

THE SOUTH WEST AFRICA CASES

On November 4, 1960, the governments of Ethiopia and Liberia¹ instituted proceedings in the International Court of Justice² against the South African government³ alleging *inter alia* that South Africa's *apartheid* policy⁴ violated certain articles of the League of Nations Mandate for South West Africa and Article 22 of the Covenant of the League. In its judgment of December 21, 1962, the Court dismissed the jurisdictional objections and found that it was competent to hear the case on the merits. However, after hearing arguments, the Court on July 18, 1966, surprisingly dismissed the case on the grounds that the Applicants lacked standing to raise the issues because they possessed no legal right or interest in the subject matter of their claims. This note is an analysis of the major issues raised by this litigation. To introduce the analysis, the first section of the note briefly reviews the history of the South West African Mandate prior to the initiation of the suit. The preliminary objections to the jurisdiction of the Court raised by South Africa are discussed in the second section. The reasons for the dismissal are examined in detail in the third section. The last section is concerned with the two substantive issues, dealt with as dicta in the 1966 decision, raised by the litigation: whether South Africa's *apartheid* policy violates "standards" of conduct for mandated nations; and to what extent may the Court rely upon any international "norm" which can be interpreted as prohibiting all governments from discriminating against its subjects on the basis of race or group membership.

I. HISTORY OF SOUTH WEST AFRICA

A. *Under the League of Nations*

The geographic area known as South West Africa was originally colonized by Germany in the late nineteenth century. During and after World War I, the Union of South Africa sought to gain exclusive control over the German colony. During the war, some of the Allied governments secretly agreed that claims to occupied German territory would be recognized in the event of an Allied victory.⁵ Though indorsed by the British War Cabi-

1. Hereinafter referred to as Applicants.

2. Hereinafter also referred to as the Court.

3. Hereinafter also referred to as Respondent.

4. South West Africa, Second Phase, [1966] I.C.J. 487-89 (Mbanefo, dissenting opinion) (hereinafter cited as S.W.A. CASES II). The alleged *apartheid* policy is reproduced in the Appendix.

5. South West Africa Cases, [1962] I.C.J. 319, 592 (Van Wyk, dissenting opinion) (hereinafter cited as S.W.A. CASES I). For an extended history of the development of

net, these agreements did not long endure under strong American opposition to such annexation proposals. In their stead, President Wilson proposed that the Covenant of the League of Nations should provide for complete authority and control of these territories by principal Allied and Associated Powers under Article 119 of the Treaty of Versailles.⁶ To implement this concept, the League was to be given authority to delegate its administrative power to a nation-state which was to act "as its agent or mandatory."⁷ This proposal ultimately became Article 22 of the Covenant of the League, which provided for a permanent mandates system under which former enemy territory was to be entrusted to certain individual nations which acted as mandatories and were accountable directly to the League.⁸

The Mandate of South West Africa was conferred upon "His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa." South Africa was responsible directly to the League for

South West Africa see C. DUNDAS, *SOUTH-WEST AFRICA* (1964); H. VEDDER, *SOUTH WEST AFRICA IN EARLY TIMES* (1938).

6. Article 119 of the Treaty of Versailles (1918): "Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions." III TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 3336, 3342-43 (1923).

7. S.W.A. CASES I 592 (Van Wyk, dissenting opinion).

8. LEAGUE OF NATIONS COVENANT art. 22 (hereinafter cited as COVENANT).

Article 22 of the Covenant provided for the formation of three groups of mandates based upon the stage of development of the people, the geographic situation of its territory, its economic conditions, and other similar circumstances. The "A" group was comprised of the former Turkish colonies of Lebanon, Syria, Iraq, Transjordan and Palestine, whose existence as independent nations could be provisionally recognized, subject to advice and assistance by a mandatory until such time as they were able to stand alone. The "B" group was comprised of Germany's former Central Africa colonies, which were considered to be at such a stage that the mandatory "was to be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion. . . ." The "C" mandate included such territories as South West Africa and certain of the South Pacific Islands, which, owing to their sparseness of population and economic underdevelopment, were to be "administered under the laws of the Mandatory as integral portions of its territory."

The basic treaty provisions relating to the League's mandates system are contained in Articles 118 and 119 of the Treaty of Versailles, III TREATIES, CONVENTIONS, ETC., *supra* note 6, at 3390-91; in Article 16 of the Treaty of Peace with Turkey, signed at Lausanne on July 24, 1923, 28 L.N.T.S. 11, 23; and in the various mandate agreements concluded between the council of the League and the respective states which acted as mandatories, MANDATE AGREEMENT FOR GERMAN SOUTH WEST AFRICA, U.N. Doc. A/70 (1946) (hereinafter cited as MANDATE).

For a concise exposition of the legal situation resulting from the provisions of the Treaty of Versailles, see International Status of South West Africa I.C.J.—Pleadings 188-89 (1950).

proper administration of the mandated territory.⁹ Under this Mandate, the Union was to have full power of administration over the territory and was to apply its own laws and legislation in the exercise of the Mandate. These broad powers, however, were restricted:

The Mandatory shall have full power of administration and legislation over the Territory subject to the present Mandate as an integral portion of the Union of South Africa; and may apply the laws of the Union of South Africa to the Territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.¹⁰

The Mandate further provided that any dispute between the Mandatory and another member of the League relating to the interpretation or applica-

9. *See* MANDATE.

In its advisory opinion of July 11, 1950, the International Court of Justice observed that the mandates system created by Article 22 of the Covenant of the League was a "new international institution." *International Status of South West Africa*, [1950] I.C.J. 128, 132 (hereinafter cited as *S.W.A. STATUS*). *See also* J. BRIERLY, *THE LAW OF NATIONS* 181-89 (6th ed. 1963); H. KELSEN, *THE LAW OF THE UNITED NATIONS* 566 (1950); 1 L. OPPENHEIM, *INTERNATIONAL LAW* § 94c (8th ed. H. Lauterpacht 1955).

10. MANDATE, art. 2. Articles 3 and 4 further prohibit the slave trade, forced labor, trafficking of arms and alcohol, military training of the natives, and the erection of military bases within the territory. Article 5 requires the Mandatory to ensure freedom of conscience and free exercise of all forms of worship, and to permit the unrestricted travel of missionaries within the territory.

It was apparently foreseen by the League that the laws of the mandatory would not always be suitable for application to the mandated territory and that the mandatory would not take the trouble to change such laws. *See* E. VAN MAANEN-HELMER, *THE MANDATES SYSTEM IN RELATION TO AFRICA AND THE PACIFIC ISLANDS* 208 (1929).

A Permanent Mandate Commission was established to rectify such a problem by close supervision, thus obviating the possibility of a mandatory rendering nugatory the ultimate objectives of the mandates system by application of laws and legislation to the territory which tend to impede the development of a self-sufficient populace. *Contra*, W. KENNEDY & H. SCHLOSBERG, *THE LAW AND CUSTOM OF THE SOUTH AFRICAN CONSTITUTION* 516 (1935):

The Union of South Africa determines by what laws South-West Africa is to be governed and how these laws are to be enforced. *Once having elected to hand over South-West Africa to the Union, the League of Nations has no power to dictate how that territory is to be governed.* The fact that the mandatory is required to report to the League what its political actions are in the mandated territory, makes no difference. It is a treaty obligation, which does not negative the Union's rights and powers. The full power of legislation and administration over the territory is therefore vested in the Union of South Africa and there is no other which can enforce law there. Even the United Kingdom stands in the same relation to the Union in this matter as any other power. . . . The Union, therefore, has sovereign power over the territory, and it has power to make laws and enforce them over the whole sphere of government. (emphasis added).

tion of the provisions of the Mandate was to be submitted to the Permanent Court of International Justice if negotiation proved ineffective.¹¹

Under this explicit authorization the government of the Union enacted the Administration of Justice Proclamation in 1919, whereby the Roman-Dutch Law as existing and applied in the province of the Cape of Good Hope on January 1, 1920, was introduced as the common law of the territory, replacing the German Law.¹² For five years the Parliament of the Union legislated directly for the Territory. Then, in 1925, the Union Parliament passed the Constitutional Act providing for the election of a South West African assembly of limited legislative powers containing twelve elected and six nominated members. Since the electors were exclusively of European origin, the natives were effectively precluded from exercising any voice in territorial legislation.¹³

During the initial stages of the administration of the mandated territory of South West Africa, the courts of the Union of South Africa handed down two decisions which reflected the Union's conception of the status of the territory.

The case of *Rex v. Christian*¹⁴ arose in 1923. The defendant, a resident of South West Africa, had been convicted by the courts of South West Africa on the charge of treason¹⁵ against the Union for his alleged participation in the Bondelzwarte Rebellion of 1922. Defendant urged that, since the sovereignty over the territory did not lie either in the local administrator or in the government of the Union of South Africa, the elements of the offense of treason could not be constituted. The court rejected the plea and unanimously held that the Mandatory possessed sufficient elements of both internal and external sovereignty to sustain the obligation of allegiance by the inhabitants of the territory.

In the second case,¹⁶ decided three years later, the court was faced

11. MANDATE, art. 7. The significance of this provision will become apparent when considered in conjunction with the compulsory jurisdiction clause, Article 37, of the Statute of the International Court of Justice. See note 79 *infra*.

12. W. KENNEDY & H. SCHLOSBERG, *supra* note 10, at 527-28. Commenting on the effect of this proclamation the authors state:

The effect of this proclamation was that Roman-Dutch Law has been introduced into South-West Africa together with all the modifications which it had undergone in the Cape Province by desuetude, custom, judicial decision, and statute, whether abrogating or enacting.

13. However, a number of important matters, including native affairs, for which the Mandatory has special responsibility, were reserved for an Executive Council, in which the Administrator is assisted by four members elected from the Assembly. N. BENTWICH, *THE MANDATES SYSTEM* 99-100 (1930).

14. [1924] S. Afr. L.R. 101 (1923) (A.D.).

15. The crime is known as *Majestas* in Roman-Dutch Law.

16. Cape Law Soc'y v. Van Aardt, [1926] S. Afr. L.R. 312 (C.P. Div.).

with the question of whether or not a criminal judgment rendered in the courts of the Territory was to be treated as a foreign judgment by the courts of the Union. The Supreme Court, in affirming the conviction, ruled that the court which gave the judgment could not be regarded as a foreign tribunal since the Mandatory was authorized to administer the land as an "integral portion" of its own territory.¹⁷

17. *Id.* at 317. Some text-writers have concluded that sovereignty over a mandated territory rests in the mandatory. W. KENNEDY & H. SCHLOSBERG, *supra* note 10, at 511. A variation of this conclusion has been accepted by a few national courts of other mandatories. *Cf.* Chow Hung Ching v. The King, 77 Commw. L.R. 449 (Austl. 1948); Nelson v. Brasby, [1934] N.Z.U.N. 228 (1933); 36 N.Z. Gaz. L.R. 227 (1934). The publicists are not in complete agreement as to the exact location of sovereignty. *See* E. VAN MAANEN-HELMER, *supra* note 10, at 45-47. The author therein summarily states the various viewpoints:

A few have held that the sovereignty over the mandated territories lies with the mandatory Powers, and they have inferred, logically enough, that, since this is the case, the mandates system is really equivalent to annexation, and that is only owing to the good will of the mandatory Powers that the League is allowed to supervise their administration. Most writers believe, on the contrary, that sovereignty resides with the Principal Allied and Associated Powers, with the League, or, in a residual way, with the inhabitants of the mandated territories. . . .

