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Extract from Wellington, South West Africa and its Human Issues (Oxford 1967), pages 412-416

* Alternate pages printed in Afrikaans (bilingual text).
Legal Consequence for States of the
Continued Presence of South Africa in Namibia despite

Purpose and Scope of Statement

resolution 284 (1970), by which it sought an Advisory Opinion from
the International Court of Justice on the question:

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

This statement is limited to a brief examination of the nature
of the South African presence in Namibia and to a discussion in some
detail of those consequences which flow automatically, by operation
of law, from the continued South African presence in Namibia. It is
not concerned, therefore, with an analysis of the specific actions¹/
called for in General Assembly and Security Council resolutions
adopted since the termination of the South African mandate over South
West Africa.²/

¹/ As such, that is. To the extent that they also flow automatically,
by operation of law, from the illegal presence in Namibia they
will be discussed in this statement.

²/ In general, the term "South West Africa" will be used to refer to
the Territory prior to the termination of the mandate and "Namibia"
to refer to it thereafter. However, "South West Africa" will
occasionally be used when current South African laws, administration,
or attitudes are being discussed.
Preliminary Assumption

This statement assumes that the South African presence in Namibia is illegal. This illegality arises, ultimately, from South Africa's betrayal of its sacred trust as tutelary power, a betrayal so gross and so fundamental as to constitute a total, continuing repudiation of its contract of mandate and thus to forfeit the only legal basis for the South African presence in Namibia. This repudiation was recognized and the consequences thereof defined and dealt with by Assembly resolutions 2145 (XXI) and 2248 (S-V). These were subsequently reaffirmed, confirmed, and strengthened by a series of resolutions, including Security Council resolution 276 (1970), to which the request for the Advisory Opinion refers.

The South African betrayal of trust, evidence of which has been presented to the Court in extenso in contentious proceedings, consisted primarily of: (1) attempting unilaterally to change the international status of the Territory and (2) failing to "promote to the utmost the material and the moral well-being and the social progress of the inhabitants of the territory...."

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3/ See infra, note 11.
5/ By, inter alia: involuntarily conferring South African citizenship on inhabitants of the Territory (South Africa Citizenship Act, No. 44 of 1949, secs. 2-7); granting the white population representation in the South African Parliament (South-West Africa Affairs Amendment Act, No. 23 of 1949, secs. 27-33); and administrative separation of the Eastern Caprivi Zipfel from South West Africa (Union) Proclamation No. 147 of 1939). For a more detailed discussion of the creeping incorporation of Namibia, see infra, "Integration with South Africa".
6/ South West Africa Mandate, art. 2, para. 2.
South Africa's failure to promote the well-being and progress of the Territory's inhabitants involved particularly: (a) denial, by ever more subtle and specious means, of political development and meaningful self-government to the inhabitants of the Territory; (b) application to the inhabitants of the Territory of repressive legislation which denies them fundamental human rights; and (c) application to Namibia of racially discriminatory legislation and practices as a matter of official policy. Such conduct constitutes violations of the United Nations Charter, in particular the second, third, and fourth preambular paragraphs and arts. 1 (2), (3), 56, and 73; the Universal Declaration of Human Rights; the generally accepted principles of the Rule of Law; the International Convention on the Elimination of All Forms of Racial Discrimination (1965), esp. arts. 2, 3, and 5; the International Convention on Civil and Political Rights (1966); and the International Convention on Economic, Social and Cultural Rights (1966). The Charter, the Declaration, and the Rule of Law, in particular, define the obligations of all States and establish the international norms by which South Africa's failure to fulfil its mandate obligation to promote well-being and social progress must be evaluated.

7/ See infra, "Self-government".
8/ Inter alia, Suppression of Communism Act, No. 44 of 1950 (see sec. 15); Unlawful Organizations Act, No. 34 of 1960 (see sec. 5); Public Safety Act, No. 3 of 1953 (see sec. 5); General Law Amendment Act, No. 76 of 1962, sec. 21 (the "Sabotage Act") (see sec. 7 (a), added by Act No. 62 of 1966, sec. 19, extending the "Sabotage Act" to Namibia; Terrorism Act, No. 83 of 1967; General Law Amendment Act, No. 101 of 1969, sec. 29 (permitting any South African government Minister to prohibit the production in court of any evidence or testimony on the grounds that it affects the interests of the State or public security); Riotous Assemblies and Criminal Law Amendment Ord., No. 9 of 1950.
9/ See infra, "National Unity".
The Nature of the South African Presence in Namibia

The Defiance of United Nations Authority

The South African presence in Namibia constitutes, as the General Assembly has described it, a "flagrant defiance of the authority of the United Nations" in at least three respects:

1. through its continued occupation of, legislation for, and administration of the Territory despite the termination of the mandate and the repeated resolutions of the Assembly and Security Council calling for its withdrawal;

2. through its continued refusal to recognize the lawful (ad interim) authority of the Council for Namibia (acting on behalf of the General Assembly) to administer the Territory and, in particular, through its exclusion of the Council therefrom; and

3. through its continual denial of the right of self-determination to the inhabitants of the Territory.

The facts supporting the first two points are matters of historical record and need no elaboration. It is appropriate to re-emphasize, however, that by repudiating its contract of mandate, South Africa forfeited its only legal basis for occupation and governance of the Territory, over which it had no rights other than those conditionally granted by the international community in trust for the benefit of the people of Namibia. 

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10/ General Assembly resolution 2372 (XXII), 5th preambular para.
inhabitants. By remaining in Namibia after its repudiation of the trust, and in the face of repeated resolutions calling for its withdrawal, South Africa has effected an unlawful seizure of the Territory no different in legal contemplation (if possibly somewhat less violent in physical circumstances) from an invasion and seizure by any other country having no rights in Namibia. Consequently, the South African administration in Namibia constitutes an illegal regime, neither a de jure nor a de facto government, operating in defiance of the only lawful government, the Council for Namibia; the latter, by reason of its forcible exclusion from Namibia, is compelled to discharge its functions and responsibilities from outside the Territory.

The Denial of Self-Determination

As to the denial of the right of self-determination, it is necessary to define the concept as employed here and to spell out in some detail the laws and practices by which the illegal regime brings about such denial, often while proclaiming its devotion to the concept.

The currently accepted concept of self-determination, now applicable to all non-self-governing territories and hence particularly to a

11/ The agent of the South African government in the South West Africa Cases stated that South Africa's right to occupy South West Africa arose from "military conquest... originating in the... surrender of the German forces in 1915..." Verbatim record, oral hearings, 39th session, p. 37 (27 May 1965). Representatives of the South African government have repeatedly taken the same position at the United Nations. This position, which contradicts the opinion of the Court in International Status of South-West Africa, 1950 I.C.J. Rep. 128 (Advisory Opinion), also conveniently ignores the role of the Allied and Associated Powers in the surrender of German colonies and possessions.

12/ General Assembly resolution 2248 (S-V); The Council was renamed by General Assembly resolution 2372 (XXII).

13/ General Assembly resolutions 1514 (XV), 2625 (XXV).
territory constituting a sacred trust of the international community—has many aspects, most of which have some relevance to Namibia. However, for the purposes of this analysis, four aspects are of primary concern:

(a) attainment of a full measure of self-government;

(b) freedom from involuntary association with or integration into any state;

(c) maintenance of territorial integrity; and

(d) maintenance of national unity.\(^{14}\)

\(\text{(e) Self-government} \)

Despite fulsome references by government spokesmen and in the official blueprint for Namibian development, the so-called "Odendaal Report"\(^{15}\), to future "self-determination"\(^{16}\) for the various "population groups",\(^{17}\) the substance of the Report and government conduct under it confirm the impression gained from the legislative and political history of the Territory: that the South African government has no intention of granting meaningful self-government to the people of the Territory, or to any portion of them.

\(^{14}\) General Assembly resolutions 1514 (XV), Annex; 2625 (XXV); 742 (VIII); see also United Nations Charter, Arts. 1 (2), 55, 73.


\(^{16}\) Odendaal Report, para. 184.

\(^{17}\) Ibid., para. 183. For a discussion of "population groups" see infra, "Territorial Integrity".
It is clear that as of the present date Namibia does not have self-government.

