AWAITING THE VERDICT

THE CASE ON SOUTH-WEST AFRICA BEFORE THE WORLD COURT

(**Editor's Note:** This is the second part of a paper presented to the Pietermaritzburg branch of the Liberal Party on 25th May, 1966. It is considerably longer than our usual articles, but we publish it in full because we are sure that our readers will find great value and interest in its fair, accurate and detailed assessment; especially since the judgement of the World Court is expected very soon.)

I: THE MANDATE

In terms of Article 119 of the Treaty of Versailles which concluded the First World War, and was signed on the 28th June, 1919, Germany renounced all her rights over her oversea possessions, **including South-West Africa.**

The League of Nations which came into being at this time, and of which South Africa was a foundation member, gave particular thought to the position of "those colonies and territories which . . . 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". (League of Nations Covenant: Article 22 — the "Mandate Article")

It was held that, to such territories, "there should be applied the principle that **the well-being and development of such peoples form a sacred trust**", and that securities for the performance of this trust should be embodied in the Covenant of the League. (Article 22:1)

It was also decided that the best method of giving effect to this principle was to entrust the tutelage of such peoples to "advanced nations who, by reason of their resources, their experience, of their geographical position, can best undertake this responsibility . . . and that this tutelage should be exercised by them as Mandatories ON BEHALF OF THE LEAGUE". (Article 22:2)

Section 6 of the same Article declares that "There are territories, **such as South-West Africa** . . . , which, owing to the sparseness of their population . . . or their geographical contiguity to the Mandatory, can be best administered **as integral portions of its territory**", subject to the safeguards already outlined in the interests of the indigenous population.

In terms of Section 7, each Mandatory **must submit** to the League of Nations "an annual report in reference to the territory committed to its charge"; and (Section 9) a permanent Commission would be set up "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".

In terms of this Article, South Africa was invited to undertake mandatory responsibilities in regard to South-West Africa; and on the 17th December, 1920, signed the mandate agreement specifically referring to that Territory.

It is of interest to note that the Mandate was actually conferred upon "**His Britannic Majesty**, to be exercised **on his behalf** by the Union of South Africa" and that "His Britannic Majesty, **for and on behalf of** the Union of South Africa, . . . agreed to accept it" and "to exercise it on behalf of the League of Nations". (Preamble)

RESPONSIBILITIES

The Mandate defines, in seven Articles, the scope and nature of South Africa's responsibilities:—

Article 1 describes the Mandated territory as that "which formerly constituted the German Protectorate of South-West Africa".

Article 2 gives South Africa "full power of administration and legislation over the Territory . . . as an **integral portion** of the Union of South Africa" and the right to "apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require". It adds that: "THE MANDATORY SHALL PROMOTE TO THE UTMOST THE MATERIAL AND MORAL WELL-BEING AND THE SOCIAL PROGRESS OF THE TERRITORY . . .".

Articles 3, 4 and 5 deal with certain details of administration made obligatory on the mandatory power.

Article 6 lays down that "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 states that the **consent of the Council of the League of Nations** is required for **any modifications** of the terms of the Mandate; and further provides that, "if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation of 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".

IMPORTANT CHANGES

Since South Africa signed this Mandate a number of important changes have taken place, not only in her own constitutional position and her relations with the outside world, but in the general field of international speculation, and even doubt as to her right to continue exercising control over South-West Africa.

In the first place, the League of Nations, which committed the territory to South Africa's charge, has itself long disappeared from the international scene. From what body, then, does South Africa **now** derive her mandatory rights? To whom must she answer for their proper exercise? Is the United Nations Organisation in fact **and in law** the successor of the League of Nations? Does it in fact inherit the supervisory powers of its predecessor in respect of mandated territories? Its claims in this connection have been challenged.

Again, the Mandate (though signed by South Africa as an independent member of the League of Nations) was actually conferred upon "His Britannic Majesty". In whom, then, does it rightly vest today, when South Africa has severed her ties not only with Britain but with the whole Commonwealth of Nations?