The real truth lies outside both these sets of arguments. The truth is that there is no such thing as sovereignty over the mandated territories, because there is nothing even resembling absolute power. . . . The power of the League is limited by the fact that since the League is not an administrative body, it can only supervise what the mandatory Powers do, but can do nothing itself. Finally, the power of the Mandatories is limited, first by their obligations as signatories of Article 22, and secondly by the right of supervision of the League.

See also Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AM. J. INT'L L. 263, 271 (1948).

The International Court considers sovereignty over a mandated territory to be in abeyance:

. . . [I]f and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the case of some of the Mandates, sovereignty will revive and vest in the new State. S.W.A. STATUS 150 (McNair, separate opinion).

Similarly, it has been established that the native population of the mandated territory does not acquire the nationality of the respective mandatory powers as a result of the transfer of the territory to the Mandatory under the mandate system. *See* 3 LEAGUE OF NATIONS OFF. J. 604 (1923); 1 L. OPPENHEIM, INTERNATIONAL LAW 210-11 (4th ed. A. McNair 1928). However, the exact nationality of the populace has continued to be a matter of much speculation. *See* O'Connell, *Nationality in 'C' Class Mandates*, 31 BRIT. Y.B. INT'L L. 458 (1954).

Thus, it would appear that the mandatories were not given unrestricted control over the mandated territory, but were to remain solely and absolutely responsible for the administration of the mandate to the League, which was vested with the unqualified right of supervision. E. VAN MAANEN-HELMER, *supra* note 10, at 42; *see* A. MARGALITH, THE INTERNATIONAL MANDATES 69-70 (1930), where the author expresses the view that the mandatory is under a duty to delegate the administration of the territory to a territorial government:

Although it is the mandatory government which is held responsible for the execution of the mandate, it cannot, itself, in the nature of things, govern the mandated territory. The administration of the territory must be delegated to the territorial government which, though subordinate, must work on the general lines laid down

B. *After Dissolution of the League*

With the dismembering of the League following World War II, a question arose as to the fate of the mandated territories, and whether the newly created United Nations succeeded to the right of the League to force compliance with the mandates.¹⁸ Although the Charter of the United Nations did not explicitly provide for the continuation of the mandates, it established an international trusteeship system for the administration and supervision of nonself-governing underdeveloped territories, including those then under mandate.¹⁹

In a final resolution upon formal dissolution of the League, the Assembly expressed the intention that those members then administering territories under mandate should continue to do so.²⁰ Eventually, all of the former mandated territories were either granted independence or were placed under the trusteeship system, with the sole exception of South West Africa.²¹

The question of South West Africa was brought before the United Nations General Assembly in 1946, after the Legislative Assembly of South West Africa adopted a resolution requesting the administrator of the territory to seek formal annexation by the government of the Union of South Africa.²² By memorandum,²³ the delegation of South Africa requested the General Assembly to accede to the proposed resolution of annexation.²⁴ The General Assembly, however, rejected South Africa's proposal and recommended that the Mandated Territory be placed under the trusteeship sys-

by the mandatory government, yet must have wide discretionary powers. This fact, the partial independence of the territories from the mandatory government, may work unfortunately for the mandated territory, for, as is often the case, a government that would give a liberal interpretation to the terms of the mandate may be represented by officials, mostly drawn from its colonial service, who are apt to interpret them too strictly.

18. One of the primary differences between the League of Nations and the United Nations is that the General Assembly has no unanimity requirement in voting as did the Council of the League, COVENANT art. 5, para. 1. This is significant since no serious censure of a member is likely to ensue from an organization in which any action must be by unanimous consent. Landis, *South West Africa in the International Court: Act II, Scene 1*, 49 CORNELL L.Q. 179, 186 (1964).

19. Articles 75-91 provide for the creation and administration of the trusteeship system. U.N. CHARTER arts. 75-91.

20. R. CHOWDHURI, INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS 113 (1955).

21. See Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AM. J. INT'L L. 263 (1948).

22. 1 U.N. GAOR, 4th Comm., Annexes 13, at 199, U.N. Doc. A/123 (1946).

23. *Id.* at 232.

24. *Id.* at 199-235.

tem.²⁵ The government of the Union was invited to submit a trusteeship agreement,²⁶ but its representative to the General Assembly replied that "the Union Government reserves its position as the administering authority, and in the meantime will continue to administer the territory in the spirit of the Mandate."²⁷

In 1949, following the Nationalist Party victory, South Africa expanded its Parliament to include South West African representatives elected by Europeans only.²⁸ That same year the submission of annual reports, as provided for in the Mandate,²⁹ was unilaterally curtailed by the Union.³⁰ Thus, the Union had, in effect, ceased functioning as a mandatory.

Reacting to the avowed intent of the Union to administer the Territory in a manner directly contrary to the policy adopted by the Trusteeship Council of the General Assembly³¹ and to the Union's general disregard for any cooperative resolution of the matter, the United Nations, as successor to the League,³² invoked the jurisdiction of the International Court of Justice, in its advisory capacity, in order to determine the legal status of South West Africa.

In July of 1950, the Court held that South Africa was under an obligation to accept its compulsory jurisdiction in a dispute relating to the interpretation or application of the provisions of the Mandate.³³ The opinion affirmed South West Africa's status as a territory under international mandate and the concomitant obligations on the part of the Union.³⁴ The pro-

25. 1 U.N. GAOR 123 (1946).

26. *Id.*

27. E. HELLMAN, HANDBOOK ON RACE RELATIONS IN SOUTH AFRICA 757 (1949).

28. *South West Africa before the United Nations*, 16 WORLD TODAY 334, 339 (1960).

29. MANDATE, art. 6.

30. 4 U.N. GAOR 102-03 (1949).

In a later statement the Union Government, through its General Assembly Representative, declared that previous submissions of the annual reports were not indicative of its accountability to the United Nations for administration of the Territory. 4 U.N. GAOR, 4th Comm., at 199, 202, A/929, A/933, A/962 (1949).

31. The Official Report of the General Assembly stated: "The South African Government was firmly convinced that the policy of encouraging the separate development of the indigenous population in its own environment was to the advantage of the population." 4 U.N. GAOR, *supra* note 30, at 202. Such a position is hardly consistent with the statement by the Trusteeship Council that "great efforts should be made to eliminate, through education and other positive measures, whatever reasons may exist that explain segregation." 3 U.N. GAOR, Supp. 4, at 44, U.N. Doc. A/603 (1948). For specific examples of *apartheid* regulations, see S.W.A. CASES II 486-89 (Mbanefo, separate opinion) reproduced in the Appendix.

32. S.W.A. CASES II 92, 214 (Van Wyk, separate opinion), 270, 274 (Tanaka, dissenting opinion), 463 (Padilla Nervo, dissenting opinion).

33. S.W.A. STATUS 138.

34. *Id.* at 143. The obligations of the Union included transmitting petitions from the inhabitants of the territory to the United Nations, which the Court viewed as having

visions of the U. N. Charter relating to trusteeship were held applicable to South West Africa only insofar as they provided a means by which the Territory might be brought under the trusteeship system.³⁵ The Court declined to impose on the Union a legal obligation to place the Territory under the trusteeship system³⁶ but did hold that the Union was not competent to modify unilaterally the international status of South West Africa.³⁷

The Union's first response to the Court's opinion was to regard it as merely advisory and therefore of no binding effect.³⁸ However, South Africa subsequently took a less determined stand, stating that it was prepared to engage in talks on the basis that there was no question of a trusteeship agreement.³⁹

The United Nations General Assembly accepted the advisory opinion and established an *ad hoc* committee for the purpose of seeking an effective solution to the problem.⁴⁰ The committee was authorized to negotiate with the Union as far as possible within the procedure of the former mandate system.⁴¹ However, its accomplishments were rendered nugatory because of the lack of cooperation on the part of South Africa.⁴²

After another advisory opinion by the Court concerning the voting procedure in the General Assembly on matters pertaining to South West Africa,⁴³ the Union transferred the administration of the "Native" affairs

the supervisory functions formerly exercised by the League. Judges McNair and Neid dissented on this question, holding that the apparatus of international supervision established by the League had lapsed by its dissolution. However, both argued that this fact did not bring the Mandate to an end, even if it weakened it, since Article 7 of the Mandate had been preserved in Article 37 of the Statute of the International Court of Justice (hereinafter cited as I.C.J. STAT.). Thus, the legal rights and interests of those members of the League who were parties to the Statute of the International Court were preserved, and these rights included the right to bring the Union before the Court under its compulsory jurisdiction. *Id.* at 138.

35. *Id.* at 144.

36. *Id.*

37. *Id.*

38. Ballinger, *The International Court of Justice and the South West Africa Cases*, 81 S. AFR. L.J. 35, 38 (1964). This is a legally defensible position since the opinion was merely advisory and did not place the Government of the Union of South Africa under a duty of observance.

39. INTERNATIONAL COMM'N OF JURISTS, SOUTH AFRICA AND THE RULE OF LAW 87 (1960).

40. G.A. Res. 449-A(2), 5 U.N. GAOR, Supp. 20, at 55, U.N. Doc. A/1775 (1950).

41. *Id.*

42. 2 U.N. GAOR, Supp. 12, at 1, U.N. Doc. A/3626 (1957).

43. Voting Procedure on Questions Relating to Report and Petition Concerning the Territory of South West Africa, [1955] I.C.J. 67, 78. The Court was of the opinion that a two-thirds majority vote of the General Assembly was required to initiate action with regards to matters pertaining to South West Africa.

of the Territory to the Union Minister of Native Affairs,⁴⁴ further integrating the Territory into South Africa.⁴⁵

In 1957, the report of the Committee on South West Africa⁴⁶ indicated that the trend in "Native" administration was in the direction of the imposition of a more severe application of *apartheid* than had already existed.⁴⁷ The report prompted the appointment of a goodwill mission,⁴⁸ which eventually recommended partition of the Mandate Territory,⁴⁹ and led to a study by the standing committee on South West Africa of possible legal action by which to ensure the fulfilment of the obligations of the Mandate.⁵⁰ In its conclusion, the committee drew attention to the legal action open to member states under Article 7 of the Mandate and Article 37 of the Statute of the Permanent Court of International Justice: reference of any dispute concerning the interpretation of the Mandate to the Court for its adjudication.⁵¹ The General Assembly, thereafter invited eligible member nations to initiate proceedings against the Union if South Africa persisted in its refusal to cooperate with United Nations committees.⁵²

II. PRELIMINARY OBJECTIONS⁵³

Late in 1960, Ethiopia and Liberia filed applications with the International Court of Justice based on the premise that the Court had succeeded to the jurisdiction of the Permanent Court of International Justice by virtue of Article 37 of the Court's charter.⁵⁴ Further reliance was placed

44. 11 U.N. GAOR, Supp. 12, at 10, U.N. Doc. A/3151 (1956).

45. *Id.* at 11.