As will be spelled out in some detail below, there is no single territorial government for all Namibia, although the "white government" with its capital in Windhoek is commonly referred to as the territorial government. The legislative history of that government, which was created in 1925\(^{19}\), shows that at no time was it ever empowered to legislate as to: native affairs; civil aviation; railways and harbours; employment of public servants in the Territory; the administration of justice; control of military forces in South West Africa; administration of postal, telegraphic, and telephonic services; operation of South African Defence Forces in the Territory; entry of immigrants into the Territory; tariffs and excises; and currency and banking and control of banking institutions\(^{20}\). Territorial legislation was always subject to absolute veto ("dis-allowance") by the territorial Administrator (a South African official) or, if he reserved decision thereon, by the Governor-General (now the State President)\(^{21}\). It was valid only to the extent

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18/ *Infra, "Territorial Integrity".*
19/ South-West Africa Constitution Act, No. 42 of 1925.
20/ *Id.,* sec. 26 (subjects permanently reserved from legislation by the territorial Legislative Assembly); sec. 27 (subjects temporarily reserved from legislation). When sec. 27 was repealed by Act No. 23 of 1947, sec. 17, some simultaneous changes were made in sec. 26 by sec 16 of Act No. 23 of 1947; the list in the text takes account of these changes. See also Odendaal Report, para. 204.
21/ Act No. 42 of 1925, secs. 32, 33.
that it was not inconsistent with existing South African legislation which applied to the Territory, and it was always subject to being overridden by subsequent South African legislation. Most important, the Constitution Act establishing the territorial government and its powers was subject to repeal, replacement, or amendment by simple act of the South African Parliament, which had created it.

Instead of an increase in the powers of the territorial government as the period of tutelage lengthened, precisely the opposite occurred: in 1969, following the Odendaal Plan, the South African Parliament removed legislative and administrative powers over 25 broad areas of activity—-from agriculture through censorship, corporations, domestic relations, mining and minerals, and social welfare to weights and measures—from the Windhoek government to Pretoria. As indicated below, the white government of Namibia now has substantially the same powers as the governments of the four provinces comprising the Republic—and they are acknowledged not self-governing.

As far as the Africans are concerned, it is true that the Odendaal Plan proposes some increase in self-government for them over the present

22/ *Ibid.*, sec. 44 (2); sec. 44 (6), following substitution of a new sec. 44 by Act No. 23 of 1949, sec. 22. Section 37 (6) of the current South-West Africa Constitution Act, No. 59 of 1968, preserves the same provision.

23/ Act No. 42 of 1925, sec. 44 (1); sec. 44 (4), following substitution of a new sec. 44 by Act No. 23 of 1949, sec. 22. Section 37 (4) of Act No. 39 of 1968 preserves the same provision.

Under the original sec. 44 (1) of Act No. 42 of 1925 the Governor-General also could override territorial legislation by proclamation. This power was abrogated by sec. 44 (3), added by Act No. 23 of 1949, sec. 22, and amended by Act No. 55 of 1951, sec. 1 (a).


25/ Infra, text at notes 47-52.
virtually non-existent level. However, in the most advanced situation envisaged in the legislation enacted to effectuate the Report's objectives, a Legislative Council may make "enactments" valid only within the specific "homeland" for which it is created on a very limited number of subjects set forth in a schedule appended to the Act. These subjects are characterized primarily by the fact that they shift to the Council responsibility for some of the most unpopular activities of government (issuance of identity documents ("passes"), maintenance of labour bureaux, imposition of capitation taxes and fees, and imposition of minor penalties for breach of Council enactments) and for some of the most costly functions (education, construction and maintenance of roads, bridges, waterworks, and sanitation works, and welfare services). No such enactment may become effective without the approval of the State President.

An analysis of the enactments to date of the Ovango Legislative Council, the only one presently in operation, shows that its only enactments have covered the adoption of annual budgets and special appropriations, the correction of typographical errors in the Council's rules of procedure, and the extension of certain salaries and allowances.

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26/ Development of Self-Government for Native Nations in South-West Africa Act, No. 54 of 1968 (hereinafter referred to as the "Native Nations Act").

27/ The State President may permit the Council to extend the effect of any specific enactment to "homeland citizens" residing outside the homeland but within the Territory. Native Nations Act, sec. 5 (1) (b).

28/ Native Nations Act, sec. 5 (2).

29/ Through May 1970.

30/ A Kavango Legislative Council has just been established. News from South Africa, 6 Nov. 1970 (pub. by Information Service of South Africa in the United States).
to headmen as well as chiefs. The regional, tribal, and community authorities of less advanced "native nations" may make enactments as to such subjects on the schedule as the State President may determine.

(b) **Integration with South Africa**

Self-determination prohibits the involuntary association of non-self-governing peoples with or their involuntary integration into any state; or, stated positively, it requires that association or integration come about only as "the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage..." Since only whites have the franchise in Namibia, it is clear

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32/ Native Nations Act, sec. 8.

33/ General Assembly resolution 1541 (XV), Annex, Principle IX (integration). See also Principle VII, relating specifically to association, which requires that the people of the territory should retain "the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes" and the right to determine their internal constitution without outside interference.

34/ The Odendaal Report stated that whites constituted 13.97% of the Territory's population in 1960 (para. 105). They constituted 15.73% in 1966 according to official estimates (Horrell, South-West Africa, p. 20). The South-West Africa Constitution Act, No. 39 of 1963, provides that members of the Legislative Assembly shall be elected by "duly registered voters of the territory..." Section 3 (1) of the Electoral Consolidation Act, No. 46 of 1948 (applied to Namibia by the South-West Africa Affairs Amendment Act, No. 23 of 1949, sec. 34), provides that persons eligible to be registered as voters shall be white.

It should be noted that non-whites may in some cases be entitled to
that the peoples of the Territory are being denied by the South African administration in Namibia the exercise of their right to self-determination in respect of the vital question of the relationship between the Territory and the Republic.

This denial of self-determination has become increasingly grave as indications have grown that South Africa is in the process of gradually incorporating Namibia into the Republic as a fifth province: a goal which has been openly espoused by many in and out of government since the end of the First World War.

The process of gradual incorporation is being achieved in such a piecemeal fashion, accompanied by such public protestations to the contrary, that leading commentators on South African law have referred to the constitutional status of the former mandate as unclear.

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vote for "homeland" officials of their own "race". But they are not eligible to vote in parliamentary elections, and, as indicated above under "Self-Government", Parliament has absolute power to determine the relationship between the Republic and its former mandate.

The term "South African administration (in Namibia)" is used in this statement to refer to the officials, civil and military, of the Republic and of the various Namibian governments [see Infra, pp. 13-19] who occupy, legislate for, or administer the Territory, or any portion thereof.

Republican officials include: the State President; Parliament, including the Prime Minister and the other Ministers and Deputy Ministers; the territorial Administrator; the Supreme Court (Appellate and South West Africa Divisions); the subordinates of the foregoing (including officers and employees stationed in Namibia, such as the Bantu Commissioners); the South African Defence Force, police, special branch (i.e., secret police), and various paramilitary organizations (e.g., the Commandos); and, where relevant, various South African government corporations (e.g., South African Airways) operating in the Territory and quasi-governmental institutions and organizations (e.g., Council on Scientific and Industrial Research (CSIR)).

On the one hand, the Prime Minister indicated, in a not totally unambiguous statement, that the changes to be made under the Odendaal Plan would not involve any question of incorporation or of change in the international status of the Territory. Section 1 of the South African Constitution, drafted before the decision in the South West Africa Cases and the adoption of the Odendaal proposals but unchanged since, defines the Republic as composed of the four provinces (the Cape of Good Hope, Natal, the Transvaal, and the Orange Free State) which comprised the Union immediately prior to the commencement of the Act, and does not mention the Territory. And despite the devolution of legislative power from Windhoek to Pretoria, it remains true that Acts of Parliament do not apply automatically to Namibia, but must be made expressly applicable thereto. (However, the amount of such legislation applied or extended to Namibia is increasing rapidly: a fairly complete count of Acts of Parliament which have either been enacted since the adoption of General Assembly resolution 2145 (XXI) and made expressly applicable to Namibia or which, though enacted earlier, have been extended to Namibia since that date, numbers 103—or about the full legislative quota for one session of Parliament.).

