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Our gratitude is also due to those African scholars who have contributed articles or directly assisted in the production of the first volume. We hope to have their continued support for the publication of future volumes of the Yearbook.

FOREWORD

The publication of an *African Yearbook of International Law* has been in the making since the creation of the African Association of International Law (AAIL) in 1986. One of the objects of the Association is 'to foster the development and dissemination of African perspectives and practices of international law, in particular through the publication of an *African Yearbook of International Law* (AYIL)'. However, the idea was first advanced in the early seventies by the then Minister of Justice of Algeria, Mr. Mohammed Bedjaoui, now a judge of the International Court of Justice, who submitted a plan for the publication of a Yearbook to the Organization of African Unity.

It is therefore with great joy and pride that we announce ourselves to Africa, and the rest of the world, with this first and inaugural volume of the AYIL. The feeling of joy and pride is even greater in view of the fact that the publication of AYIL coincides with the United Nations Decade of International Law whose purpose is to promote a wider acceptance and appreciation of international legal norms and principles.

The nations of Africa, like others in the world, have exerted a significant influence on the development of international law; while international legal rules have had a profound impact upon their own evolution. However, unlike other nations, they have not so far disposed of an intellectual forum whereby issues of international law as they apply to Africa, as well as Africa's contribution to the progressive development of international law, are systematically analyzed and scientifically dissected. The AYIL is meant to fill this void. As such it is hoped that it will contribute to the promotion, acceptance of and respect for the principles of international law, as well as to the encouragement of the teaching, study, dissemination and wider appreciation of international law in Africa.

In this, as well as in its subsequent volumes, the AYIL will strive to present the African perspectives and practices of international law in a systematic and scientific manner in order to contribute to the broader development of international law. A clear articulation of Africa's views on the various aspects of international law based on the present realities of the Continent as well as on Africa's civilization, culture, philosophy and history will undoubtedly contribute to a better understanding among nations.

The peoples and States of Africa are currently going through a difficult period of their existence and development. The hopes and expectations raised by the emergence into independent nationhood during the past three decades have encountered the hard realities and demands of nation-building, consolidation of Statehood

and promotion of economic and social development. In some instances, fragile economic and social structures and State institutions have buckled under burdensome pressures.

Civil conflicts have broken out in a number of countries leading to the breakdown of the apparatus of government and, in certain cases, the disappearance or eclipse of the State. The case of Somalia is a prime example, but not the only one. This phenomenon needs to be studied in order to draw some lessons from it in the continuing struggle for the consolidation of Statehood in the Continent. It is hoped that the AYIL will play an important role in this regard by examining the tensions underlying the State in Africa, and by shedding more light on the causes of the fragility of African State institutions so as to facilitate the identification of appropriate remedies. The tension and inter-relationship among issues such as territorial integrity, self-determination, ethnic diversity and nation-building will be addressed constantly. Development, human rights and democratization in Africa will also be the subject of continuous attention and examination.

The structure of the first volume – consisting of a special theme, individual articles, notes and comments, book reviews and basic documents – will be followed to the extent possible in future volumes; but will also be constantly improved with the addition of new features and areas of study.

It is our fervent hope that the AYIL will attract more contributions in the future from African international lawyers currently teaching or practising in Africa. Most of those who have toiled to make this first volume a reality are now working outside the Continent. They are, however, all determined to see to it that this intellectual forum will serve first and foremost the teachers and practitioners of international law in Africa. It is also our ardent desire to find a permanent home for the Yearbook in Africa, and to 'repatriate' it. With the winds of change actually sweeping through Africa, and the intellectual energy that keeps gathering strength within the Continent, these hopes and desires will certainly not be delayed for much longer.

Abdulqawi A. Yusuf
New York, June 1993

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NAMIBIA AND INTERNATIONAL LAW: AN OVERVIEW

Georges Abi-Saab*

There are several reasons to explain why Namibia is the opening chapter of the *African Yearbook of International Law.*

Not only is international law in Namibia one of the oldest African problems which haunted the United Nations (UN) since its inception and which took four and a half decades before it could be brought to a successful conclusion – revealing in the process how the international legal system works and how concepts and methods evolve in response to a changing political environment – but also the handling of the case, particularly during its final phase – that of the implementation of the UN Peace Plan for Namibia (which is analyzed in the following three articles) – heralds certain new trends in contemporary international law and organization that promise to remain with us for some time to come.