46. 12 U.N. GAOR, Supp. 12, at 4, U.N. Doc. A/3626 (1957).

47. *Id.* at 9.

48. G.A. Res. 1143(X), 12 U.N. GAOR, Supp. 18, at 25, U.N. Doc. A/3805 (1957).

49. 13 U.N. GAOR, Annexes, Agenda Item No. 39, at 5, U.N. Doc. A/3900 (1958).

50. G.A. Res. 1060(XI), 11 U.N. GAOR, Supp. 17, at 30, U.N. Doc. A/3572 (1957).

51. 12 U.N. GAOR, Supp. 12(A), at 6, U.N. Doc. A/3625 (1957).

52. G.A. Res. 1360(XIV), 14 U.N. GAOR, Supp. 16, at 28-29, U.N. Doc. A/4354 (1959).

53. For an extended discussion of the "preliminary objections" raised by the Union of South Africa and the subsequent disposition thereof by the International Court, see Ballinger, *supra* note 38; Feder, Rice & Etra, *The South-West Africa Cases: A Symposium*, 4 COLUM. J. TRANSNAT'L L. 47 (1965); Landis, *supra* note 18.

54. S.W.A. CASES I 321. I.C.J. STAT. art. 37 provides:

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

See also U.N. CHARTER art. 93, para. 1, which states that "all Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."

on the compulsory jurisdiction clause of Article 7 of the Mandate for South West Africa which provided that any unresolved disputes with any League member concerning the Mandate should be submitted to the Permanent Court for resolution.⁵⁵ Since Ethiopia and Liberia satisfied the criterion of the Permanent Court that "only states . . . can be parties in cases before the [Permanent] Court,"⁵⁶ both during the existence of the League⁵⁷ and at the time of the commencement of the proceedings,⁵⁸ their applications were accepted.⁵⁹

In substance, the applications requested the Court to reaffirm its position of 1950 that South West Africa is a territory under a mandate exercised by the Union; that the Mandate is a treaty in force; that the Union remains subject to the international obligations of Article 22 of the Covenant of the League and the Mandate; that the General Assembly of the United Nations is the legally qualified organization to exercise the supervisory functions previously exercised by the League regarding the territorial administration; and that the Union must necessarily submit to the supervision and control of the General Assembly regarding the exercise of the Mandate, the transmission of petitions from the populace to the United Nations, and the submission of an annual report on territorial administration as provided for in Article 6 of the Mandate.⁶⁰ The applications alleged that the Union has

55. Art. 7(2) provides as follows:

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

This provision has been regarded as recognition by each of the mandatory powers of the Permanent Court of International Justice as the final authority in disputes over interpretation of the mandates. *See* N. BENTWICH, *supra* note 13, at 120; Q. WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 91, 155 (1930).

56. Article 34 of the Statute of the Permanent Court of International Justice. *See* STAT. P.C.I.J., in HUDSON, *PERMANENT COURT OF INTERNATIONAL JUSTICE* 669, 676 (1943).

57. Both Ethiopia and Liberia were members of the League and therefore fulfill the criterion of Article 34, since the Covenant provided that only "fully self-governing" states could be members. COVENANT art. 1, para. 2.

58. Both Ethiopia and Liberia are members of the United Nations, the Charter of which provides for membership only by "states." U.N. CHARTER arts. 3 & 4.

59. Landis, *supra* note 18, at 193, points out that in her conversation with African representatives at the United Nations the question arose as to whether other African nations, former colonies of Britain and France, had succeeded to the status of the mother country and thereby became competent to initiate these proceedings. However, such question was not presented to the Court by inclusion of other African states as applicants because of the possibility of distracting the Court's attention from the substantive issues involved.

60. S.W.A. CASES I 322-33.

substantially modified the terms of the Mandate without the consent of the United Nations, thereby violating Article 7 of the Mandate and Article 22 of the Covenant of the League; that the Union has not promoted to the utmost the material and moral well-being and social progress of the peoples of the Territory; and that the Union has practiced *apartheid* by adoption and application of legislation, administrative regulations, and official actions which suppress the rights and liberties of peoples of the territory. All of these actions were alleged to be inconsistent with the international status of the Territory.⁶¹

South Africa's reply to these allegations was that "the Governments of Ethiopia and Liberia have no *locus standi* in these contentious proceedings and that the Honorable Court has no jurisdiction to hear, or adjudicate upon, the questions of law and fact raised."⁶² Thus, the Union's preliminary objections sought to defeat the jurisdiction of the Court rather than to defend on the merits of the case:

Firstly, . . . the Mandate for South West Africa is no longer a "treaty or convention in force" within the meaning of Article 37 of the Statute of the Court, this Submission being advanced (*a*) with respect to the said Mandate Agreement as a whole, including Article 7 thereof, and (*b*) in any event, with respect to Article 7 itself;

Secondly, neither the Government of Ethiopia nor the Government of Liberia is "another Member of the League of Nations," as required for *locus standi* by Article 7 of the Mandate for South West Africa;

Thirdly, the conflict or disagreement alleged by the Governments of Ethiopia and Liberia to exist between them and the Government of the Republic of South Africa, is by reason of its nature and content not a "dispute" as envisaged in Article 7 of the Mandate for South West Africa, more particularly in that no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby;

Fourthly, the alleged conflict or disagreement is as regards its state of development not a "dispute" which "cannot be settled by negotiation" within the meaning of Article 7 of the Mandate for South West Africa.⁶³

The Court handed down a judgment on December 21, 1962, rejecting all four of the Union's objections by a majority of eight to seven.⁶⁴ The majority opinion first considered whether the parties had previously consented to the jurisdiction of the Court. It is a fundamental principle of international law that a sovereign is under no legal compulsion to submit

61. *Id.* at 323-24.

62. *Id.* at 326.

63. *Id.* at 326-27.

64. *Id.* at 319.

its disputes to any tribunal, except as it has consented to do so.⁶⁵ Consent may be manifested in a variety of ways, one of which is entering into treaties conferring automatic jurisdiction upon the International Court of Justice, or some other tribunal, over certain judicial disputes.⁶⁶ The Mandate agreement contained such a compulsory jurisdiction clause.⁶⁷ Thus, for the Court to establish its jurisdiction over the controversy, it had to find that "the Mandate, in fact and in law, is an international agreement having the character of a treaty or convention."⁶⁸ The Court was not to be deterred by mere misnomers,⁶⁹ asserting that neither terminology nor lack of form⁷⁰ was a determinative factor as to the character of an international agreement.⁷¹

65. See W. BISHOP, *INTERNATIONAL LAW* 63 (2d ed. 1962). This was the argument advanced by Judges Spender and Fitzmaurice in their dissenting opinions. S.W.A. CASES I 467, 473-74, 501-02, 545 (Spencer and Fitzmaurice, dissenting opinion). See also, J. BRIERLY, *LAW OF NATIONS*, 368 (6th ed. 1963); 6 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 1-147 (1943); 2 L. OPPENHEIM, *INTERNATIONAL LAW*, 1-96 (6th ed. H. Lauterpacht 1940).

66. See Bishop and Myers, *Unwarranted Extension of Connally-Amendment Thinking*, 55 AM. J. INT'L L. 135 (1961).

67. MANDATE, art. 7(2).

68. S.W.A. CASES I 330. The Court noted that it had no jurisdiction under Article 36(1) of the Statute, which provides for jurisdiction over all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force. I.C.J. STAT. art. 36, para. 1.

69. S.W.A. CASES I 331. The Mandate is described in its last paragraph as a "Declaration."

Note that the International Law Commission has formulated the following definition for purposes of its *Draft Articles on the Law of Treaties*, a definition adopted by Judges Spender and Fitzmaurice in their joint dissent (S.W.A. CASES I 475):

"Treaty" means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. . . . concluded between two or more States or other subjects of international law and governed by international law. 2 Y.B. INT'L L. COMM'N 161, U.N. Doc. A/CN.4/SER. A/1962/Add.1.

The Union of South Africa's contention in this regard was that in defining the terms of the Mandate, the Council was taking executive action in pursuance of the Covenant, and was not entering into an agreement which could be considered a treaty or convention. S.W.A. CASES I 330.

70. The Mandate instrument, which recorded both prior written agreements and oral negotiations, was unratified and unsigned.

The Court held that the Mandate need not be registered under Article 18 of the Covenant of the League because the Covenant only became effective January 10, 1920, while the Mandate had actually been conferred seven months earlier. *Id.* at 332.

The Court's position as to the lack of form has found authoritative support from both publicists and precedent. See Customs Regime between Austria and Germany, [1931] P.C.I.J., ser. A/B, No. 41, at 47; H. LAUTERPACHT, *FIRST REPORT ON THE LAW OF TREATIES* (1953); A. MCNAIR, *THE LAW OF TREATIES* 6 (1961); 1 L. OPPENHEIM, *INTERNATIONAL LAW* §§ 481-82, at 868 (8th ed. H. Lauterpacht 1955); 1 G. SCHWARZENBERGER, *INTERNATIONAL LAW* 430 (3d ed. 1957).

71. S.W.A. CASES I 331, 405 (Jessup, separate opinion). The court placed con-

Of course, the Mandate could be considered a treaty only if the Union of South Africa and the League of Nations both had treaty-making capacity.⁷² South Africa's capacity was indisputable because the Union Government was admitted to the League and was also a signatory to the Treaty of Versailles. Both of these facts indicate recognition of the Union's treaty-making capacity by the international community. The League, however, would appear to present a more difficult question; but, the Court assumed the existence of such capacity as an incident to the League's international personality.⁷³

The Court next considered the argument that the Mandate and its concomitant obligations had lapsed upon dissolution of the League.⁷⁴ South Africa contended that the rights and duties concerning the administration of the territory of South West Africa still existed, while those rights and obligations relating to supervision by the League and to submission of disputes to the Permanent Court of International Justice, being of a contractual nature, necessarily became extinct upon dissolution of the League.⁷⁵ The Union also argued that there was no provision in the Charter of the United Nations for continuing Article 7 of the Mandate.⁷⁶ However, the majority found such contentions to be wholly unacceptable in light of the 1950 advisory opinion⁷⁷ and was adamant in holding that all original duties and obligations of the Mandate continued in force regardless of the dissolution

siderable emphasis on the fact that the Mandate embodied a provision that it was to be deposited in the archives of the League and certified copies were to be forwarded to all signatories of the Versailles Treaty in arriving at the conclusion that the Mandate constituted a "treaty." *Id.* at 331-32.

72. *Id.*

73. S.W.A. CASES I 332. This position finds support in an earlier case wherein the Court declared that the United Nations had an international personality which must be recognized even by non-member states. Advisory Opinion on Reparation for Injuries, [1949] I.C.J. 174. But, as pointed out by one author, in this opinion there was no definition of "international personality":

Therefore, an attempt to define "international personality" must cautiously state the holding of the case on that point, namely that the international personality may include the right to bring international claims. Feder, *The Developing Concept of Treaty*, 4 COLUM. J. TRANSNAT'L L. 47, 56 (1965).