38/ Government Decisions, para. 3.
40/ See supra, text at note 24.
41/ If an act is made specifically applicable to Namibia, amendments to the Act apply automatically to the Territory without being specifically made applicable thereto. See R. v. Ntoni, 1961 (3) S.A. 507 (S.W.A.), effectively overruling R. v. Neibas, 1958 (4) S.A. 319 (S.W.A.).
Further miscellaneous evidence may be cited to the same effect:

(i) South African official statements continue to refer to the Republic's "administration" of the Territory. (ii) Until recently at least, South West Africa came under the Ministry of Foreign Affairs. (iii) As late as 1962 the South African Minister of Finance entered into an "agreement" with the Administrator of South West Africa concerning the avoidance of double taxation which was far closer in tone and subject-matter to a treaty than to a simple arrangement between department heads or a contract between government corporations or quasi-government institutions.

On the other hand, day-by-day political and legal developments all seem to indicate that an inexorable process of incorporation is well advanced.

Thus, under legislation cited above, inhabitants of Namibia have been involuntarily made South African citizens, and white inhabitants have been given representation in Parliament.

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43/ The end of 1967.


45/ See the Windhoek Advertiser's journalistically worded summary of the effect of changes implementing the Onderstepoort Plan:

The right perspective was that rearrangement (i.e., of legislative and administrative functions between the South African and South West African governments) amounted to financial, administrative and political incorporation without offence to international law. It was a step, a long step, towards constitutional incorporation. [3 April 1970]

46/ Supra, note 5.
Further, the powers of the territorial Legislative Assembly\(^{47}\) have been reduced, for all practical purposes to those of a provincial Legislative Council. This similarity is not immediately apparent through a comparison of the statutes involved since the South African constitution specifically sets out the powers of the provincial councils, leaving all the remaining ones\(^{48}\) vested in Parliament\(^{49}\), whereas the South West Africa Constitution Act specifies the powers (vis-a-vis Namibia) vested in Parliament, with the territorial legislature having residual powers\(^{50}\).

However, a comparison of the legislative powers which, according to the Odendaal Report\(^{51}\), are to be left to the Territory's Legislative Assembly with those assigned to the provincial councils shows their substantial identity. And it should not be overlooked that the South West/Affairs Act transferred not only vast legislative powers, but also the administration of the same subject-matter from the territorial government to the appropriate South African ministries\(^{52}\).

\(^{47}\) Again it should be emphasized that the territorial Legislative Assembly has jurisdiction over the "white area" only (and in certain cases over whites located in other "homelands"). (See below under "Territorial Integrity"). However this is generally true of the provincial councils also under "separate development" in the Republic. In both province and Territory the "white government" is dominant. The comparison, therefore, is valid.

\(^{48}\) Save powers over such intrinsically local matters as Parliament may deign to let the provinces exercise.

\(^{49}\) Republic of South Africa Constitution Act, No. 32 of 1961, sec. 64.

\(^{50}\) South-West Africa Constitution Act, No. 39 of 1968, sec. 22 (1), as amended by the South-West Africa Affairs Act, No. 25 of 1969.

\(^{51}\) Para. 232.

\(^{52}\) South-West Africa Affairs Act, No. 25 of 1969, sec. 19 (1), and appended schedule.
In addition to the transfer of legislative and administrative powers to the South African government, there has been an accelerating trend towards the merger of Namibian institutions and services into their South African counterpart. Although this started early with the vesting of South West Africa Native Reserve Land in the South Africa Native Trust, and the merger of the South West Africa Police into the South Africa Police Force, it has continued in the post-Odendaal period with the merger of the South West Africa Land Bank into the South Africa Land Bank and of the public service pension funds of South West Africa into the newly created Provincial and the Territory Service Pension Fund. Apparently in line with the same trend, separate trade statistics are no longer issued for Namibia.

(c) Territorial Integrity

The South African government makes no secret of its total, unqualified opposition to territorial integrity for Namibia. It has, however, attempted to couch that opposition in terms acceptable to the international community -- even when the effect of so doing was to throw doubt on the efficacy of its fifty years of tutelage in the Territory.

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54/ Land Bank Amendment Act, No. 31 of 1969.
56/ But this may reflect, at least in part, an intention to make it more difficult to bring pressure to bear on the Republic vis-a-vis Namibia by obscuring useful data.
Thus the Odendaal Report stated that the population of Namibia consists of "twelve different population groups" with varying physical characteristics as well as varying traditions, customs, language, religion, level of development, and social, political and economic systems. "If such divergent groups were to be represented in one central authority, the Commission foresees endless friction and clashes between groups..." In particular, after noting that some of the groups seemed to harbor "strong feelings" against other groups and would prefer to live with members of their own group, to the exclusion of others, the Commission pointed out that the Ovambo represent almost half the population of the Territory and "would completely dominate" the other groups under any system of one man/vote.

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57/ Para. 105. The groups are: Bushmen; Damara; Nama; Basters (Rehoboth); Coloured; Whites; Herero; Kaokovelders; Ovambo; Okavango; East Caprivians; Tswana and Others;

It should be noted that the Rehoboth Basters are in fact a special group of Coloureds, who have a communal history of more than a century, dating from the time they were denied land titles in the northern Cape Province and thereupon trekked into South West Africa to found a new community.

For certain administrative purposes the Nama are sometimes classified as Coloureds. See, e.g., South-West Africa Constitution Act, No. 39 of 1968, sec. 22(1) (g) (as substituted by Act No. 25 of 1969, sec. 14 (g)), (y) (added by Act No. 25 of 1969, sec. 14 (d)).

58/ Para. 186.

59/ Para. 187. This observation, if intended to represent a very general attitude on the part of Africans, appears contradicted by the information presented in Tables XIX and XX (para. 146) of the Report showing the distribution of population in home areas: obviously members of different population groups are now living peaceably side by side in the existing reserves and urban locations.

60/ Emphasis added.

61/ Para. 188.

62/ Para. 189.
Finally, the Commission added that the non-white groups, had little experience with the highly complicated economic and political systems of the whites. If any such system were put into effect for the entire Territory, therefore, a general lowering of the standards of administration and government would result, as well as a hampering of the whites, "to whom the Territory mainly owes its economic progress, to such an extent that development and progress in the Territory would be seriously retarded."62 The Commission concluded that it believed that

one central authority, with all groups represented therein, must be ruled out and that as far as practicable a homeland must be created for each population group, in which it alone would have residential, political and language rights to the exclusion of other population groups, so that each group would be able to develop towards self-determination without any group dominating or being dominated by another.63

The South African government is in the process of carrying out this recommendation. It has established homelands for the various non-white groups, except the Coloureds.64

The African homelands correspond in large part to the "native reserves" established at the end of the First World War and modified from time to time by the mandatory power.65 The entire remainder of the Territory, 66

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62/ Para. 189.
63/ Para. 190.
64/ See maps copied from Odendaal Report and appended to this statement.
approximately 60 per cent of the total land surface, constitutes the "white area". (As in the Republic, the (relatively small number of) Coloureds are admitted not to have any "homeland", and none is projected for them; they are to be concentrated in a number of townships, which they will manage, and in a rural area along the Orange River.)

It should be noted that the "national" self-determination which the Odendaal Report holds out for the various population groups -- if it has any meaning at all -- requires for its realization exactly the political, economic, and technical development and sophistication which

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66/ Id., para. 425. The allocation of land under the Odendaal Plan is summarized as follows, with all areas not listed as reserves being in the white area:

<table>
<thead>
<tr>
<th>Percentage of land</th>
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<tr>
<td>Towns and township areas</td>
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<tr>
<td>Farms and government lands (including emergency grazing areas)</td>
</tr>
<tr>
<td>Reserves for Coloureds and indigenous inhabitants</td>
</tr>
<tr>
<td>Walvis Bay area (excluding township)</td>
</tr>
<tr>
<td>Game and nature parks</td>
</tr>
<tr>
<td>Diamond areas</td>
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Horrell, South-west Africa, page 40 (South African Institute of Race Relations 1967).)