1. THE IMPACT OF INTERNATIONAL LAW ON NAMIBIA

In a way the case of Namibia provides a perfect illustration of the weaknesses and strengths of international law, and thus helps dispel some of the major misconceptions about it.

The denouement took a very long time to come, during which the persistence of a situation, generally considered illegal, was often singled out as a stark demonstration of the 'ineffectuality' of international law and/or its 'purely rhetorical nature'. For, does not law manifest its existence through its trace in social life?

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A. A. Yusuf (ed.), African Yearbook of International Law, 3-11.

Here lies the misconception. For as Namibia clearly shows, in the case of international law, the fact that this trace is not always immediately visible does not mean that it is totally absent over time. In other words, its effect is usually incremental or cumulative rather than immediate. This is because even when illegality is determined (which is not always attainable, for want of a competent instance), international law cannot on its own directly undo the illegal situation, not disposing of sufficient centralized social force to support it. However, this does not mean that such a legal determination will remain without social (ie practical) consequence. For if international law cannot, for want of proper means, directly act to undo illegality, it can at least have the 'passive virtue' of a 'holding operation', in the face of an illegal but effective situation.

The more perdurable the holding operation, the more it undermines the 'effectiveness' and increases the 'opportunity cost' of maintaining the illegal situation over time. It is in this manner that international law can deflect the illegal behaviour of governments and present its consequences. But not disposing of a proper executive power, international law has to rely, even as a holding operation, on its prime subjects, the States, to give legal effect, i.e. to draw or act upon the legal consequences of the determination of illegality.

Under these conditions, what is remarkable is not so much the time it took to reach a settlement for Namibia in conformity with the purposes of the Mandate and the prescriptions of international law, it is rather that international law managed to maintain its 'holding operation' for such a length of time; barring any other outcome, or softer options.

What legal means did modern international law develop and deploy for that purpose? For example, for protecting the rights of the victims, especially in a flagrantly asymmetrical situation, and preventing them, as well as third parties, from capitulating to an illegal *status quo*, which would have allowed its transformation (through recognition, acquiescence, estoppel, prescription, historical consolidation, etc) into a new *status juris* (a transformation which would have been more consonant with the ethos of classical international law).

One of the particularities of the handling of Namibia by the UN was a frequent resort to the International Court of Justice, yielding four advisory opinions and two judgments. The court, was thus given the opportunity not only to clarify the various legal issues raised by the case, but also to articulate the workings of the 'holding operation'. In this way, the *South-West Africa* case (as it was then called) served as a fertile ground for the germination of some of the major concepts of contemporary international law.

Legal innovation begins with the answer given in the first advisory opinion of 1950 to the controversy over the survival of the Mandate. The court found that the Mandate had an 'objective' character, as a 'sacred trust', whose continued existence was not dependent on that of the League of Nations either as a grantor or as a

supervisor of the Mandate, but on the successful fulfilment of its mission in favour of the inhabitants or rather the people of South-West Africa (a concept which has to undergo greater elaboration in the context of the principle of self-determination).

This way of articulating the legal reasoning underlying the court's opinion carries with it the makings of a new paradigm of international law. Indeed, in spite of the discrete reference to the recognition by South Africa of the continuance of its obligations under the Mandate as a subsidiary line of argument, the main thrust of the court's argument moves away from the traditional, purely interstate and voluntarist representations of international law which dominated its inter-war period (eg the *Lotus* case), in favour of a resolutely community-oriented approach: well before the concept of 'international community' became clearly perceived and of common currency in the idiom of international law.

How can the 'sacred trust' be explained, except in terms of a 'community interest'? And even if the Mandate were to be artificially reduced to a mere set of interstate legal relations (as some judges proffered), States requiring compliance would still be acting not so much *uti singuli*, but as bearers of the community interest. We have here the beginnings of such latterly important doctrines of contemporary international law as those of *jus cogens* rules, *erga omnes* obligations, *actio popularis* and international crimes of States.

However, the court opinion went well beyond that, by considering that the community interest can be and is best defended by the international community itself, whatever the entity that comes closest to representing it at any moment of time; acknowledging in the process the succession in functions between the League of Nations and the UN, through a teleological interpretation of the Charter which constituted a further step towards recognizing the UN as an institutional embodiment of the international community.