The author also cites the South West Africa cases as standing for the proposition that international personality may include the right to engage in treaty-making. *Id.*

74. S.W.A. CASES I 332-33.

75. *Id.*

76. *Id.*

77. *Id.* at 334. In its 1950 advisory opinion the Court had tersely stated:

The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder would not be justified. S.W.A. STATUS 127, 133.

of the League.⁷⁸ Although the League and the Permanent Court both had ceased to exist, the obligation of the Respondent to submit to the compulsory jurisdiction of that court was effectively transferred to the International Court before the dissolution of the League.⁷⁹

The remaining objections were centered mainly upon the terms "another Member of the League of Nations" and "dispute" as used in Article 7 of the Mandate.⁸⁰ The Union argued that inasmuch as all the members of the League necessarily lost their membership and accompanying incidents of membership when the League was dissolved "there could no longer be 'another member of the League' today."⁸¹ Therefore, even if Article 7 of the Mandate were still in force as a treaty or convention within the meaning of Article 37 of the Statute, no state has *locus standi* to invoke the jurisdiction of the International Court of Justice.⁸² The majority rejected South Africa's literal interpretation of the phrase "another Member of the League" as "incompatible with the spirit, purpose, and context of the instrument."⁸³ Because the Council of the League under the unanimity rules⁸⁴ could not impose its own view upon the Mandatory and could not appear before the Court as a petitioner, the only possibility for enforcement of the "sacred trust" would be for a member of the League to bring the dispute before the Permanent Court for its adjudication.⁸⁵

In April, 1946, all members of the League agreed by resolution to continue the mandates as far as practically feasible and to maintain the rights

78. Judge Jessup was of the opinion that the nature of Article 7 was that of a "Third-State Beneficiary" contract. S.W.A. CASES I 409 (Jessup, separate opinion).

79. *Id.* at 334-35. This result was reached by considering Articles 92, 93(1) and 110(4) of the Charter of the United Nations in conjunction with Article 37 of the Statute of the International Court of Justice. The Court, relying on historical and empirical data, found that South Africa had ratified the provisions of the Charter in 1945 when the League and the Permanent Court were still in existence and when Article 7 of the Mandate was still in force. Such ratification was, in effect, voluntary acceptance of the compulsory jurisdiction of the International Court in lieu of the Permanent Court to which it had originally agreed to submit by virtue of Article 7 of the Mandate.

80. *See* note 55 *supra*.

81. S.W.A. CASES I 335.

82. *Id.*

83. *Id.* at 336. Undoubtedly, the Court must have been persuaded to some extent by the Applicants' argument that to find that they did not have the required *locus standi* would necessitate overruling of the 1950 advisory opinion. S.W.A. CASES, PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS [1962] I.C.J. 199. The Court, in its 1950 advisory opinion had unanimously agreed that judicial supervision under Article 7 of the Mandate had survived the League's demise. S.W.A. STATUS 128, 138. *See also*, 1 L. OPPENHEIM, *supra* note 70, at 226 n.3 for a commentary on this aspect of the decision.

84. Articles 4 and 5 of the Covenant provide for unanimity in voting.

85. S.W.A. CASES I 337.

of the members of the League, notwithstanding the dissolution of the League itself.⁸⁶ The court reasoned that this resolution was adopted with the express purpose of continuing the Mandate as a treaty between the Mandatory and former members of the League.⁸⁷

The third preliminary objection was that this case did not involve a "dispute" as envisaged in Article 7 of the Mandate. The Union contended that the word dispute must be given its generally accepted meaning in a context of a compulsory jurisdiction clause and that, when so interpreted, it means a disagreement or conflict between the Mandatory and another member of the League concerning the legal rights and interests of such other member. This disagreement, it was argued, did not affect any material interests of the applicant states or their nationals.⁸⁸ Furthermore the "obligations imposed for the benefit of the inhabitants" were owed solely to the League. Thus, the Union's contention was that League members by virtue of their membership participated in the *League's* supervision of the Mandate, but that individually the members had no legal right or interest in the observance by the Mandatory of its duties to the inhabitants.⁸⁹

86. *Id.* at 338. The Court placed considerable emphasis on the circumstances surrounding the dissolution of the League and the Members' awareness that the operation of the Mandates during the period of transition from the Mandatories to the Trusteeship system was bound to be handicapped by legal technicalities and formalities. Similarly, the statement by the delegate of South Africa, at the second plenary meeting of the Assembly on April 9, 1946, was held to be a clear recognition on the part of the Government of South Africa of the continuance of its obligation under the Mandate for South West Africa, including Article 7, after the dissolution of the League. Here the delegate had announced that the Union would regard the dissolution of the League as in no way diminishing its obligations under the Mandate and that it would continue to fulfill its obligations as it had done in the past. *See LEAGUE OF NATIONS OFF. J.* 33 (1946).

87. S.W.A. CASES I 341.

While the majority rejected any implication that League members were actual parties to the original Mandate agreement, S.W.A. CASES I 332, Judge Jessup proffered a legal basis for recognition of Applicants' standing under the original Mandate. Relying on the *Free Zones* cases, *Free Zones of Savoy and District of Gex*, [1932] P.C.I.J., ser. A/B, No. 46, Judge Jessup found precedent for applying the third-party beneficiary doctrine of contract law to treaties and conventions. S.W.A. CASES I 409 (Jessup, separate opinion).

Various theories have been advanced by the text-writers which lend authority to the Court's pronouncement. *See Q. WRIGHT, supra* note 55, at 158; Hale, *The Creation and Application of the Mandate System*, 25 *TRANSACT. GROT. SOC'Y* 185, 256 (1939); Keith, *Mandates*, 4 *J. COMP. LEG. & INT'L L.* 71, 82 (1922).

88. S.W.A. CASES I 343. As more succinctly stated in the pleadings, South Africa contended:

The provisions of Article 22 of the Covenant and those of the Mandate itself appear to exclude the possibility that League Members were intended to have a legal interest in matters not affecting their material interests, that is in matters which could affect only the inhabitants. S.W.A. CASES, PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS [1962] I.C.J. 243.

89. S.W.A. CASES I 343.

The Court met these objections by maintaining that the Union's contentions were contrary to the natural and ordinary meaning of the provisions of Article 7, which mentions "any dispute whatever" arising between the Mandatory and another member "relating to the interpretation or the application of the provisions of the Mandate."⁹⁰ It found the right to legal action as conferred by Article 7 on member states of the League, to be an essential and inseparable part of the Mandate,⁹¹ with the role of the Court as a "final bulwark of protection . . . against possible abuse or breaches of the Mandate."⁹²

The fourth preliminary objection was that this dispute was not one which "cannot be settled by negotiation" with the Applicants within the meaning of Article 7. There had been no such negotiations with a view to its settlement.⁹³ The Applicants conceded that even though the various discussions in the United Nations General Assembly about South West Africa had not been profitable, direct negotiations between the parties had never been tried.⁹⁴ To answer this objection the Court relied on the factual situation stating, in effect, that parliamentary diplomacy was as adequate as direct diplomatic exchanges at the state level.⁹⁵ The Court emphasized that it is

90. *Id.* The Court felt that the language in Article 7 was broad, clear and precise, giving rise to no ambiguity and permitting no exceptions:

It refers to any dispute whatever relating not to any one particular provision or provisions, but to "the provisions" of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory towards the inhabitants of the Territory or towards the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself. *Id.*

But such a firm and positive statement by the majority seems a bit strange in view of the fact that seven dissenting judges took the opposite view on exactly the same point.

91. *Id.* at 344.

92. *Id.* at 336. The dissenters took the defensible position that the disputes envisaged by Article 7 were disputes in the traditional sense of the term, *i.e.*, disputes between the actual parties before the court about their own interests, such as the protection of their own rights and the rights of their nationals. *Id.* at 455, 463, 559, 569, 659-60.

93. President Winiarski, in his dissenting opinion, stated:

By negotiations between States, however, it can only be possible to settle disputes in which the parties can deal freely with their rights and their interests. The condition laid down in Article 7 [this article refers to a dispute which "cannot be settled by negotiation"] decisively proves that that Article envisages only legal cases in the true, the only universally accepted sense of the expression, where States, believing themselves to possess legally protected rights and interests, and which have been unable to settle their disputes by negotiation, ask the Court to decide as between them. S.W.A. CASES I 457 (Winiarski, dissenting opinion).

94. *Id.* at 346.

95. The Court said:

Moreover, diplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation. In cases where the disputed questions are of common interest to a group of States on one side or the other in an organized body, parliamentary or conference diplomacy has often been found to be the most practical

not so much the form of negotiation that mattered as the attitude and views of the parties on the substantive issues involved: "So long as both sides remain adamant . . . there is no reason to think that the dispute can be settled by further negotiations between the Parties."⁹⁶

Thus, the Court found itself competent to determine the important issue: does the practice of *apartheid*, in and of itself, constitute a violation of the duties which South Africa agreed to assume under the terms of the Mandate?

III. THE DISMISSAL OF THE CASE

On July 18, 1966, the Court dismissed the case in a forty-nine page opinion,⁹⁷ asserting that the Applicants did not possess any legal right or interest in the subject matter of their claims.

The rights possessed by the Applicants, of course, included those which were conferred directly upon the members of the League as individual states, or in favor of their nationals, by "special interests" provisions in the mandates.⁹⁸ The Court, however, distinguished these "special interests" provisions from other provisions which defined the mandatory's obligations to the inhabitants of the Territory and to the League.⁹⁹ The latter were known as the "conduct" provisions. The Court concluded that the issue to be resolved was whether any legal right or interest was vested in members of the League individually under the "conduct" provisions of the mandates which would entitle individual member nations to exact compliance with the terms of the mandate from the mandatories.¹⁰⁰

The Applicants contended that they had a legal right or interest in the conduct of the mandate because of the mere existence of the "sacred

form of negotiation. The number of parties to one side or the other of a dispute is of no importance; it depends upon the nature of the question at issue. If it is one of mutual interest to many States, whether in an organized body or not, there is no reason why each one of them should go through the formality and pretence of direct negotiation with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition.
Id.

96. *Id.*

97. S.W.A. CASES II 6. Since the Applicants appeared before the Court in their special capacity as former members of the League, claiming rights said to have vested at the time of the League, the Court was required to act as if the case arose at the point in time when the mandates system was instituted. *Id.* at 23.

98. *Id.* at 20. Special interests provisions contained rights "of the same kind as are to be found in certain provisions of ordinary treaties of commerce, establishment and navigation concluded between States." *Id.* "Their [special interests provisions] primary object was to benefit the individual members of the League and their nationals. Any action or intervention on the part of member States in this regard would be for that purpose—not in furtherance of the mandate as such." *Id.* at 21.

99. *Id.* at 20.