Further, the Permanent Court of International Justice (referred to in Section 7 of the South-West Africa Mandate) has been superseded by the International Court of Justice, established in 1945 by the United

Nations Organisation. Is South Africa bound in law to submit herself to the decisions of this later judicial body, called into existence a quarter of a century after the promulgation of the Mandate? Is the Mandate itself **still in force** and **legally binding**?

Such are a few of the many intricate problems surrounding the South-West Africa issue, and they are currently exercising some of the best legal minds of our day.

SOUTH AFRICA'S ARGUMENT

The South African government has argued in a written statement presented to the International Court of Justice in March 1950:—

(a) That at the demise of the League of Nations, there was no **total transfer** of League functions to the United Nations Organisation nor was there a **specific transfer** with regard to the mandates system. . . . It was not sufficient to establish that the U.N.O. was a **substitute** for the League of Nations. It required to be shown that a **de jure** survival, and not merely a **de facto** continuity, existed.

(b) That this could not be done. No specific provision for **Mandates** had been made in the United Nations' Charter. The **Trusteeship** system which **had** been written into it merely provided that a mandatory Power **could, if it so desired,** negotiate a **new** international agreement in respect of the mandated territory. Since South Africa had never desired, or consented to, such new agreement, the United Nations had **no legal rights** in respect of the Mandate for South-West Africa.

(c) That, since the League of Nations had recognised that its own functions had come to an end, the Mandate had **necessarily ceased to exist as an enforceable instrument.** With the lapse of the Mandate there are **no longer any legal limitations upon the Union's competence in respect of the territory.**

(d) The South African Government does, however, recognise the binding nature of certain Mandate principles — notably, that of "the sacred trust of civilisation".

ARGUMENTS AGAINST

Against South Africa it has been argued:—

(a) That the Mandate is still **"a treaty in force"** and legally binding.

(b) That South Africa remains subject to the international obligations set forth in Article 22 of the Covenant of the League of Nations and in the Mandate itself.

(c) That the United Nations is **legally qualified** to exercise the supervisory functions which were formerly the responsibility of the League.

In **July** of 1950, the **International Court of Justice** gave its **Advisory Opinion**:—

(a) That the international status of South-West Africa could only be modified **by South Africa acting with the consent of the United Nations.** Actually it was ruled, **by 8 votes to 6,** that the Provisions of the old League of Nations Charter DO NOT IMPOSE A LEGAL OBLIGATION ON SOUTH AFRICA to place South-West Africa under the "trusteeship" system designed by the U.N.O.

(b) That South-West Africa **is** a territory under international mandate (the Mandate assumed by South Africa in 1920);

(c) That South Africa continues to have the international obligations stated in the Mandate; and

(d) That the supervisory functions formerly exercised by the League of Nations are to be exercised by the U.N.O.

Now Advisory Opinions are **not binding.** South Africa was not obliged to accept this one — nor, for that matter, were its critics. But, the General Assembly of the U.N.O. **did** accept it, even though it severely limited future action by Member states. Since then, the question of South-West Africa has been annually raised against this country in the Assembly; but the very intricacy of the legal problems surrounding the whole issue made actual **action** against the Republic a difficult and tricky business, and it was only in November 1960 that Ethiopia and Liberia actually brought suit against South Africa before the International Court of Justice at the Hague.

MORAL PRINCIPLES

We have dealt very briefly with the main **legal** issues involved. It remains for us to come nearer, perhaps, to our own lay level and ask what **moral** principles are being flouted or adhered to by South Africa in her administration of the disputed territory.