67/ The heart of the white area lies in the Southern Sector or "Police Zone", which has been separated since the time of the German Protectorate by the so-called "Red Line" from an inverted-U shaped Northern Sector. [See Odendaal Report, paras. 94 ff. and map appended to this statement.] Whites have never been allowed to settle in the Northern Sector, and Africans from that area have been treated virtually as aliens in the Police Zone. [See, e.g., Extra-Territorial and Northern Natives Control Proclamation, No. 29 of 1932.]

The boundary between the two sectors has been defined by a schedule appended to the Prohibited Areas Proclamation, No. 15 of 1919, replaced by No. 26 of 1928. The schedule itself has been repeatedly amended, as the Red Line has been pushed farther and farther north to accommodate land-hungry white farmers and mining interests. [See government Notices 103 of 1933; 83 of 1939; 126 of 1950; 375 of 1947; 255 of 1950; 2 of 1953; 198 of 1954; 14 of 1956; 21 of 1957; 38 of 1959; 3 of 1961; 22 of 1961.] The expansion of the African homelands recommended by the Odendaal Report must be read in the light of the earlier expansion by whites into the northern lands supposed to have been reserved for Africans.

the Commission found the non-whites lacked and felt alien to themselves; yet a key reason for the separation of the groups was that the non-whites lacked such development. Thus the denial of territorial integrity not only prevents the attainment of self-determination as the General Assembly has defined it in theoretical formulation, but even in terms of the premises of the Odendaal Report.

This conclusion is confirmed not only by the kind and scope of self-government which the South African government has provided for the most "advanced" African homeland69/, but also by the homelands themselves: They are too small for the population to be carried70/, they are, in general, not suited to successful farming or grazing and lack adequate water supplies in most cases71/; and they contain relatively few of the Territory's (known) exploitable mineral deposits72/.

(d) National Unity

National unity, that is, equality of treatment or lack of discrimination (racial or otherwise), is the last aspect of the right of self-determination particularly applicable to Namibia.

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70/ According to the Odendaal Commission's own figures, the 83.06% of the population that is non-white [Para. 105] is assigned only 39.68% of the territory's land surface [Supra, note 66].
71/ See the discussion of the proposed homelands by a South African geographer, Wellington, South West Africa and Its Human Issues, pp. 412-16 (Oxford 1967). A photocopy of these pages is appended to this statement.
72/ See the map of mineral distribution which is appended to this statement. The appended map showing the African homelands proposed in the Odendaal Report illustrates another shortcoming of the homelands: none of them has any seacoast or seaport. This lack will certainly inhibit the development of trade and commerce so necessary for a viable economy and therefore for meaningful self-government. But it serves the purpose of an occupying power which does not want the people under occupation to have contact with outside ideas and influences or to obtain assistance for their attempts to end the occupation.
The pervasive and gross racial discrimination in Namibia, officially sanctioned and indeed prescribed by the South African administration during the mandate, constituted a fundamental and continuing breach of South Africa's obligation to promote the well-being and social progress of the people of the Territory. And its continuance under the illegal South African administration constitutes a continuing denial of the right of self-determination. Such discrimination occurred in every phase of life, every kind of activity, from labour to education to travel; evidence of such discrimination was presented to the Court in extenso in the South West Africa Cases.

Apparently in an attempt to mute criticism on this score, the Odendaal Commission, following very closely the rationale of "separate development" in the Republic, proposed a kind of national unity at the expense of territorial integrity: i.e., the development of various "group" ("national") homelands in each one of which members of the appropriate group would have exclusive residential, political, and language rights.\(^{73/}\)

It is clear that this proposal can give rise, at best, to a kind of group equality or non-discrimination, operative in a limited area only. The individual who wishes, for any reason, to live or act apart from his group has no rights anywhere in the Territory except in a homeland where he may choose not to be.

\(^{73/}\) Odendaal Report, paras. 190, 213, 249, 415. And see supra, "Territorial Integrity".
However, all the evidence indicates that there is no real group equality either. Thus the administration has allocated 60 per cent of the land area, including much of the best farm land, all significant diamond areas, all ports, and most known mineral-rich areas, to the 16 per cent of the population that is white. When there is technical equality among groups, it is all too often of the sort attributed to the law, which deals even-handedly with rich and poor: both are free to sleep under bridges. Thus whites (not on official business) must have permission to enter (at least some) African homelands, just as Africans must have permits to enter the white area; but few whites have urgent personal reasons to go to the African areas, whereas most African males must go to work in the white area in order to survive, and their families will be separated from them for the duration of their work contracts unless they are allowed into the white area with them. An African working in the white area is rightless, subject to the will of the people who established the whole structure of discriminatory laws and practices; but a white in an African homeland, although technically rightless, remains a member of the racial group which dominates the Republic and may well be capable of persuading the administration to apply punitive measures to any African who would take advantage of the white's temporary rightless status.

Finally, it should be pointed out that only whites have representation in Parliament, where ultimate control of the rights of all groups and homelands is located.

74/ See Supra, text at notes 70-72.

75/ E.g., "banning" under the Suppression of Communism Act, No. 44 of 1950, or refusal to grant a "work permit".
Repression of opponents of the illegal administration

As has been indicated above76/, South Africa breached its mandate obligations by, inter alia, applying to South West Africa repressive legislation contrary to fundamental human rights and to the Rule of Law. It has continued to apply these same laws, as well as subsequently enacted ones of increasing severity, since the adoption of General Assembly resolution 2145 (XXI).

It has used these statutes, along with military, para-military, and regular and secret police forces in an attempt to suppress all existing opposition to its continued illegal occupation of Namibia and to its racially discriminatory policies.

In the course of applying such measures to Namibia, the administration has arrested and held in detention an unknown number of Namibians. Since representatives of the South African government refuse to answer queries even of Members of Parliament77/ concerning persons held under the Terrorism Act78/, there is no way of knowing who or how many persons are being detained, or where they are held or in connection with what alleged offense, until they "surface" usually either as defendants or witnesses in political trials. Thus, information about some 100-200 prisoners came to light with the first "terrorism trial" of S. v. Eliaser Tuhadeleni and [36] others79/. (This

76/ Supra, page 3.


78/ No. 83 of 1967.

trial took place in Pretoria, where the defendants had been detained -- some for as long as 300-400 days in solitary confinement\(^{80/}\) -- although they were all Namibians, arrested in Namibia.) As is pointed out in the 1970 report of the Council for Namibia\(^{81/}\), such trials are continuing, with some of them apparently being held in secret.

The opposition which the South African government has tried to suppress by these and other repressive measures has by this time been transformed into a liberation movement, attempting by all means available to it to bring about the termination of the illegal South African occupation in Namibia. It has been recognized by the Organization of African Unity, and the General Assembly has requested all States to provide increased moral and material assistance to the people of Namibia in their struggle against foreign occupation\(^{82/}\).


Many allegations have been made concerning the maltreatment of detainees held under the Terrorism Act, but they are hard to establish, since no one - neither family nor lawyers nor doctors nor ministers of religion - is entitled to have access to the prisoners until they are charged. In a most unusual situation a witness who surfaced in the Tuhadseni case, sought an injunction to prevent the torture of another detainee known to be held at the same time, and a court entertained the proceeding. Subsequently, after a series of surrealist adventures, the detainee, Gabriel Mhindi, an elderly gentleman, sued the government for damages for mistreatment. The action was ultimately settled out of court, by a payment of a generous sum for his "legal costs", but without any admission of fault on the part of the government. This is a standard method in South Africa of handling actions for damages for mistreatment in detention if it appears that the plaintiff may be able to prove his charges.


\(^{82/}\) General Assembly resolutions 2517 (XXIV) and 2555 (XXIV).
Legal Consequences for States

Laws and Acts of South African Administration Invalid

As has been set forth above, the South African presence in Namibia is unlawful, ultimately as a violation of the obligation implicit in the mandate to withdraw from the Territory upon forfeiture (by reason of its own continuing material breach, amounting to repudiation of the contract) of its conditional right to occupy, legislate for, and administer Namibia.\(^\text{63/}\)

It is unlawful, consequently, as an occupation of foreign territory without right or justification cognizable in international law, and as a forcible denial of the right of self-determination which the international community, speaking through the United Nations, recognizes as appertaining every non-self-governing people or country. Finally, it is unlawful as a continuing defiance of the General Assembly and Security Council resolutions calling on South Africa to withdraw from Namibia and to yield the administration of its former mandate to the United Nations Council for Namibia.\(^\text{64/}\)

It follows that the South African administration from and after the adoption of General Assembly resolution 2145 has been based solely upon an unlawful usurpation of authority and has been maintained solely by force. It cannot, therefore, be considered either a \emph{de jure} or \emph{de facto} government, but a mere naked occupier; and any constitutional or legal provisions under which it purports to be present or to act in Namibia are void. Further, all its legislative, executive, administrative, and judicial acts,

\(^\text{63/}\) General Assembly resolution 2145 (XXI).