100. *Id.* at 22.

trust."¹⁰¹ The Court disagreed, holding that the "sacred trust" remains only a moral or humanitarian ideal, lacking any judicial expression or legal form. This thereby gives rise to no enforceable rights and obligations outside the mandate system as a whole.¹⁰²

In light of the judicial character and structure of the League, the Court found that, by virtue of Article 2 of the Covenant,¹⁰³ member states were precluded from individual action with respect to League matters.¹⁰⁴ Individual member states could take part in the administrative process only through their participation in the activities of League organs, but had no right of direct intervention in the administration of mandatories, for such was solely the prerogative of the League organs.¹⁰⁵

Similarly, the Court rejected the suggestion that when the League dissolved, the rights previously vested in the League itself (or its competent organs) inured to the individual states which were members at the date of dissolution.¹⁰⁶ The members of a dissolved international organization can be deemed to retain only rights which they *individually* possessed when the organization was extant. The Court would not interpret the unilateral declarations (or statements of intention) made by the various mandatories on dissolution of the League, which expressed their willingness to continue to be guided by the mandates in their administration of the territories concerned, as conferring on the members individually any new legal rights or interests.¹⁰⁷ Furthermore, the Court found that nothing had occurred after the dissolution of the League to vest in its members rights they did not previously have.¹⁰⁸

With respect to the contention that the Applicants' legal right or interest had been settled by the 1962 judgment and could not be reopened, the Court pointed out that a decision on a preliminary objection could never be conclusive of an issue pertaining to the merits, whether or not it had in fact been dealt with in connection with preliminary objections.¹⁰⁹ By virtue of Article 62, paragraph 3, of the Court's rules, "when preliminary objec-

101. *Id.* at 34. Applicants contended that the "sacred trust" in Article 22 of the Covenant was a "sacred trust of civilization" and thus all nations had an interest in seeing that it was carried out. For the text of Article 22, see note 134 *infra*.

102. *Id.* at 35.

103. Article 2 of the Covenant provided that the "action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat." COVENANT art. 2.

104. S.W.A. CASES II 23, 24.

105. *Id.* at 26.

106. *Id.* at 35.

107. *Id.*

108. *Id.* at 36.

109. *Id.*

tions are entered by the defendant party in a case, the proceedings on the merits are . . . suspended."¹¹⁰ Until the proceedings on the merits are resumed, there can be no decision finally determining or prejudging any issue on the merits.¹¹¹ Thus, the Court found no contradiction between a decision that the Applicants had the capacity to invoke the jurisdictional clause and a decision that the Applicants had not established a legal basis for their claim on the merits.¹¹²

Turning to the contention that the jurisdictional clause—Article 7(2)—of the Mandate conferred a substantive right to compel the Mandatory to carry out the “conduct” provisions, the Court observed that it would be remarkable if so important a right had been created so indirectly and in such a casual fashion.¹¹³ The Court could not distinguish this particular jurisdictional clause from many others. It stated that it was an almost elementary principle of procedural law that a distinction had to be made between the right to activate a court and examine the merits of a claim, and the plaintiff’s legal right with respect to the subject matter of the claim, which would have to be established to the satisfaction of the Court.¹¹⁴

The Court, after dismissing tangential contentions of the Applicants,¹¹⁵ directed itself to the final contention: the so-called argument of “necessity.”¹¹⁶ It was suggested that since the Council never had a means of imposing its views on the Mandatory, and since no advisory opinion of the Court would be binding on the Mandatory, the Mandate could have been flouted at will. Hence, it was essential as an ultimate safeguard for the “sacred trust” that each member have a legal right to take direct action.¹¹⁷ The Court felt the argument was obviously misconceived because the man-

110. *Id.* at 37.

111. *Id.* The Court pointed out that a judgment on a preliminary objection might touch on a point of merits, but this it could do only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection.

112. *Id.* at 38.

113. *Id.*

114. *Id.* at 39. The Court also compared the rights of members of the League Council under the jurisdictional clauses of the Minorities Treaties signed after the First World War, with their rights under the jurisdictional clauses of the mandate instruments. In the case of the mandates, the jurisdictional clause was intended to give the individual members of the League the means of protecting their “special interests” relative to the mandated territories; in the case of the Minorities Treaties, the right of action of the members of the Council under the jurisdictional clauses were intended for the protection of minority populations. *Id.* at 40, 41.

115. *Id.* at 41, 42. These contentions dealt with the legislative history of the mandates.

116. *Id.* at 44.

117. *Id.* at 46.

date system was expressly designed to exclude the kind of enforcement which, according to the "necessity" argument, was essential.¹¹⁸ It was never intended that the mandatories should be answerable to individual League members; otherwise, any individual member could independently invoke the jurisdiction of the Court by alleging misconduct, even if the Council of the League was perfectly satisfied with the way in which a mandatory was carrying out its mandate.¹¹⁹ Moreover, it was noted that the "necessity" argument amounts to a plea that the Court should recognize the equivalent of an *actio popularis*—the right of any member in a community to take legal action in vindication of a public wrong.¹²⁰ Such a right, while known in certain municipal systems of law, has never existed in international law, and the Court held that it was not implied in the "general principles of law" referred to in Article 38, paragraph 1(c) of its Statute.¹²¹ The Court finally determined the whole "necessity" argument to be based on considerations of an extra-legal nature, "the product of a process of afterthought."¹²² Such a theory was never officially advanced during the period of the League, but rather it was subsequent events alone, not anything inherent in the mandates system, that gave rise to the alleged "necessity." Further, the Court was of the opinion that this necessity, if it does exist, lies in the political field and does not constitute necessity in the eyes of the law.¹²³

Summary disposition was made of the last contention, that the Court is empowered to supply an omission resulting from the failure of the framers of the Mandate to foresee what was to occur. The Court merely said that it "cannot however presume what the wishes and intentions of those concerned would have been in anticipation of events that were neither foreseen nor foreseeable; and even if it could, it would certainly not be possible to make the assumptions in effect contended for by the Applicants as to what those intentions were."¹²⁴

118. *Id.* Compare notes 82-83 *supra* and accompanying text.

119. *Id.* at 46-47.

120. *Id.* at 47.

121. *Id.*

122. *Id.* at 47.

123. *Id.* at 47. The Court further stated:

It is always open to parties to a dispute, if they wish the Court to give a decision on a basis of *ex aequo et bono*, and are so agreed, to invoke the power which, in those circumstances, paragraph 2 of this same Article 38 confers on the Court to give a decision on that basis, notwithstanding the provisions of paragraph 1. Failing that, the duty of the Court is plain. *Id.* at 48.

124. *Id.* at 48-49.

IV. THE MERITS OF THE CASE

The Applicants alleged in their Memorial a cause of action based on a "norm of non-discrimination or non-separation" and on certain undefined "standards."¹²⁵ It became clear that the Applicants' whole case with respect to the alleged contraventions of the Mandate was based on the existence of either a "norm" or "standards" when the Applicants' agent said: "The issue before the Court, accordingly, is whether the processes of the organized international community have or have not eventuated in international *standards* or an international legal *norm*, or both."¹²⁶

Applicants contended that the alleged "standards" were binding on Respondent by reason of an implied agreement in the Mandate itself, under which the Mandatory was bound to submit to guidelines laid down by the supervisory authority.¹²⁷ Applicants' "norm" contention indicated that Respondent was obliged under the Mandate to govern in accordance with international law. Consequently any legal norm binding upon Respondent as the administering authority in respect of South West Africa would be enforceable under Article 7(2) of the Mandate.¹²⁸ The only difference between the two concepts was that the "standards" were argued to be applicable only to South Africa as a Mandatory, whereas the "norm" was said to be binding on all states, including Respondent in its capacity as a sovereign state.¹²⁹

Even though a majority of the Court dismissed the case without resolving these two allegations, both concurring and dissenting opinions, in dicta, did discuss these issues.

125. S.W.A. CASES II 15. Applicants' Submission No. 4 reads as follows:

Respondent, by virtue of economic, political, social, and educational policies applied within the Territory, by means of laws and regulations, and official methods and measures, which are set out in the pleadings herein, has, in the light of applicable international standards or international legal norm, or both, failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant; and that Respondent has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfil its duties under such Articles.

Non-discrimination and non-separation were defined as follows:

In the following analysis of the relevant legal norms, the terms "non-discrimination" or "non-separation" are used in their prevalent and customary sense: stated negatively, the terms refer to the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential: stated affirmatively, the terms refer to governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such. *Id.* at 142 (Van Wyk, separate opinion).

126. *Id.* at 145. (emphasis added).

127. *Id.* at 157.

128. *Id.*

129. *Id.* at 159.

A. *Did South Africa Breach Mandate Standards?*

1. *Purpose of the Mandates System.*

The underlying purposes for the establishment of the mandates system have been the subject of much comment, with theories ranging from "a new contrivance for ordinary annexation"¹³⁰ to the advancement of the well-being of backward people.¹³¹ Apparently the mandates were created "in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization."¹³² Support for this view has been gleaned from the principles laid down by Article 22 of the Covenant of the League of Nations which are applicable to territories inhabited by peoples not able to provide for their own well-being and development.¹³³ In the opening paragraph of Article 22,¹³⁴ the terms "sacred trust" and "tutelage" would appear to be

130. W. KENNEDY & H. SCHLOSBERG, *THE LAW AND CUSTOM OF THE SOUTH AFRICAN CONSTITUTION* 511 (1935).

131. *See* E. VAN MAANEN-HELMER, *THE MANDATE SYSTEM* 41 (1929), where the author is of the opinion that the mandates system embodies two fundamental principles: "that the advanced peoples of the world shall secure the well-being and development of the backward peoples, and that the resources of the undeveloped portions of the earth shall be used for the benefit of the world as a whole."

See also Rappard, *Human Rights in Mandated Territories*, 243 *ANNALS* 118, 119 (Jan. 1946) wherein the author expresses still another view:

This system, it should be recalled, was not set up primarily for the protection of human rights, but for the settlement of rival political claims. . . . At the Peace Conference, the victors, with various degrees of insistence, were inclined to demand the annexation of the territories they had occupied. As President Wilson had repeatedly declared that the war was not being fought for, and should not lead to, the territorial aggrandizement of the victors, he consistently opposed these requests. The result of the discussion which ensued was a compromise: the victors retained possession of the respective territories they had conquered, but consented to administer them not as sovereign masters but as mandatories on behalf of the League of Nations and under specific, internationally agreed conditions. (emphasis added).

132. S.W.A. STATUS 128, 132. The governing principles of the system are to be found in the English conception of trust rather than in the Roman conception of agency with respect to the administrative of property. N. BENTWICH, *THE MANDATE SYSTEM* 7 (1930). *See also* M. HALL, *MANDATES, DEPENDENCIES AND TRUSTEESHIP* 97-100 (1948); Q. WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 389 (1930); Brierly, *Trust and Mandates*, *BRIT. Y. B. INT'L L.* 217-19 (1929).

133. W. KENNEDY & H. SCHLOSBERG, *supra* note 130, at 512, wherein it is stated: Practical effect is given to these principles by entrusting the tutelage of such peoples to advanced nations who are in a position to undertake the responsibility; such tutelage to be exercised by them as mandatories on behalf of the League. . . . The degree of authority, control, or administration to be exercised by the mandatory is to be defined by the council, and the mandatory is to make an annual report to the council "in reference to the territory committed to its charge," which report is to be examined by a permanent commission constituted to advise the council on all matters relating to the observance of the mandate.

134. Article 22 of the Covenant provides:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and

more than merely descriptive of the idealistic or humanitarian objectives of the mandate system. While the terms obviously import a high moral value, there is authority for the proposition that they were intended to have some legal significance as well.¹³⁵ This proposition was accepted by the Court in its 1962 decision,¹³⁶ thus adding judicial significance to the contention that

which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience, or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions, and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience or religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

135. LEAGUE OF NATIONS, THE MANDATES SYSTEM, ORIGIN—PRINCIPLES—APPLICATION 12-13 (1945). See also A. MARGALITH, THE INTERNATIONAL MANDATE 198 (1930).