Before doing so, however, we must glance carefully, even if cursorily, at:—

THE COURSE OF THE DISPUTE

The dispute at U.N.O. over the international status of South-West Africa began in 1946. In that year, Field-Marshall Smuts, then Prime Minister of South Africa, sought the approval of U.N.O. for **the incorporation of South-West Africa in the Union.** He contended that he was bringing forward the matter because incorporation was the carefully ascertained and strongly expressed desire of the **majority of the territory's inhabitants.**

The General Assembly argued that the **African** inhabitants of the territory had not yet secured political autonomy nor reached a stage of political development enabling them to express a considered opinion (which the Assembly could recognise) on so important a question as the incorporation of their territory. It further recommended that the territory be placed under the new United Nations **trusteeship system.**

South Africa rejected both the view **and** the recommendation.

In July 1947 she announced to the U.N. —
(a) that she would not proceed with incorporation;

(b) that she would continue to administer the territory in the spirit of the Mandate;

(c) that she would continue to submit annual reports — but **for information** only; and

(d) that, in her government's view, the wishes of the South-West Africa inhabitants should not be flouted, and that some provision for their representation in the South African Parliament should be made.

In 1948, a Nationalist government came to power in South Africa. Its attitude towards the South-West Africa issue was very much the same as that of its predecessor — only more so! Mr. Eric Louw was for some years to be the main propounder of its views at the United Nations.

But by this time — as, indeed, almost from the **beginning** — the dispute had BROADENED from considerations such as the status of the territory, the formal obligations of South Africa, and the supervisory functions of the U.N., to a GENERAL CONCERN WITH THE CHARACTER OF SOUTH AFRICA'S ADMINISTRATION THERE.

SUBSTANCE OF COMPLAINTS

This "general concern" — and this only — has of late years formed the substance of the annual complaints against the Republic. And this same "general concern" is, in effect, the whole substance of the present suit against us.

Year after year the General Assembly has found cause to condemn the nature of South African administration in South-West Africa. It has given its view that "conditions in the territory . . . and particularly for the 'Native' majority, are still far from meeting the standards implicit in the purposes of the mandate system. It has recommended the progressive transfer of legislative and other powers to the territory; the revision of existing policies and practices of 'Native' administration; extension to **all** inhabitants of representation in the territorial legislature; the discontinuance of racial discrimination and of apartheid, etc., etc.

In November 1959, the General Assembly "noted" the conclusion of the U.N.O. Committee on South-West Africa that **"it is essential to the welfare and security of the peoples of South-West Africa that the administration of the territory be altered without undue delay".**

By November 1960, the question of South-West Africa had featured on the United Nations' agenda for **14 years**; and year after year the possibilities of negotiation had been wrecked by the insistence of the U.N. that South Africa place the territory under the trusteeship system — the one point that South Africa is **determined not to concede** and appears **legally entitled to refuse.**

POLITICAL PROBLEM

Ballinger makes the point that "the dispute over South-West Africa is at root a political, not a legal, problem". Wellington accepts "South Africa's legal right to reject a trusteeship for South-West Africa", but points out that "the gravamen of U.N.O.'s charges against South Africa has centred on the alleged unfairness of the Administration to indigenous people for whose interests Article 22 of the League Covenant enjoined a special care".

In other words, in the eyes of the outside world (or such portion of it as is represented at the U.N.), South Africa's offences (if any) have been, and are being committed in that borderland of conduct where the moral and the political shade into each other and cannot be regarded as distinct or separate approaches.

Significantly, the suit brought by Ethiopia and Liberia rests mainly on this moral issue. It is true that it asks the Court to declare that the South-West Africa Mandate is still an international treaty **in force**; that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the territory; and so on. **But** the main attack undoubtedly rests on the claim that South Africa has violated Article 2 of the Mandate and Article 22 of the Covenant.

ETHIOPIA AND LIBERIA'S SUBMISSION

Here, quoted verbatim, are the relevant paragraphs of their submission:—

"E. The Union has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory. . . .

"F. The Union in administering the Territory, has practised APARTHEID, i.e. has distinguished as to race, colour, national or tribal origin, in establishing the rights and duties of the inhabitants of the Territory.