\(^\text{64/}\) Security Council resolutions 245 (1968); 246 (1968); 264 (1969); 269 (1969); 276 (1970); 283 (1970); 284 (1970). And, \textit{inter alia}, General Assembly resolutions 2325 (XXII) and 2372 (XXII).
being derived from an illegal and void source of authority, are likewise void and without effect.\footnote{See, e.g., Security Council resolution 276 (1970), oper. para. 2.}

The only laws of Namibia which are now valid and in effect are those which were lawfully enacted while the mandate was in force and were consistent with the terms of the mandate and of the United Nations Charter. Until a lawful government is established by the people of the Territory, the Council for Namibia, acting under the powers conferred upon it by the General Assembly, may repeal, replace, supplement, or amend, such laws by its own laws, decrees, or administrative regulations promulgated \footnote{See General Assembly resolution 2248 (S-V), establishing the Council for Namibia (then South West Africa).} ad interim. Subsequently the new government of Namibia will become the sole source of new national law.

In the meantime, all laws other than those described above as being valid and in effect in Namibia are not part of the territorial law and have no application in Namibia.

\textit{Schema}

The principal consequences for States of South Africa's continued presence in Namibia follow necessarily and automatically, by operation of law, from the fundamental propositions that that presence is unlawful and

\footnote{"Laws" include Acts of Parliament, proclamations, territorial ordinances, sub-legislation under the foregoing, and administrative and judicial interpretations thereof.}
in defiance of the United Nations, and that all laws and acts of the illegal regime are void and of no effect. They are discussed below under the following general headings:

- duties of States vis-a-vis the illegal regime;
- duties of States vis-a-vis the Council for Namibia;
- duties of States vis-a-vis the people of Namibia;
- duties of States in relation to claims deriving from the illegal regime; and
- duties of States vis-a-vis persons who, in the course of private transactions, submit to the jurisdiction of the illegal regime.

**Duties of States vis-a-vis the Illegal Regime**

As a necessary response to the fundamental propositions set out in the preceding paragraphs, all States have the correlative duties to treat the South African administration in Namibia as illegal and its acts as void, and, conversely, to refrain from any action which could be deemed to recognize that administration as legitimate and/or its laws as valid or effective. Since the primary (and traditional) means of treating a regime as illegal is to deny recognition, it follows that fulfillment of these duties for the most part requires basically negative acts of abstention from customary modes of conduct amounting to or implying recognition.

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88/ There is some overlapping of consequences under these headings.

89/ "Acts" is used in this statement to include legislative, executive, administrative, and judicial acts.
- Denial of claims to territorial jurisdiction

Thus, fulfillment of these duties requires, in the first instance, denial of South African claims to territorial jurisdiction, in particular to physical boundaries including Namibia, Namibian territorial waters\(^{90}\), and Namibian air space.

- Denial of claims to legal jurisdiction

It also requires denial by States of South Africa’s claims to legal jurisdiction over Namibia. This entails in the first instance refraining from accrediting diplomatic or consular representatives to the illegal regime, i.e., to South Africa (or, in some cases of consular representatives, to a portion thereof) including Namibia\(^{91}\). "Honorary" consuls or agents, however minimal or purely formal their functions, are covered. It entails, in addition, refusal to recognize any purported international representation of Namibia by South Africa, whether in international organizations, in treaty negotiation, in commercial or other quasi-private dealings between states affecting Namibia, or otherwise\(^{92}\). It also entails the refusal

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\(^{90}\) See Territorial Waters Act, No. 87 of 1963, esp. secs. 1 (iii), 8.


\(^{92}\) E.g., States should refuse to recognize the right of South Africa, purporting to act on behalf of Namibia (to protect Namibian boundary claims), to intervene in the negotiations between Zambia and Botswana for the improvement of ferry connections across the Zambesi River at Kasungula as part of an international highway system between the two States. Representation of Namibian rights in the matter should be undertaken by the lawful authority, the Council for Namibia. See New York Times, 19 April 1970, p. 11, col. 1; 1 June 1970, p. 16, col. 1.
to recognize the validity of South African passports issued to Namibians or of South African visas issued for entrance into or residence in Namibia.

Denial of South Africa's claim to legal jurisdiction also requires the refusal to extend to Namibia any treaty to which South Africa is a party or to take any action affecting Namibia under any treaty extended to Namibia. Although the extension to South West Africa prior to the adoption of resolution 2145 of a treaty to which South Africa was a party was not, and is not, necessarily invalid, any act of the South African administration after the termination of the mandate by which it purports to represent Namibia or to deal with Namibian matters in connection with application of the treaty must be deemed void and of no effect. Thus a current request by the South African government under an extradition treaty extended to South West Africa before termination of the mandate for the extradition of a person wanted for a non-political offense allegedly committed in Namibia even before termination of the mandate could not be honored since the Republican government is no longer the lawful authority in the Territory.

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95/ An incomplete survey of official publications shows that South African extradition treaties with at least 28 countries were extended to South West Africa prior to the Second World War. An extradition treaty with the United States was extended to South West Africa in 1951 (United Nations Treaty Ser., vol 151, no. 1951), and an extradition treaty with Israel, extending to South West Africa, became effective in 1960 (Proclamation No. R. 14 of 1960, So. Af. Gaz. No. 6362, 5 Feb. 1960).
Denial of the claim to legal jurisdiction also entails refraining from any transaction with the South African administration relating to Namibia\textsuperscript{26/} (such as, for example, the purchase of strategic materials found or produced in the Territory); refraining from any resort to the invalid laws of the Territory\textsuperscript{27/} (as suing in a Namibian court); and refraining from undertaking any joint ventures - military, economic, scientific, or other -- with the illegal regime, whether within or without Namibia\textsuperscript{28/}. "Joint ventures" include such diverse activities as, inter alia, training of a police or military officer of the illegal regime in a military or police academy of any State; cooperation in development projects such as the damming of the Cunene River; operation of a satellite tracking station, either jointly or otherwise by permission of the illegal regime, in Namibia or with Namibian personnel; cooperation in the use of atomic energy or the development of nuclear power stations in Namibia; and joint or cooperative studies of the migration of fish or birds of interest to Namibian authorities. The term should be interpreted to cover not only the activities of governments, but also of government ("proprietary") corporations and quasi-governmental or mixed government-private institutions and organizations, as well as of representatives and agents of all the foregoing.

It should be pointed out that a failure by a State to fulfil the obligations entailed by the duty of non-recognition would constitute a breach of its international obligation to respect the autonomy, territorial integrity, and fundamental rights of Namibia. The obligation to uphold the principles accepted in the Mandates System and elaborated under the Charter of the United Nations requires all States to recognize only the valid ad interim administration of the United Nations pending the establishment of a self-governing Namibian State.

- Duty not to strengthen de facto control of Namibia

The duties of States vis-a-vis the South African administration in Namibia are not limited, however, to the various kinds of actions set out above, which are more or less traditionally associated with non-recognition of an illegal regime. Since South Africa has dishonored an international trust and usurped the authority of the United Nations, which represents the international community and every member thereof, all States have an additional duty not to strengthen the de facto occupation force.

This duty entails, in the first instance, refraining from any action which will or may, directly or indirectly, strengthen the illegal regime militarily (against external or internal threat), economically, psychologically, administratively, or otherwise.

Actions from which States should refrain as strengthening the regime militarily include, first and foremost, the delivery of any kind of arms.

22/ Including the licensing or private manufacturers or dealers to deliver.
or munitions to the South African administration. "Arms and munitions" should be deemed to include spare parts and machinery convertible to military or paramilitary use or to police work, as well as patents, technical know-how, etc., related in any way to objects used for or activities involving the maintenance of the South African presence in Namibia or the suppression or repression of opponents thereof.