136. The essential principles of the Mandates System consist chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a regime of tutelage for each of such peoples to be exercised by an advanced nation as a "Mandatory" "on behalf of the League of Nations"; and the recognition of a "sacred trust of civilization" laid upon the League as an organized international community and upon its Member States. This system is dedicated to the avowed object of promoting the well-being and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights.

These features are inherent in the Mandates System as conceived by its authors and as entrusted to the respective organs of the League and the Member States for application. The rights of the Mandatory in relation to the mandated territory and

a mandatory is responsible both to the inhabitants and to the members of the League¹³⁷ in the exercise of its administrative authority in a manner conducive to the avowed aims of the mandate—insuring the well-being and development of the peoples inhabiting the territories in question.¹³⁸

2. *The "Standards" Contention*

In support of their "standards" contention, Applicants argued that the Mandate provides by implication that the organized international community in general, and the competent supervisory organ referred to in Article 6 of the Mandate in particular,¹³⁹ were empowered to enact legal rules relative to the administration of the territory to which the Respondent was obliged to give effect. Secondly, the Applicants contended that, inasmuch as the Respondent was a member of the United Nations and the International Labour Organization,¹⁴⁰ it was not only bound by the constitutions of these institutions but also by "the authoritative interpretation thereof" by the organs of these institutions; therefore, the provisions of the constitutions of these institutions, so interpreted, were standards binding on the Respondent in its administration of South West Africa. The Applicants

the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations. The fact is that each Mandate under the Mandates System constitutes a new international institution, the primary, overriding purpose of which is to promote "the well-being and development" of the people of the territory under Mandate. S.W.A. CASES I 329.

However, this view was rejected (or at least modified) in the 1966 decision. S.W.A. CASES II 35.

137. See N. BENTWICH, *supra* note 132, at 5. See also 1 C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 102-03 (2d ed. 1945).

138. LEAGUE OF NATIONS, *supra* note 135, at 23-24:

Like guardians in civil law, they must exercise their authority in the interests of their wards—that is to say, of the peoples which are regarded as minors—and must maintain an entirely disinterested attitude in their dealings with them. The territories with the administration of which they are entrusted must not be exploited by them for their own profit.

139. Article 6 of the Mandate provides:

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5. MANDATE art. 6.

140. The Applicants based the argument with regard to the International Labor Organization on the following provision from the Declaration of Philadelphia:

[A]ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity. . . . S.W.A. CASES II 166.

However, the Court found that the wording did not support the Applicants' "standards" contention.

further contended that in any event the legal effect of the League resolution of 18 April 1946, which referred to Chapters XI, XII and XIII¹⁴¹ of the Charter, is that the Mandate "must be read in the light of the Charter."¹⁴²

Only three members of the Court discussed the "standards" contention in detail. Judge Van Wyk, in a separate concurring opinion, found that neither the League Council¹⁴³ and its appointed Permanent Mandates Commission¹⁴⁴ nor the General Assembly of the United Nations¹⁴⁵ ever had the competence to "prescribe from time to time standards binding upon the mandatories in general, or upon any particular mandatory."¹⁴⁶ Van Wyk also found that membership in the International Labour Organization or the United Nations did not bind South Africa to any acceptable standard found in the respective Constitution¹⁴⁷ and Charter¹⁴⁸ of these organizations. With regard to the latter he said that "the Charter does not purport to lay down or define human rights and fundamental freedoms" and that "subsequent attempts at drafting comprehensive and legally effective instruments for this purpose have not proved successful."¹⁴⁹

Thus, "the whole concept of 'human rights and fundamental freedoms' is as yet an undefined and uncertain one with no clear content."¹⁵⁰

Even in his dissent, Judge Tanaka agreed that the concept of the promotion of "material and moral well being and social progress of the inhabitants," which is the objective of the Mandate (Article 2, para. 2), is itself essentially of political character and therefore incapable of judicial review.¹⁵¹ However, Judge Jessup, in his lone dissent, looked to pronouncements of the United Nations in determining a standard to be used in interpreting Article 2 of the Mandate.¹⁵² Thus, Judge Jessup concluded:

141. Judge Van Wyk answered this argument in his concurring opinion:

It [the resolution] did no more than to note that Chapters XI, XII and XIII of the Charter embodied "principles" "corresponding" to those declared in Article 22 of the Covenant. S.W.A. CASES II 168 (Van Wyk, separate opinion).

142. S.W.A. CASES II 159 (Van Wyk, separate opinion).

143. *Id.* at 161.

144. *Id.* at 163.

145. *Id.* at 165.

146. *Id.* at 161.

147. *Id.* at 166.

148. *Id.* at 165.

149. *Id.*

150. *Id.*

151. S.W.A. CASES II 281 (Tanaka, dissenting opinion).

152. S.W.A. CASES II 441 (Jessup, dissenting opinion). Respondent agreed that "the effect of obtaining the agreement of an organization like the United Nations would, for all practical purposes, be the same as obtaining the consent of all the members individually, and that would probably be of decisive practical value, for the United Nations represents most of the civilized States of the world." *Id.*

The task of passing upon Applicants' third submission which asserts that the practice of apartheid is in violation of the Mandatory's obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations, is a justiciable issue, not just a political question. Therefore, the legal interest of Applicants in the proper administration of the Mandate . . . was properly invoked . . .¹⁵³

B. *Is There an International Norm of Human Rights?*

The basic issue in the "norm" contention was whether there was some norm of positive international law which would place South Africa in breach of any duty it might have by the practice of *apartheid* in the mandated territory. To determine this, the Court needed to find a respect for the human rights of the individual as evidenced in either convention or general customary international law.

1. *Political Disputes*

Unless a norm of positive international law by which to judge the issue of *apartheid* exists,¹⁵⁴ the Court apparently would be forced to resolve a political, as opposed to a legal, question, which, lacking the consent of the parties,¹⁵⁵ is manifestly without its power to accomplish.¹⁵⁶

There is no generally accepted definition of "legal disputes." Definitions offered range from "those in which the dispute as to the respective rights of the parties is governed by a fairly definite rule of law,"¹⁵⁷ to "those in which all the parties believe they can satisfy their interests better by the application of law than by some other means."¹⁵⁸ One effort to establish an accepted definition was Article 1 of the Locarno Treaties of 1925, which considered legal disputes to be "all disputes of every kind . . . with regard to which the parties are in conflict as to their respective rights."¹⁵⁹ This criterion

153. *Id.* at 442.

154. There is a split of opinion on the question of whether the "norm" of international law must have existed at the time of the establishment of the Mandate or not. Some dissenting opinions clearly took the position that "norms" arising subsequent to the establishment of the Mandate are applicable to this case. S.W.A. CASES II 293-94, 439 (Tanaka and Jessup, dissenting opinions).

155. This authorization is found in Article 38(2) of the Statute of the Court which provides for settlement of a dispute *ex aequo et bono* with the parties' consent.

156. S.W.A. CASES II 279, 439 (Tanaka and Jessup, dissenting opinions).

157. Fenwick, *The Distinction Between Legal and Political Questions*, 18 PROC. AM. SOC'Y INT'L L. 44 (1924).

158. Wright, *The Distinction between Legal and Political Questions with Especial Reference to the Monroe Doctrine*, 18 PROC. AM. SOC'Y INT'L L. 57 (1924). One author has also noted a definite tendency to base the distinction between legal and political disputes upon a nation's own self-interest and its own initiation:

If the question does not affect what the nation may deem to be its vital interests, or if it has less to lose by a judicial settlement than by war or other political

has been subsequently criticized as creating the false impression that legal disputes can be distinguished from political ones by an objectively ascertainable quality inherent in the conflict.¹⁶⁰ In its stead, a subjective criterion has been proffered—legal disputes are those in which both parties base their respective claims and their rejections of the other party's claims on positive law; whereas political disputes are disputes in which at least one party bases its claim or defense on principles other than those of positive international law, *i.e.*, general principles of justice or equity.¹⁶¹

Apparently this criterion was embodied in the formulation of the Statute of the International Court of Justice, for Article 36(2) restricts the jurisdiction of the Court to all "legal disputes" concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation. Resolution of these disputes is to be made in accordance with Article 38, which, *inter alia*, calls for the application of international conventions and principles of customary international law. Thus, it would appear that the legal or political character of a dispute is to depend, not upon its substance, but rather upon the norms which are to be applied to it; *i.e.*, the dispute is legal if it is to be decided according to norms of positive international law, whereas it is political if it is to be decided according to other norms, such as principles of justice and equity.¹⁶²

method, it will be submitted and will by many for that reason be called legal. . . . Thus, what is known as a political question becomes a legal question solely because there is a willingness, induced by any one of many considerations counselling self-restraint, to have it peaceably settled. Borchard, *The Distinction between Legal and Political Questions*, 18 PROC. AM. SOC'Y INT'L L. 50,53 (1924).

159. For text see *Final Protocol of The Locarno Conference 1925*, 20 AM. J. INT'L L. 21, 26 (Supp. Off. Doss. 1920).

160. Kelsen, *Compulsory Adjudication of International Disputes*, 37 AM. J. INT'L L. 397, 402-03 (1943).

161. *Id.* at 403.

162. H. KELSEN, *THE LAW OF THE UNITED NATIONS* 478-79 (1950). The author notes an exception to the general proscription against entertainment of a political question in the case of an agency authorized by a norm of international law to decide a dispute according to the principles of justice and equity. In such a case the principles applied assume the character of international law with the decision of the agency assuming legal character. This is an instance of an agency creating law for the specific case, and thus the difference between so-called "legal" and "political" disputes is only a difference between two kinds of legal disputes: disputes to be settled in accordance with pre-existent law, that is law as it exists at the time the dispute arises, and disputes to be settled in accordance with the law to be created by the competent authority for the settlement of the dispute.

A somewhat more expansive interpretation has been given to "political dispute" by some authors, who consider it to entail any disagreement which relates not to the application of the rules of international law, but rather to the adequacy of the existing legal order. In other words, the disagreement arises from the dissatisfaction with the applicable

2. Possible Bases for an International Norm

a. Historical custom. In international law a principle becomes enforceable through the practice of custom or convention. With regard to human rights, their short history has not been followed by any great progress in the realization of human rights as legal rights in many countries. In fact, one noted author commented of the last decade: "[T]he present conditions of life in most countries of the world show a denial of human rights to most people."¹⁶³ This same author also contends that before the modern international community received its first constitution under the League, human rights did not appear as a distinct set of rules within the law of nations but remained subject to municipal law alone.¹⁶⁴

With the exception of a few rare cases of collective intervention, early customary international law did not provide for protection of the individual against the oppression of his own government.¹⁶⁵ This was due to the fact that the principle of sovereignty recognized the right of a state to exercise its unfettered jurisdiction within its own territory, save only for the obscure doctrine of humanitarian intervention in cases where a state maltreats its subjects in such a way as to shock the conscience of mankind.¹⁶⁶ Customary law did, however, provide for the protection of the human rights of foreigners, "authorizing the State of which they were nationals to intervene diplomatically in order to secure for them certain minimum standards of treatment."¹⁶⁷ This concept undoubtedly provided the basis for a number of treaties which contained recognition of human rights by providing for religious freedom and the cultural and political rights of minorities.¹⁶⁸

rules of law. L. GOODRICH & E. HAMBRØ, CHARTER OF THE UNITED NATIONS 257 (1949).