This 'protective' approach of the 1950 advisory opinion, confirming the survival of the Mandate and the passing of the supervisory functions to the UN, in turn made it possible for the General Assembly, in the exercise of these functions, to withdraw the Mandate from South Africa in 1966 (in the wake of the abortive judgment of the same year), for the material breach of its obligations as a mandatory, particularly by imposing the system of apartheid in Namibia.[1] Two decades later, the 1971

1 The subsequent creation of the Council for Namibia, and its efforts at 'state-building' from the outside, delegitimizing even further the position of South Africa in Namibia, together with continued legal pressure from the General Assembly and the Security Council, though coming from the political organs of the UN, partook of the same legal strategy.

For an interesting analysis of this 'constructive' or 'constitutive' role of 'collective legitimization' (including its reverse side 'collective delegitimization') see Huaraka, Tunguru, *Namibia by Resolutions: A Legal Analysis of International Organizations' Attempts at Decolonization*, Geneva, Graduate Institute of International Studies, 1979 (unpublished doctoral thesis).

advisory opinion innovated again by explicitly articulating for the first time, in a succinct but comprehensive manner, the obligations of all States, as members of the international community, in the face of a persistent illegal situation:

> 'The Court is of the opinion,
> ...
> (2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;
> (3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.'[2]

This is, in a nutshell, the special regime of State responsibility arising from gross violations of international law, which were subsequently characterized by the International Law Commission in 1976 (following on the proposal of its Special Rapporteur, Professor Roberto Ago) as 'international crimes'.[3] A regime which was codified later on in 1984 by another Special Rapporteur of the ILC, Professor Ripaghen, in terms almost identical to those of the advisory opinion:

> 'An international crime committed by a State entails an obligation for every other State:
> (a) not to recognize as legal the situation created by such crime; and
> (b) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and
> (c) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b)'.[4]

The trail blazing role of the advisory opinion in this respect is evident. It was the first authoritative statement to formulate the legal consequences arising out of

2 ICJ Rep. 1971, p. 16, at 58.

3 Draft Articles on State Responsibility, Part I, Article 19. *ILC Yearbook* 1976, vol. II, Part 2, p. 75.

It is to be noted that two of the specific examples of 'international crimes', provided in draft Article 19/3, 'on the basis of the rules of international law in force', are:

'(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples...;

(c) a serious breach on a wide spread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*...'

4 Draft Articles on State Responsibility, Part II, Article 14/2, *ILC Yearbook* 1984, vol. II Part 1, p. 3.

the violation of fundamental rules of international law not in terms of a bilateral relation between the perpetrator and the victim of the violation, but as a triangular one in which the international community is also a principal party.

This community, acting through the States composing it, not only has a direct interest and *locus standi* to react against the violation (by seeking redress and cessation), but it is also subjected to certain obligations with a view to defending the integrity of the legal system (as well as the victim or victims, particularly where they have no *locus standi* in international law). These obligations of non-recognition of the illegal situation and of abstention from any act implying recognition or comforting the position of the violator, though essential components of the 'holding operation', were not until that advisory opinion as clearly perceived or well established in law as they came out of it.

2. NEW APPROACHES TO PEACE

The handling of the case of Namibia by the UN also provided an opportunity for developing new approaches in dealing with seemingly intractable situations, by way of 'peace-making', 'peace-keeping' and 'peace-building'.

2.1 **Peace-making**

Peace-making or the quest of a substantive solution to a crisis, whose terms would be at one and the same time compatible with the purposes and the principles of the Charter and mutually acceptable to the parties, is of course one of the main functions of the UN, as provided in Article 1/1, 2/3 and the whole of Chapter VI of the Charter on the 'Peaceful Settlement of Disputes'.

In the case of Namibia, while frequent resort was made to the court by the General Assembly and later the Security Council, the efforts of the African States to obtain a judgment on the merits came to nothing. Although the legalities of the situation were clearly laid down in the advisory opinions and findings of the political organs of the UN, they were not 'self-enforcing'. As the Western powers rejected the idea of the Security Council taking enforcement action against South Africa, the only alternative left open was for the UN to try, through the procedures of Chapter VI, to bring South Africa to accept self-determination for Namibia, while applying continuous, though milder, pressure on it.

The techniques developed and currently used by the General Assembly and the Security Council in their exercise of their functions under Chapter VI, have been to resort to the traditional means of peaceful settlement of disputes, but to integrate them in their own work, either by appointing a mediator, a conciliation or a fact-