In addition, States should refrain from all activities or projects which might, in other circumstances, be considered essentially civilian in nature, but which can be turned to military use or advantage by the illegal regime. Among the more obvious examples are: civil aviation projects; collaboration in atomic and rocket or satellite science; and cooperation in riot control projects.

In this connection, it should be pointed out that it is, as a practical matter, impossible to strengthen the Republic proper (i.e., excluding Namibia) militarily without in fact strengthening its de facto control of Namibia since no State supplying arms or munitions to South Africa can control their use once they have been turned over to the Republic; even if South Africa would honor a commitment not to use in Namibia any arms or munitions delivered to it, the delivered weapons would have the effect of releasing existing weapons for use in the Territory, to maintain the illegal regime by force. The same caveat applies to so-called external defensive weapons: under the most favorable circumstances (from the standpoint of the United Nations), the delivery of such arms and munitions to South Africa would result in the release of some (alternative) weapons useful for maintaining the illegal regime in Namibia.
Actions from which states should refrain as strengthening the regime economically include, *inter alia:* those which aid the development of Namibia while it remains under South African administration; those which make possible increased Namibian trade; and those which result in increased revenues for the regime, through taxation or otherwise.

In specific terms, States should refrain, *inter alia,* from licensing or granting landing or similar rights to air and/or shipping lines which are controlled by the illegal South African administration or which serve Namibia. Since the services of and revenues from air and shipping lines serving Namibia contribute to the development of the Territory (and therefore strengthen the South African presence there), States should take all steps within their power to prevent air or shipping lines subject to their control from rendering such services or gaining such revenues.

Furthermore, air or shipping lines controlled by the South African administration (whether directly as government corporations or indirectly as mixed government-private organizations or as private organizations operating under license from the illegal regime) constitute, at law, creatures of the government and are tainted by its illegality. If there are any South African air and shipping lines which do not serve Namibia, they should also be denied licenses and/or landing or other rights on the ground that they contribute revenues to the South African government, which is thereby further enabled to maintain its illegal presence in Namibia.

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100/ Or continuing the licenses or the landing or similar rights of such air or shipping lines.
In order to avoid strengthening the regime economically States should also refuse to accept mail\textsuperscript{101}, radio, telephonic, or telegraphic communications originating in or transmitted via "Namibia"\textsuperscript{102}. Since all such communications are handled by the Posts and Telegraphs Ministry of the illegal regime, it follows that the refusal to accept such communications will also constitute an act of non-recognition.

Similarly, States should refuse to accept or otherwise to deal in any way with any financial obligations of any type issued by or under the control or license of the illegal regime. States should also direct their central banks and all other publicly controlled financial institutions not to accept or to deal with any such obligations and not to clear or to deal with any document or instrument cleared through the central bank or through any other publicly controlled or licensed bank of the South African administration. Such action is also required by the duty of non-recognition discussed above.

To avoid strengthening the illegal regime economically States should also refrain from trading or dealing with the South African administration or any of its creatures or with any person (natural or corporate) who supports the regime through the payment of fees or taxes levied on the right to engage in such business, on the transaction, on the acquisition or processing of the goods involved, or on the profits therefrom. Again, such action is also required by the duty of non-recognition: States may not recognize the regime by trading with it, its creature, or its licensee. Furthermore, the

\textsuperscript{101} Until recently mail from Namibia bore South West African stamps; now it bears South African postage.

\textsuperscript{102} The extent to which this duty can be applied to electronic communications depends on the degree of control of the State over communications companies. Generally, communications are a state monopoly; in most other countries communications companies are at least subject to licensing requirements and therefore, at least minimally, to government policy guidance.
acts of the illegal regime in purporting to issue licenses or to levy taxes are, in legal effect, void and therefore not cognizable by States.

Actions from which States should refrain as strengthening the illegal regime psychologically include all which encourage the supporters of the regime, which discourage its opponents and inhabitants of the Territory, and all which approve or accept (or seem to approve or accept) the regime, its defiance of the United Nations, and/or its official policy of racial discrimination and other denials of human rights.

Actions from which States should thus refrain include, inter alia, inviting public officials, professional persons and teachers, business people, sportsmen, artists, and cultural leaders, etc., from Namibia to engage in national or international meetings or seminars, lecture or "leadership" tours, personnel exchanges, special training programs, demonstrations of products, skills, or devices, or for other similar purposes. Conversely, States and public institutions should in no case accept or, to the extent they have power to do so, permit their officials, agents, or representatives to accept similar invitations issued by the South African administration or by any other State or public or private institution or group if the invitation includes taking part in any such activities in the Territory. However admirable the particular cause or institution involved, issuance or acceptance of such an invitation will inevitably be used by the illegal regime to insinuate approval on the part of the States or of the persons that are involved: In South Africa there is no such thing as a purely

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103/ I.e., invitations issued by government officials or public institutions, such as state universities, government subsidized research projects, etc.

104/ They can at least control the actions of their officials acting in a public capacity or to the extent they cite their affiliation with a public institution.

105/ Such an invitation can also be used to indoctrinate citizens of other States so that they will come to accept or approve the illegal regime.
personal act on the part of any person whose name carries weight either domestical-
y or abroad, as a perusal of *News from South Africa*, the weekly news letter of the South African Information Service, quickly reveals.

Another such type of action from which States have a duty to refrain is the granting or continuation of preferential treatment or arrangements of any sort covering the illegal regime in Namibia which seem to encourage or at least to fail to discourage its intransigence. Such arrangements include, *inter alia*, continuing "Commonwealth" commercial and tariff preferences and sterling bloc advantages, as well as special treatment of "Commonwealth" citizens and the elimination of visa requirements. The application of most-favored-nation tariff agreements is also involved. (Most of these arrangements, incidentally, also strengthen the regime economically.)

Since the economy of Namibia is now virtually completely integrated into that of the Republic, and the South African government controls the Territory's immigration and citizenship policies out of Pretoria, it is obvious that this duty requires States to give up all preferential arrangements with the Republic in order to prevent their automatic extension to the Territory.

Actions from which States should refrain as strengthening the regime administratively include all which would assist the South African administration in carrying out routine activities, as to which international cooperation would otherwise be the rule, including accepting communications from, answering requests of, waiving requirements for, and otherwise assisting representatives of the regime. Fulfilment of this duty would require

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106/ Inhabitants of Namibia (and the Republic) are also the targets of government public relations programs supporting official policy.
such diverse conduct on the part of States as refusal to make available to the illegal regime information, data, statistics, samples, designs, etc.; refusal to issue, authenticate, or certify original documents or copies; and refusal by courts to honor letters rogatory, testamentary, or of administration.

Again it should be pointed out that the duty of non-recognition of the unlawful regime requires exactly the same conduct.

- Duty to secure withdrawal of the illegal regime

The duty to prevent strengthening the illegal regime (as well as the duty of non-recognition) blends at some point into the duty to secure the withdrawal of the illegal regime. Conscientious fulfilment of the first of these two duties, in the ways set forth above, and by all other appropriate means, may be expected to bring considerable pressure on the Republic to withdraw from its former mandated territory.

In addition, it is clear that the duty to secure withdrawal requires the granting of "moral and material assistance" to Namibians engaged in an active attempt to expel the unlawful South African administration.

- Duties of States vis-a-vis the Council for Namibia

Most of the duties of States vis-a-vis the Council for Namibia are implicit in the resolution establishing it: to recognize it as the only lawful government (ad interim) of Namibia; to cooperate with and assist

107/ The discussion throughout is not intended to exclude other means, but to suggest the scope of the duties concerned and some of their most important applications.


109/ General Assembly resolution 2240 (S-V).
it in administering the Territory; and to that end, to help secure the withdrawal of South Africa from the Territory.

- Duty of recognition

Recognition of the Council as the only lawful government of Namibia (pending the achievement of self-government) entails in the first instance denying recognition to the illegal South African administration in Namibia, with all the consequences suggested in the preceding section, and granting recognition to the Council instead, despite its inability to administer Namibia from within the Territory.