163. P. DROST, HUMAN RIGHTS AS LEGAL RIGHTS 14 (1951).

164. *Id.* at 15.

165. *See* 1 L. OPPENHEIM, INTERNATIONAL LAW 312-13 (8th ed. H. Lauterpacht 1958).

166. This principle has had its advocates beginning with Grotius, but its application has been sporadic, limited to the most severe instances, such as intervention in behalf of the Greek people in 1827 and, subsequently, in behalf of the oppressed Armenians in Turkey. *See* Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS 23 (1965).

167. *Id.*

168. *E.g.*, Treaty of Berlin (1878); Treaty of Paris (1856); Congress of Aix-la-Chapelle (1818); Treaty of Vienna (1815); Treaty of Westphalia (1648); Treaty of Augsburg (1555). For a detailed survey of these treaties, *see* O. JANOVSKY & M. FAGEN, INTERNATIONAL ASPECTS OF GERMAN RACIAL POLICIES 6-27 (1937); C. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES 156-75 (1934).

b. Unilateral declarations. The modern view of the international community, as manifested in the declarations of world organizations,¹⁶⁹ governments,¹⁷⁰ scholars,¹⁷¹ jurists,¹⁷² authors,¹⁷³ and scientists,¹⁷⁴ reflects a general condemnation of the practice of discrimination on the basis of race, creed or color. The late Hersch Lauterpacht wrote: "The moral claims of today are often the legal rights of tomorrow."¹⁷⁵ Yet, mere declarations of moral turpitude create no legal obligations. The world community has not yet progressed to the point at which human rights are afforded any positive standard of customary international law by which violations can be ascertained. Perhaps this can be attributed to the reluctance of nation-states to surrender some of their sovereignty to a collective agency such as the United Nations, because the enforcement of such rights necessarily involves an

169. See G.A. Res. 1979, 18 U.N. GAOR Supp. 15, at 51, U.N. Doc. A/5515 (1963); G.A. Res. 1899, 18 U.N. GAOR Supp. 15, at 46, U.N. Doc. A/5515 (1963); G.A. Res. 1806, 17 U.N. GAOR Supp. 17, at 39, U.N. Doc. A/5217 (1962); G.A. Res. 1805, 17 U.N. GAOR Supp. 17, at 38, U.N. Doc. A/5217 (1962); G.A. Res. 1703, 16 U.N. GAOR Supp. 17, at 40, U.N. Doc. A/5100 (1961); G.A. Res. 1702, 16 U.N. GAOR Supp. 17, at 39, U.N. Doc. A/5100 (1961); G.A. Res. 1596, 15 U.N. GAOR Supp. 16A, at 7, U.N. Doc. A/4684 (1961); G.A. Res. 1593, 15 U.N. GAOR Supp. 16A, at 7, U.N. Doc. A/4684 (1961); G.A. Res. 1565, 15 U.N. GAOR Supp. 16, at 31-32, U.N. Doc. A/4684 (1960).

170. China: 13 U.N. SCOR, 1053rd meeting 41 (1958); France: 15 U.N. SCOR, 854th meeting 2-3 (1960); Greece: 13 U.N. GAOR, Special Pol. Comm. 20 (1958); Ireland: 16 U.N. GAOR, Special Pol. Comm. 83 (1961); Malaya: 17 U.N. GAOR, Special Pol. Comm. 49 (1962); Mexico: 16 U.N. GAOR, 4th Comm. 98 (1961); The Netherlands: 17 U.N. GAOR, Special Pol. Comm. 38 (1962); Norway: 18 U.N. SCOR, 1055th meeting 6-7 (1963); Pakistan: 17 U.N. GAOR, Special Pol. Comm. 22 (1962); 15 U.N. SCOR, 852nd meeting 30 (1960); Poland: 14 U.N. GAOR, Special Pol. Comm. 49 (1959); United Kingdom: 17 U.N. GAOR, 4th Comm. 332 (1962); 15 U.N. GAOR, 4th Comm. 83 (1960); United States: 18 U.N. GAOR 31 (1963); 18 U.N. SCOR, 1052th meeting 31 (1963).

171. G. DE KIEWIET, *THE ANATOMY OF SOUTH AFRICAN MISERY* 47-49 (1956); R. DOXEY, *THE INDUSTRIAL COLOUR BAR IN SOUTH AFRICA* 200 (1961); Brooks, *South Africa and the Wider Africa, 1910-1960*, 27 RACE RELATIONS J. 8 (Jan.-March 1960); Thompson, *Fifty Years of Union*, 27 RACE RELATIONS J. 66-67 (April-June 1960); Wilson, *The Principle of Maintaining the Reserves for the African*, 28 RACE RELATIONS J. 8-9 (Jan.-March 1962).

172. H. FAGAN, *OUR RESPONSIBILITY: A DISCUSSION OF SOUTH AFRICA'S RACIAL PROBLEMS* 47 (1960). See also *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

173. E. CALLAN, ALBERT JOHN LUTHULI AND THE SOUTH AFRICA RACE CONFLICT 57-58 (1962); A. LUTHULI, LET MY PEOPLE GO: AN AUTOBIOGRAPHY 202, 245 (1962); E. MPHAHLELE, THE AFRICAN IMAGE 33-34 (1962); A. PATON, THE PEOPLE WEPT 44 (1958); P. VAN RENSBURGH, GUILTY LAND; THE HISTORY OF APARTHEID 138-39 (1962).

174. J. CLARK, PREJUDICE AND YOUR CHILD 47 (2d ed. 1963); I. MAC CRONE, RACE ATTITUDES IN SOUTH AFRICA 261 (1937); R. MAC IVER, THE WEB OF GOVERNMENT 428 (1947); P. TOBIAS, THE MEANING OF RACE 22, 48-49 (1961).

175. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 74 (1951).

intrusion by the international community into matters of traditionally domestic concern. Moreover, any immediate attempt to enforce such an all-embracing concept as "moral rights" would tend to prove somewhat impractical since the moral rights of men in some communities differ from the moral rights of men in other communities;¹⁷⁶ the need for international legislation is readily apparent.

c. Natural rights. In the words of Jacques Maritain, human rights are *universal* in that they belong to a man simply because he is a man:

The human person possesses rights because of the very fact that it is a person, a whole, master of itself and of its acts, and which consequently is not merely a means to an end, but an end, an end which must be treated as such. The dignity of the human person? The expression means nothing if it does not signify that by virtue of natural law, the human person has the right to be respected, is the subject of such rights, possesses rights. These are things which are owed to man because of the very fact that he is man.¹⁷⁷

Echoing Maritain, Judge Tanaka, in accepting the Applicants' alternative contention that the alleged legal norm was cognizable under the terms of Article 38 (i) (c) of the Statute ("the general principles of law recognized by civilized nations"),¹⁷⁸ reasoned that the principle of protection of human rights is derived from the concept of man as a *person* and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend upon the will of the state as expressed in its laws and other legislative measures, or in its treaties or customs. Under such a view it would appear that states are incapable of creating human rights by law or convention and can only confirm their existence and give them protection: "The role of the State is no more than declaratory."¹⁷⁹ Human rights, then, belong to that category of law known as *jus cogens*, which are incapable of being changed by way of agreement between states;¹⁸⁰ whether such rights are expressly recognized or not they constitute "general principles of law" to which

176. M. CRANSTON, *WHAT ARE HUMAN RIGHTS* 74 (1962).

177. J. MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* 37 (1943).

178. S.W.A. CASES II 300 (Tanaka, dissenting opinion).

179. *Id.* at 297.

180. *Id.* at 298.

181. *Id.* It is in this respect that S. Rosenne comments:

Having independent existence, their validity as legal norms does not derive from the consent of the parties as such. . . . The Statute places this element on a footing of formal equality with two positivist elements of custom and treaty, and thus is positivist recognition of the Grotian concept of the co-existence implying no subjugation of positive law and so-called natural law of nations in the Grotian sense. II S. ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE* 610 (1965).

nations are subject.¹⁸¹ Extending this concept, Tanaka said that his analysis of human rights in general can be applied to the principle of equality, thus giving a basis for a norm of non-discrimination.¹⁸²

Unfortunately, the world community has successfully negated any attempt to identify natural or moral rights with any aspects of enforceable rights. Certainly customary international law cannot be said to have progressed to the point where these rights have been completely inculcated in legal rights and efforts to promulgate conventions which would fill this void have met with little success. Nor can it be contended that the principle of protection of human rights constitutes a principal of law recognized by the nations of the world, since nation-states have long inflicted upon their minorities oppression and abuse. It must, therefore, be concluded that human rights remain mere ideals, commanding no sanction for their repeated violation.

d. Conventions.

i. Minorities Treaties. Shortly after World War I came the first major attempt to provide international recognition of basic human rights. In conjunction with the peace settlements and the formation of the League, fourteen nations¹⁸³ "agreed" to accept specific obligations with respect to minorities within their own territories, guaranteeing life, liberty, and freedom of religion to all inhabitants within their territorial boundaries, and ensuring the treatment of their nationals on a basis of perfect equality.¹⁸⁴ Thus, the foundation of the new structure of minority protection appears to have been *equality in rights*, with the ultimate goal being prevention of discrimination on the basis not only of religion but also of race and language.¹⁸⁵

Using the Treaty of Poland as a model for all other Minorities Treaties,¹⁸⁶ and equality as a guiding principle, the signatories stipulated that the provisions of the Treaties constituted binding obligations. The Treaties were placed under the guarantee of the League, and any member of the Council

182. S.W.A. CASES II 300 (Tanaka, dissenting opinion), citing C. JENKS, *THE COMMON LAW OF MANKIND* 121 (1958), for the proposition that the principle of respect for human rights includes equality before the law as a general principle of law.

183. The signatories were as follows: Albania, Austria, Bulgaria, Czechoslovakia, Esthonia, Finland, Greece, Hungary, Latvia, Lithuania, Poland, Rumania, Turkey, Yugoslavia.