"G. The Union, in administering the Territory, has adopted and applied legislation, regulations, proclamations and administrative decrees which are by their terms and in their application, arbitrary, unreasonable, unjust and detrimental to human dignity. . . .

"H. The Union has adopted and applied legislation, administrative regulations, and official actions which suppress the rights and liberties of inhabitants of the Territory essential to their orderly evolution toward self-government, the right of which is implicit in the Covenant of the League of Nations, the terms of the Mandate, and currently accepted international standards, as embodied in the Charter of the United Nations, and the Declaration of Human Rights. . . ."

SOUTH AFRICA'S ARGUMENTS

South Africa's arguments before the International Court have naturally been of the same two-pronged character. She has argued (very properly) that the United Nations is **legally** on shaky ground in its attempt to interfere in South Africa's administration of the territory; and she has called numerous witnesses — of varying academic, administrative and executive background — to testify that she has in no way violated the spirit of Article 2 of the Mandate — that she

is, in fact administering the territory to the benefit of all — and that "apartheid" is for the general good in South-West Africa as in the Republic itself — and that the five-year development plan for the territory arising out of the report of the Odendaal Commission of 1962 will bring peace and prosperity to the whole area.

The following summary of South Africa's case appeared in the Press just before the last adjournment of the International Court:—

"South Africa yesterday completed its case before the International Court of Justice here and submitted final submissions denying allegations by Ethiopia and Liberia that it had violated its mandate over South-West Africa.

"South Africa asked the court to declare that the whole of the mandate for South-West Africa lapsed on the dissolution of the League of Nations and that South Africa was therefore no longer subject to any legal obligations under it.

"Alternatively, South Africa asked the court to declare that even if the mandate continued in existence after the dissolution of the League, South Africa's obligations to report and account to the League had not been replaced by any similar obligation to report and account to any organ of the United Nations or any other organisation, and that South Africa has not violated its obligations under the mandate and the Covenant of the League."

II: THE LAND UNDER MANDATE

What, in fact, is the "moral" position of South Africa vis-à-vis the territory she has held in trust for nearly fifty years? How far has she observed her pledge (officially renewed in 1947) to "promote to the utmost the material and moral well-being and the social progress of the inhabitants"? How far, **since** 1947, has the extension to South-West Africa of the Mandatory's own specialised policies — statutory apartheid, job reservation, race-education, race-settlement, and the like — forwarded or hindered the said "well-being" and the "progress" of its peoples?

THE "AVERAGE" EUROPEAN OF THE TERRITORY, ON THE ADMINISTERING END, AND THE "AVERAGE" NON-WHITE, ON THE RECEIVING END OF ALL THESE POLICIES, WILL ALMOST CERTAINLY COME UP WITH DIFFERENT ANSWERS.

So far as the present paper is concerned, it has seemed best merely to set out a number of undisputed **facts** concerning South-West Africa, and leave their assessment and interpretation to the individual judgment — with this sole reminder: that the territory has been administered from the start on thoroughly "South African" lines, and our assessments will, and should, be influenced by our first-hand knowledge of the workings-out of these same policies in our own land.

FACTS

Here are some of the established facts of the South-West African situation:—

(1) The Mandatory has poured men (i.e. Europeans) and money and know-how into the territory. It has spared virtually no effort and no expense to build up the local economy; to establish and/or encourage industry; to open up the country by road and rail; to support the exploitation of its mineral wealth and its huge fishing-industry potential; and to ensure that the services ancillary to urbanisation and industrial expansion are adequately organised and efficiently conducted.

(2) In the process, it has undoubtedly raised the overall standard of living in respect of **all** the inhabitants of the area. It has also greatly improved the overall **health** of the territory: indeed, "the population's health is good. Malnutrition is not serious" (Odendaal Report and 6) and "the incidence of disease is not high" (ibid.). In supply of medical practitioners, nurses, midwives, hospital beds, and in **expenditure (on health) per head of population,** South-West Africa compares favourably with other territories in Africa; and the Odendaal Commission (1962) has recommended yet further improvement and extension of these and other health facilities in all the Native "homelands" (ibid.).