In all cases in which there are rival claims, of or derived from the Council on the one hand, and of or derived from the South African administration on the other, it requires States to recognize the claims of or derived from the Council.\(^{110/}\).

In the particular case of travel and identity documents issued by the Council\(^{111/}\), the duty of recognition requires States to accord them the same recognition and acceptance granted prior to the adoption of resolution 2145 to documents issued to inhabitants of South West Africa by the South African administration. In the case of other activities carried on by the South African administration before the termination of the mandate, it requires States to hold void and of no legal effect such activities carried out by the illegal regime thereafter and to recognize the right of the Council to carry out any of such activities as it shall deem desirable and expedient to perform.

\(^{110/}\) As to uncontested claims deriving from the illegal regime, see infra, "Duties relating to Claims Derived from Illegal Regime".

Duty to cooperate with the Council

The duty to cooperate with the Council entails, in the first instance, recognition of its legal status as set forth above. Beyond that, however, and fundamentally, it requires willingness by all States, particularly those with vast resources and power, to serve on the Council and to contribute thereby to its effectiveness.

The duty also entails contributing financial, technical, and educational assistance to the Council and to Namibians in exile who are (or are potentially) capable of acting as public servants in a self-governing Namibia, in the same manner and to the same extent (in the light of the circumstances) as such assistance is granted to the governments of other developing countries.

Duties of States vis-à-vis Namibians

South African laws and acts affecting Namibia, being void and without legal effect, are not binding on Namibians. States, therefore have a primary duty to recognize the right of Namibians to resist the application of such laws and acts to themselves, their property, and their affairs.

Recognition of right to resist personal application of laws

This duty entails, first, the refusal by all States to assist any official of the illegal regime in applying any void law or act to any Namibian. In particular, this requires States to refuse to extradite Namibians to the Territory for otherwise extraditable offenses. (The duty of non-recognition also requires States not to take any action under an extradition treaty (legally) extended to South West Africa.) States bordering on South Africa or Namibia have a special obligation to prevent incursions across the frontier by South African officials (or by private
persons having an understanding with such officials) for the purpose of seizing Namibians and returning them to the Territory or to South Africa; when such acts occur, they have a duty to protest vigorously and to request the assistance of other States in presenting such protests.

In addition, this duty entails granting political asylum and necessary supportive services—educational, vocational, medical, and social welfare—to Namibians who have fled the Territory to escape the application to themselves of the administration's void laws and acts. Namibians who enter States as students or in special visa categories should not be threatened with deportation and/or otherwise harrased, but aided in obtaining extensions of or necessary changes in status when their circumstances change. States should not penalize them for their political opinions.

Moreover, States should grant assistance (by all means not prohibited by the Charter) to Namibians who are engaged in forcibly resisting the application of such void laws and acts to themselves and their fellow Namibians.

- **Recognition of right to resist laws applying to property.**

The duty of States also extends to the recognition of the right of Namibians to resist the application of the regime's laws and acts to their property, whether personal or public, and in particular to those of the Territory's natural resources which constitute wasting assets.

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113/ Such other States have, of course, a duty to assist in the presentation of such protests and to add their own.

114/ Including national art treasures, antiquities, etc.
This duty entails, in the first instance, a refusal by all States to recognize as valid any title to or interest in any property which was removed from its indigenous owner or from its natural situs in the Territory since the adoption of resolution 2145 if such title or interest was derived (immediately or ultimately) from the South African administration in Namibia. Conversely, States would be required to recognize title or interest derived from the Council in the case of any natural resource or other public property.

The duty also requires States to assist the Council in finding and recovering public property removed from the Territory under void laws.

**Duties relating to Claims Derived from the Illegal Regime**

Since the South African regime in Namibia is illegal, and its laws and acts are void and without legal effect, it follows that:

(i) No action taken under, in accordance with, or in pursuance of any such law or act can be justified thereby, compensated thereunder, or otherwise affected thereby; and

(ii) The purported creation, grant, confirmation, guarantee, abolition, termination, or modification by any such law or act of any right, title, power, interest, or obligation is void and without legal effect; and

(iii) Any official document issued under, in accordance with, or in pursuance of any such law or act is void and of no legal effect.

Consequently, States have a duty not to recognize any claims which are derived directly or indirectly, from the illegal regime, whether based

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115/ A claim is "derived from" the illegal regime if any necessary element or link in a chain of title or interest depends on a void law or act (through actions or documents of the sort described in (i) - (iii) or otherwise).
on acts of the sort referred to in (i) or (ii) above or on documents of
the sort referred to in (iii) or otherwise derived.

In this context "claims" is used broadly to cover every sort of positive
or negative claim or defense,117/, whether joint, several, beneficial, represent-
ative, or class, asserted by a State or any of its subdivisions, by its re-
presentative, agent, nominee, or licensees, or by a person or persons, whether
or not constituting a corporate body. It may be asserted in any kind of
action or proceeding, legal, equitable, civil, criminal, or administrative.
before a judicial, quasi-judicial, or administrative tribunal, before an
arbitral tribunal, or even before an executive official118/ or an official of
a public or quasi-governmental institution who has the power to make decisions
or awards which are normally binding on the claimant.119/ A claim (or defense)
may be asserted either directly, as in an action on a debt, or indirectly,
as in a proceeding to determine status, which may constitute a prerequisite
for an award or for further legal proceedings.120/

116/ Positive claims include, inter alia, counterclaims, cross-claims,
third-party claims, intervenor's claims, impleader, and interpleader.

117/ Negative claims or defenses include, inter alia, non fecit, demurrers,
res judicata, double jeopardy, justification, excuse, indemnification,
counter-claims, cross-claims, liability over, and interpleader.

118/ As in a request for a pardon.

119/ E.g., the admission officer of a school or a government purchasing
agent.

120/ E.g., to determine whether one is entitled to be placed on a list
from which appointments or promotions are to be made.
Without attempting to exhaust the endless catalogue of claims derivable from the illegal regime to which States are required to deny recognition, the following types may be listed:

- Claims arising out of or derived from judicial acts of the illegal regime, including:
  
  claims for the enforcement of judgments affecting Namibia or arising out of or derived from decisions, determinations, or findings which constitute a part of such judgments;
  
  claims arising out of or derived from decrees or judicially approved settlements in bankruptcy or compositions of creditors;
  
  claims arising out of or derived from decrees in matrimonial, filiation, adoption, and related proceedings;
  
  claims arising out of or derived from the settlement of dededents' estates and the handling of the estates of orphans and incompetents;
  
  claims arising out of or derived from notarial acts.

- Claims arising out of or derived from general administrative functions and activities of the illegal regime, including:
  
  claims arising out of or derived from decisions, determinations, findings, or decrees made or issued by administrative tribunals or officials and out of or from the implementation or enforcement thereof;
  
  claims arising out of or derived from grants and awards made by administrative tribunals or officials;

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121/ Includes judgments of Namibian or South African courts purporting to affect: any citizen or resident of the Territory, any person doing business in the Territory, or the South African administration in Namibia or any official thereof; or any real property located in the Territory; or any personalty originating, located, processed, or having a legal situs in the Territory or in transit into, out of, or through the Territory; or any transaction which takes place in the Territory or is governed by territorial law or would, as of the date of the adoption of resolution 2145, have been governed by territorial law.
claims arising out of or derived from the payment of fees, rents, and other moneys purportedly due to the South African administration by citizens or residents of Namibia, and by persons doing business in Namibia or under Namibian law;

claims arising out of or derived from the registration, authentication, or certification of documents, and/or the issuance of official copies thereof;

claims arising out of or derived from the collection and issuance of vital, economic, and other statistics and data.

- Claims arising out of or derived from the performance of specialized administrative functions and the operations of particular government agencies, including:

claims arising out of or derived from the payment to the illegal regime of taxes—purportedly due it from Namibian citizens and residents and persons doing business in the Territory or under Namibian law;

claims arising out of or derived from obligations issued by the illegal regime;

claims arising out of or derived from charters, contracts, or concessions issued by the illegal regime—;

claims arising out of or derived from corporate or other franchises and licenses issued by the illegal regime;

claims arising out of or derived from patents, copyrights, trademarks, and related rights conferred by the illegal regime;

claims arising out of or derived from the operation of postal (including postal savings), telecommunications, and radio services by the illegal regime in Namibia;

122/ Including payments denominated royalties, fees, or otherwise, but which in legal effect constitute taxes.

