate sanction of refusing to grant visas to any tourists obtaining travel arrangements through an offending agency.

In the 1972 Assembly session a chance was lost to insist on concessions in exchange for support of a reduction in the United States assessment. In the 1973 session it now appears that the admission of West Germany will be a major objective of the Western Powers. The African States ought to exact specific concessions in exchange for their support: e.g. from the United States an agreement to deny tax credits for taxes paid to South African or local authorities on business activities in Namibia 6/; from West Germany the closing of its consulate in Windhoek and a ban on all German investment in Namibia. They should analyse the issues at each succeeding Assembly session to determine which ones would give them leverage with which Western Powers - and then apply that leverage.

Obviously, such concessions can be obtained only if at least the vast majority of African States act as a bloc; deciding on their demands in advance and sticking to them despite blandishments and threats.

7. Common Market and GATT

African States should exert maximum political pressure on sympathetic members of the Common Market to make sure that the Market does not grant any special benefits or advantages to South Africa, as a country formerly receiving Commonwealth preferences, and to see that the Market does not enter into any special arrangement with the Republic.

The OAU should undertake research to determine whether, as suspected, Namibian products are being treated as if they originated in South Africa for the purposes of GATT. When the evidence has been assembled, concerned states should make appropriate protests and insist upon proper application of GATT rules to exclude Namibian goods 7/.

8. Liberation radio

The OAU, in conjunction with the liberation movements, should establish a liberation radio station to broadcast around the clock to Namibia and the rest of Southern Africa. In addition to news and special liberation programmes, it should carry educational material 8/ to supplement the non-education provided for Africans by white authorities. If necessary, the OAU and the liberation movements should distribute transistor radios to Africans in Namibia and the rest of Southern Africa.

9. Research

The OAU should have an active programme aimed at practical problems relating to liberation in all parts of Southern Africa:

6/ The African States should consult with friendly lawyers as to the terms of such concessions: e.g. they would gain little by the tax credit concession if the Internal Revenue Service, instead, permitted taxpayers to deduct such payments as necessary business expenses.

7/ This is another reason for requiring specialized agencies to insist that the Republic submit information separating South African and Namibian data.

e.g. determining which Namibian products are treated as if South African under GATT; monitoring developments in the Namibian Bantustans. This research should be co-ordinated with that done at the United Nations and by non-governmental organizations; some kind of informal clearinghouse of information and documents should be established. The directors of the major Southern Africa research programmes should meet from time to time to discuss new developments, future projects, and practical applications of information uncovered in the course of research.

Conclusions

The preceding suggestions include some of the means not involving the use of force by which the United Nations as an institution and concerned states, singly and/or jointly, can begin to implement the International Court's Opinion, that South Africa should end its illegal occupation of Namibia. They are designed to initiate a process of undermining the South African moral, political, and economic position in Namibia, so that the people of that Territory will be able to achieve their own liberation.

The suggestions are designed to avoid the grandiose and the theoretical; rather, they concentrate on the possible and the practicable. Nevertheless, their implementation requires determination, unity, and courage on the part of Africans, who are the most immediately and personally concerned, and a reordering of some national priorities to rate the liberation of Southern Africa with the development of free Africa.

Some of the suggestions may be applicable to all Southern Africa, as well as to Namibia; other due to the former mandate's peculiar legal situation, are applicable to that Territory only. All should be equally vigorously pursued. This would be true even if their benefit were restricted to Namibia exclusively. But, in fact, progress towards liberation in Namibia - as in any part of Southern Africa - will hasten freedom for the entire area.