(3) The Mandatory has extended and encouraged educational facilities for White and Non-White alike. It has established Government schools for Coloured and Native children and a Government Training Centre for Native teachers. It has subsidised mission schools and a mission training institute. A number of Native teachers have been sent to South Africa for training. Moreover, the whole cost of the State institutions and the subsidies to mission schools is **not** a charge on "Native" funds but is borne by the **general revenue** of the territory.

(4) The rapid expansion of industry, etc., in the territory has opened up numerous avenues of employment for the Non-White peoples, and the chance to acquire skills or semi-skills which qualify a man for a better-than-average wage.

(5) The Odendaal Commission has recommended an increase of nearly 50 per cent. in the amount of land to be settled as Native "homelands".

(6) Not un-typically, the amount of **R20 million** was included in South Africa's own budget, as a charge on her own funds, for further development of the mandated territory in 1964/1965.

OTHER FACTS

Here are some other facts:—

(1) In 1945, after nearly 30 years of South African administration, "the minimum wage (for Africans) in the territory was **9s. a month.** A move by the fishing companies to raise this was squashed immediately by the farmers.

In 1963/1964 it was reported that, "in the mines, the wage is 1s. 9d. a day for the first 22 weeks, after which the labourer must go back to the Reserves. Farming wages are somewhat higher than in the mines, the minimum being 25s. a month and the **maximum** £4." (Report on South-West Africa by the Research and Information Commission of the International Student Conference, 1963/1964).

(2) At the present time, the Whites in the territory number, in round figures, 74,000; the Coloureds, 13,000; the Africans, 440,000.[2] White farmers occupy roughly one-half of the country; the Native peoples, about one-quarter.[6]

(3) Virtually the whole of the territory's central north-south belt — the only agriculturally-viable portion of the country — is in European hands. Except in the dry Kaokoveld (in the north-west), and the areas of good rainfall and almost-tropical conditions occupied by the Ovambo and Okavango tribes, and in the tropical Caprivi Strip, "Kalahari sand covers almost all the 'home' areas of the northern (Native) sector".[2] "To the Herero, landless after the 1904 uprising, the mandatory set aside a large area of the **south-eastern sandveld**." (ibid.). "(Their) homeland is almost entirely on the sandveld they once scorned and dreaded. At the moment they possess one small reserve consisting almost entirely of hardveld — but 'Arminuis', . . . the one reserve they really valued highly, will" (if the proposals of the Odendaal Commission are implemented) "be taken over by the Government." (ibid.).

(4) The proposed increase in the area of Native homelands will come partly (but most **minimally**) from White farms — with R17 million paid in compensation to White farmers. A further part will come from Government lands and game reserves. A glance at the map reveals, however, that by far the greatest portion of the envisaged "additions" consists of further generous measures of Kalahari sandveld (ibid.).

(6) And, finally — a presumption only, but one so "strong" as virtually to qualify as "fact" — the whole "feel" of discriminatory legislation in South-West Africa must resemble from the Non-White's point of view, the "feel" it has in the Republic.

III: CLAIM AND COUNTER-CLAIM

In reply to the suit brought against her, South Africa has acknowledged (March 1965) "a duty to promote the economic progress of all the inhabitants of the territory". She further considered that **no group could claim any preferential treatment.** She was "in no way opposed to the idea of suffrage for all or any peoples **in appropriate circumstances**". Her policy (of apartheid) was "not one of domination but its very antithesis". It was "aimed at the evolutionary determination of the supremacy of the guardian and the emancipation if the ward" (Quoted, "Daily News", 16/5/1965).