123/ In the United States a claim for approval of a stock issue may in effect hinge on the validity of the issuer's title to land and extracted minerals conferred by concession from the regime (in view of requirements as to full disclosure in prospectuses accompanying such a stock issue).
claims arising out of or derived from the operation of railways, harbours, air transport, and all other publicly or quasi-publicly owned and/or operated transport and ancillary services, including specifically the issuance of commercial paper in connection with the carriage of goods by such services or systems within Namibia;

claims arising out of or derived from the operation of government, quasi-government, or government licensed banks and related financial institutions;

claims arising out of the operation of public or publicly licensed schools and universities and other educational and training institutions.

Claims based on or derived from documents emanating from the South African administration in Namibia\(^{124}\), including:

- Official Gazettes, South African Law Reports, and other official publications and records, including authenticated, certified, or photographically reproduced copies thereof;
- identity and family documents;
- passports, visas, and related documents;
- charters and franchises (including corporate charters);
- diplomas and licenses;
- economic and vital statistics and cost-of-living, life expectancy, and related indices, tables, and data;
- deeds and registrations;
- patents, copyrights, and trademarks;
- (honorary) designations and titles granted by the administration and public or quasi-public governmental organizations and institutions\(^{125}\);

\(^{124}\) Including government and quasi-governmental institutions and organizations, such as public schools and universities, the Rehoboth Investment and Development Corporation, and the South West Africa Native Labour Association (SWANLA).

\(^{125}\) E.g., S.C. (State Counsel, replacing Q.C. or K.C.) and "Hon.," a designation which by proclamation in the Gazette a retired official is allowed to retain after leaving the office to which it pertains.
ship registrations and maritime licenses and certificates;

records, including statements and bankbooks, of publicly controlled banks, including the postal savings system;

public records of publicly controlled or licensed organizations and institutions;

receipts issued by the administration, its agents, representatives, or licensees;

certificates issued by the illegal regime and quasi-governmental organizations, including certificates of weight and measure, quality and quantity, contents, purity, health, origin, title, authenticity, competence, educational or professional achievement, etc.

In connection with the duty of States not to recognize claims based on, arising out of, or derived from the void laws and acts of the South African administration in Namibia, certain points should be stressed:

(1))"Claims" includes defenses: Thus, a divorce decree issued by a Namibian court should neither entitle the divorced spouse to marry (in a State which permits remarriage of divorced persons) nor constitute a defense in a proceeding for an annulment of a subsequent marriage.126/

(2) "Tax" payments (however designated) to a usurper cannot protect the taxpayer against claims of the rightful government (in this case the Council for Namibia ad interim and ultimately the new Namibian state) for payment of taxes on the same transactions, profits, etc. Such payments to the illegal regime may not be claimed as offsets under double taxation treaties lawfully extended to Namibia.127/

Moreover, tax payments to the unlawful usurper create no rights and therefore may not be allowed as proper business expenses.

126/ Assuming that the marriage is not automatically void.

127/ As has already been pointed out, States have a duty not to recognize the illegal regime by taking any action under any such treaty extension.
(3) Insofar as a concession was validly granted and the appropriate activities undertaken and the products thereof removed from Namibia prior to the adoption of Resolution 2145, it would appear that there could be no challenge to title or to the lawfulness of the activity (on any grounds considered in this statement). Claims relating to activities undertaken after the adoption of Resolution 2145, even though under a concession granted prior to its adoption, should not be recognized insofar as the activities depend on current government approval or the payment of current taxes for their effectuation. A concession obtained before the adoption of Resolution 2145 but renewed or amended thereafter should be deemed a new concession, which is void and of no legal effect.

- Duties vis-a-vis Persons Submitting to Illegal Regime

Citizens of States, acting in their private capacities, may in two closely related but not identical sets of circumstances submit to the jurisdiction of the illegal regime: (i) by engaging in traditionally private and personal activities, such as tourism, sports, or religious and charitable missions, and (ii) by engaging in activities, particularly trade with and investment in Namibia, which can be, and sometimes are (depending on prevailing State economic and political systems), carried on by State organs, by State controlled organizations, or by the private sector.

128/ Such activities may, of course, be organized or even prohibited by a State, but they can be engaged in only by individuals.

129/ Particularly activities discussed supra at pp. 32-35.

130/ Subject, in many cases, only to the general criminal law and to certain public health and safety regulations.
Submission to the jurisdiction of the illegal regime in such circumstances occurs when a citizen enters Namibia, takes part in any activity which is subject to licensing, regulation, or taxation by the South African administration, or otherwise admits that he is subject to the laws of the illegal regime in any undertaking or for any purpose whatsoever.

Such submissions to the jurisdiction of the illegal regime, while individually without legal effect, may cumulatively have the practical effect of enabling the regime to defy the United Nations more effectively by encouraging its proponents and demoralizing its opponents, as well as by providing it with economic support and advanced technology. States, therefore, have a duty to take all possible steps to see that their citizens—(a) do not submit to the jurisdiction of the South African administration in the course of personal or private activities of the sort described in (i) above, and (b) abide by all the prohibitions and restraints applicable to States' activities of the same sort vis-a-vis the illegal regime.

This duty entails, in the first instance, the direct and outright prohibition of such activities if, and to the extent that, that is possible. To the extent that the States' political and economic system make outright prohibition impossible, then such States are required to take the strongest possible measures to discourage such activities.

131/ In some cases the duty might extend to State residents who were citizens of another State or to other persons doing business in the State but not necessarily citizens (or even residents) thereof.
In the case of private and personal activities under (i), States have a duty to take such steps as prohibiting travel organizations which arrange segregated travel programs from continuing in business and refusing to permit representatives of the South African administration to solicit immigration. In addition, States have a positive duty to educate their citizens as to the nature and practices of the illegal regime.

In the case of activities under (ii), States have a duty to discourage such activities by, inter alia: appropriate information policies; withholding all forms of support and encouragement which might otherwise be granted to activities of the same sort (e.g., credit guarantees, loans, subsidies, government insurance, tariff preference and quotas, and tax benefits); refusal to recognize claims of persons arising out of such activities; and the application of each State's national anti-discrimination legislation to the activities of each State's citizens carried on in Namibia.

Conclusion

Due to South Africa's repudiation of its contract of mandate, recognized and acted upon by General Assembly resolutions 2145 (XXI) and 2246 (S-V), its presence in Namibia is no longer lawful and constitutes an unjustified seizure and occupation. This occupation is, moreover, characterized by a continuing denial of every significant aspect of the right of self-determination, which the Assembly has confirmed as the right of every non-self-governing

133/ Id., paras. 4-7.
134/ Id., para. 5.
people and country, and particularly of a territory constituting a sacred trust of civilization. The South African presence is perpetuated by force applied against the people of the Territory.

Since the regime in Namibia is illegal, a usurpation of authority, it follows that it is not entitled to recognition, in any form, by any State, and that States have, further, a duty to take actions designed to bring about an end to that usurpation. They also have the duty to see that their citizens, engaging in private activities, do not act so as to negate or mitigate the effect of official policy and conduct. States also have a duty to recognize and assist the only legal ad interim government of Namibia, the United Nations Council for Namibia, and to succor and support the people of Namibia who are subjected to the illegal occupation in their attempts to escape therefrom, to prevent the despoliation of themselves and their property, and to drive the usurper out of the country. Finally, since the regime in Namibia is unlawful, all its laws and acts are void and of no legal effect; States therefore have a duty not to recognize any claims of any sort based on, arising out of, or derived from any such law or act.

In discussing some of the implications and practical applications of the consequences for States (as summarized in the preceding paragraph), it should be emphasized that the examples given are not meant to be complete or exhaustive. They are intended merely to suggest the multiple and complex forms which State action should take in order to fulfill the obligations of States arising out of South Africa's continued illegal presence in Namibia.
Note on Citations to Laws


Ordinances of the territorial Legislative Assembly, proclamations affecting Namibia, and Government Notices, are taken from the Laws of South West Africa (published annually), unless otherwise indicated. Other sources (which are indicated) include the [official] South West Africa Government Gazette and the South Africa Gazette.