PROFITS

On the other hand, of the interim situation now obtaining, Arnold Beichman has written ("Spectator", 19/11/1965): "While the territory's future hangs in the balance, South African industrialists with the right Government contacts are making profits as high as 40 per cent. on capital invested in South-West enterprises. Concessions have been granted to only seven companies for fish processing factories in South-West Africa. The concessions are no more than a licence to make money. For example, the 1948 South-West fish-catch was a mere 13,000 tons. Last year it skyrocketed to 740,000 tons, mostly rock-lobster and pilchards, valued at £17 million. . . . Sea Products Ltd., of South-West Africa, on a capital investment of £2.5 million four years ago, had net profits after taxes (which are quite low) of £1 million or 40 per cent. Sea Products stock prices in these four years have soared nine times over the original price. Other companies show similar profits on fish and fish meal.

"The second major source of wealth is diamonds and base metals such as copper, lead, zinc and manganese. In 1961, this scrub, semi-desert territory produced £18 million worth of diamonds and £7 million in base-metal exports. . . . The underwater diamond operation of the Marine Diamond Corporation, owned by a Texas millionaire, Sam Collins, boasts a big investment by the Anglo-American Corporation, the Oppenheimer pinnacle company. It has been mining about 1,000 carats a day and it is hoped to reach 2,500 carats a day later this year (i.e. 1965). Another diamond concessionaire is the Terra Marine Co., whose officers are closely allied with the Nationalists. . . .

"The third sector of the area's wealth is agriculture, which means, largely, ranching of caracul sheep imported years ago from Russia. The animals thrive in the arid climate and so South Africa has another splendidly profitable asset much in demand.

"Thus while the legal debate winds up, the exploitation of South-West Africa goes on . . . and the exploitation . . . is entirely for the one-seventh of the population which owns two-thirds of South-West Africa's land."

Beichman quotes "an informed South African" as saying: "Nobody knows what the Government will do if the court finds against South Africa; so in the meantime the small group of monopolists are making the kind of money which nobody anywhere is making, and to hell with the future."

IV: SOME QUESTIONS

Conventionally, a paper of this kind should end with a few "conclusions", however tentative — or at least with a hint or two as to inferences which might properly be drawn from its contents. Instead, this paper will simply set forth what the **whole South-West African issue** appears to present to the world at large at this moment — namely, a series of unanswered (and, in part, unanswerable) questions.

There are two which are barely worth putting forward, in that the answers to them are anybody's guess: What will the International Court of Justice decide? And how will South Africa react?

For the rest, we may ask ourselves:—

First: Will the findings of the world court be based on the purely-legal issues involved? Or will it (even, perhaps, in violation of its own legal intentions) be influenced by the attendant moral considerations?

Again, just what **are** these "moral considerations" which are presently exercising the consciences of men and nations? **Has** South Africa a moral, as distinct from a legal, right to treat the territory as a virtual fifth

province? If A. entrusts £500, and its temporary usufruct, to B., and then dies intestate, is B. "morally" entitled to hold on to the money? If, more importantly, A.'s trust involves a child — or a whole territory full of peoples — does B. acquire "moral" right to the sole and unquestioned control of these human destinies?

SPIRIT OF THE MANDATE

And yet again: Has South Africa in fact observed the spirit of the mandate given her in 1921? How far have her actions and her policies been actually **directed** towards promoting the best interests of **all** the territory's inhabitants? We have noted overall improvements in health, in wages and in education since the land came under mandate: how far must these things be ascribed to pure **intention**? How far have they been virtually fortuitous — the regular and necessary concomitants of an ambitiously expanding economy?

And finally: Can those who **know** the effect of South Africa's discriminatory legislation on her own Non-European peoples — can such persons believe that these same policies applied to South-West Africa do, in fact, "promote well-being"? If we remember that the **spirit** of the entrusting mandate pleaded for something very like the recognition of human dignity, then this is the one question we can surely answer for ourselves.

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