184. Waldock, *supra* note 166, at 4.

185. O. JANOWSKY & M. FAGEN, *supra* note 168, at 28-29.

186. For text, see J. ROBINSON, O. KARBACH, M. LASERSON, N. ROBINSON, M. VICHNIAK, *WERE THE MINORITIES TREATIES A FAILURE?* 313-18 (1943) (hereinafter cited as ROBINSON). See also O. JANOWSKY, *NATIONALITIES AND NATIONAL MINORITIES* 112-15 (1945), for a discussion of the rights protected under the Minorities Treaties.

of the League had the right to bring to its attention any danger of an infraction of the provisions. The Council was empowered to take such action and give such directions as it deemed proper and effective. In addition, any dispute as to the Treaties' application could be referred to the Permanent Court of International Justice.¹⁸⁷ But to effectuate this commendable plan necessitated the regulation of "what constitutes the most sensitive sphere of the political life of a country"¹⁸⁸—that is, the relationship between a state and its citizens. Each state was required to implement these Treaties as part of its fundamental constitutional law and to ensure that "no law, regulation, or official action"¹⁸⁹ conflicted or interfered with their stipulations, nor prevailed over them.¹⁹⁰

The value of the Minorities Treaties in establishing a precedent for the observance and enforcement of basic human rights is doubtful. Though the original purpose of the Treaties was quite noble,¹⁹¹ later authorities have concluded that the protection of minorities was but a pawn in the game of international power politics: "The subordination of the responsibilities under the treaties to considerations of political necessity or expediency, led to the complete politicization of what was originally intended to be a great humanitarian enterprise."¹⁹²

An extensive examination of the basic conceptions underlying the Treaties and the principal purposes which they were intended to serve, had led two of the foremost authorities in this area of international law to conclude:

Contrary to what might at first sight be thought its character, as careful examination of the treaties and especially their application reveals, the system was neither humanitarian nor juridical. Its essential aim might have been to shield the minorities from the danger of op-

187. M. MOSKOWITZ, *HUMAN RIGHTS AND WORLD ORDER* 95 (1958).

188. P. DE AZCARATE, *LEAGUE OF NATIONS AND NATIONAL MINORITIES* 27 (1945).

189. Treaty with Poland, Art. I, reprinted in ROBINSON, *supra* note 186, at 314.

190. Waldock, *supra* note 166, at 4.

191. The origin and purpose of the Minorities Treaties was authoritatively stated by George M. Clemenceau, President of the Council of the Peace Conference:

There rests, therefore, upon these Powers an obligation, which they cannot evade, to secure in the most permanent and solemn form guarantees for certain essential rights which they will afford to the inhabitants the necessary protection whatever changes may take place in the internal constitution of the Polish State. *LEAGUE OF NATIONS OFF. J.*, Special Supp. 73, at 44 (1929).

Similarly, this attitude is reflected in the proposed article submitted by President Wilson for the Covenant of the League of Nations:

The League of Nations shall require all new States to bind themselves as a condition precedent to their recognition as independent or autonomous States to accord to all racial or national minorities within their several jurisdictions exactly the same treatment and security, both in law and in fact, that is accorded the racial or national majority of their people. 2 D. MILLER, *THE DRAFTING OF THE COVENANT* 91, 105 (1928).

192. M. MOSKOWITZ, *supra* note 187, at 118.

pression by the majorities and from the sufferings, both moral and material, which such oppression necessarily causes; but in fact its aim was purely *political*.¹⁹³

and,

. . . [T]he primary objective is the peace of the world; the means through which this is to be attained, and thus the indirect objectives of the Treaties, is the internal stability of the Treaty states; and the means through which this, again, is to be achieved is the wellbeing of the minorities, which shall make them contented and loyal citizens of the states of which they form part. The welfare of the minorities is thus, in a sense, relegated to the third place. . . .¹⁹⁴

Thus, it would appear that protection of minorities was actually conceived as a means to an end: assurance of internal stability of treaty-states with a view to securing international peace.¹⁹⁵

With a single exception, the provisions of the Treaties were devoted to ensuring that a nation's minorities would not be victims of discriminatory treatment by public authorities,¹⁹⁶ hardly constituting a precedent for observation of universal human rights. However, the exception was a clause in the Treaties under which the signatory state guaranteed to *all its inhabitants* full protection of life, liberty, and religious freedom.¹⁹⁷ Thus, the Treaties thereby assume a universal character in that this clause makes no distinction between majority and minorities, but guarantees these basic freedoms to all alike. If the Minorities Treaties are to be considered a genuine precedent for recognition and protection of universal human rights, it would necessarily be solely in this respect.

193. De Azcarate, *Protection of Minorities and Human Rights*, 243 ANNALS 124 (Jan. 1946) (emphasis added). The author bases this contention on the fact that since the minorities protected belonged to the same nationalities as those of majorities in other nations, it was therefore practically inevitable that these states should be interested in the fate of the minorities. This being a fertile source of quarrels, the system of international protection of minorities then had as its principal object the ending of this deplorable state of affairs. In so doing it gave the League of Nations real authority to examine violations of the minorities treaties.

194. C. MACARTNEY, *supra* note 168, at 275.

195. Hula, *International Law and the Protection of Human Rights*, in LAW AND POLITICS IN THE WORLD COMMUNITY 176 (Lipsky ed. 1953).

196. O. JUNGHANN, NATIONAL MINORITIES IN EUROPE 31 (1932).

197. Treaty with Poland, Art. 2, reprinted in ROBINSON, *supra* note 186, at 314:

Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion.

All inhabitants of Poland shall be entitled to the free exercise, whether public or private of any creed, religion or belief, whose practices are not inconsistent with public order or public morals.

Nonetheless, the Minorities Treaties fail to meet the test of establishing a universal and a definite rule of positive international law. It is difficult to understand how certain rights can be considered universal when only a limited number of states were bound to observe them. In the words of one author:

The stigma of inequality was attached also to the minorities system of Versailles. It was a special regulation applying to special states, *and not a general system for the protection of minorities everywhere*. In fact, not even all of those states whose dominion has been extended by the peace treaties had to accept international control over their relations with newly acquired minorities.¹⁹⁸

Also, as the same author points out: "what has been accepted under duress as a special regime is not voluntarily acceptable even as a general scheme."¹⁹⁹

The Minorities Treaties further fail to establish any positive rule of international law in that they were merely international agreements whose purpose was to create certain rights for minorities against their own state.²⁰⁰ It has been described as an unsuccessful attempt to impart to treaty law the standing and force of municipal constitutional law.²⁰¹

Emphasis has been placed on the fact that the authors of the Treaties neglected to spell out in detail the fundamental rights to be respected.²⁰² This failure to formulate any definite standards can be attributed in no small measure to the fact that the signatory states maintained that the Treaties were not self-executing, but rather that they required transformation into domestic law before their provisions became applicable. They further maintained that most states neglected to effect their outright transformation.²⁰³

Any contention that the "guarantee clause" of the Minorities Treaties²⁰⁴ provides a basis for universal recognition of human rights must yield to the patent meaning of the clause. The clause provides that "the stipulations in the foregoing Articles, *so far as they affect persons belonging to racial, religious, or linguistic minorities*, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations."²⁰⁵ Thus, in spite of the fact that a signatory state guaranteed to all its inhabi-

198. Hula, *supra* note 195, at 171 (emphasis added).

199. *Id.* at 171.

200. O. JUNGHANN, *supra* note 196, at 30-31.

201. *See* Hula, *supra* note 195, at 173.

202. *Id.*

203. ROBINSON, *supra* note 186, at 187-94.

204. Treaty with Poland, Art. 12, reprinted in ROBINSON, *supra* note 186, at 316-17.

205. *Id.* (emphasis added).

tants the rights to life, liberty and religious freedom, the infringement of any of these rights was not considered an international concern and could not lead to intervention by the League unless the victims belonged to a minority group:

[T]he "guarantee clause" is the clearest indication of the *political*, not the humanitarian, character of the protection of minorities by the League of Nations since the only reasonable explanation of limiting the intervention of the League to infractions affecting persons belonging to a minority is that these infractions could become a source of international difficulties. . . .²⁰⁶

ii. *United Nations Charter*. It has been stated that the United Nations views the *apartheid* problem in South Africa as strictly a question of human rights, or, more appropriately, as a denial of basic human rights and fundamental freedoms to an overwhelming majority of the population on the basis of color and race.²⁰⁷ Justification for United Nations preoccupation with this policy ostensibly finds its basis in the Charter²⁰⁸ which is said to contain seven specific references to human rights. The Preamble reaffirms the faith of the *people* in the dignity and worth of the human person, and in the equal rights of men and women of all nations. Article 1 declares that "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" is a primary purpose of the United Nations. This undertaking is reiterated in Article 55. In Article 56 all the members pledge to take joint and separate action in co-operation with the United Nations for the achievement of this end. Articles 13 and 62 direct the General Assembly and the Economic and Social Council respectively to "initiate studies and make recommendations" for this purpose, and Article 68 empowers the Council to establish commissions for the *promotion* of human rights.²⁰⁹

206. De Azcarate, *supra* note 193, at 124, 127. The author, however, feels that for the purposes of considering the guarantee provision of the Minorities Treaties as a precedent for a future system of international or supernational protection of human rights, although the provision could deprive it of sanction by limiting the intervention of the League to infractions affecting minorities, it did not deprive the provision of its international character. *Id.* at 127. The present writer is in full agreement with the contention that the Minorities Treaties afford a precedent upon which to *build* a universal standard for the protection of human rights, but submits that they did not constitute one in and of themselves.

207. Malkotra, *Apartheid and the United Nations*, 354 ANNALS 137 (July 1964). For a complete analysis of the development of *apartheid* see R. REAME, *THE HISTORY OF APARTHEID* (1962).

208. Malkotra, *supra* note 207, at 138.

209. It may also be pointed out that Article 76 provides as the "basic objectives" of the trusteeship system the encouragement of respect for human rights.

It is with respect to these "references" that the contention is raised that the human rights provisions of the Charter are not "mere embellishments of an historic document,"²¹⁰ but rather constitute a binding legal obligation upon the signatories.²¹¹ Within the Charter is found language from which a mandatory obligation to respect "human rights and fundamental freedom" is implied.²¹² Since the Charter constitutes a legal document, it is then deduced that the repeated affirmations of the "fundamental human rights" of the individual must be deemed to refer to legal rights recognized by both international law and the independent law of states.²¹³

Judge Tanaka in his dissent said that "from the provisions of the Charter referring to the human rights and fundamental freedoms it can be inferred that the legal obligation to respect human rights and fundamental freedoms is imposed on member States."²¹⁴ Recognizing the imperfect nature of the protection of these rights and freedoms Judge Tanaka stated:

Without doubt, under the present circumstances, the international protection of human rights and fundamental freedoms is very imperfect. The work of codification in this field of law has advanced little from the viewpoint of defining each human right and freedom, as well as the machinery for their realization. But there is little doubt of the existence of human rights and freedoms; if not, respect for these is

210. See INTERNATIONAL LAW ASS'N, *Human Rights*, REPORT OF 42ND CONFERENCE, PRAGUE 1947 14-15 (1948).

211. See Lauterpacht, *The Subjects of the Law of Nations*, 64 L.Q. REV. 97, 101 (1948).

212. See H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 147-48 (1950) where the author states:

Members of the United Nations are under a legal obligation to act in accordance with these Purposes. It is their legal duty to respect and observe fundamental human rights and freedoms. . . . There is a mandatory obligation implied in the provision of Article 55 that the United Nations 'shall promote respect for, and observance of, human rights and fundamental freedoms'; or, in the terms of Article 13, that the Assembly shall make recommendations for the purpose of assisting in the realisation of human rights and freedoms. There is a distinct element of legal duty in the undertaking expressed in Article 56 in which 'All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.'

213. *Id.* at 159. This view is similarly supported by another eminent authority, Judge Philip Jessup:

It is already law, at least for Members of the United Nations, that respect for human dignity and fundamental human right is obligatory. The duty is imposed by the Charter, a treaty to which they are parties. P. JESSUP, *A MODERN LAW OF NATIONS* 91 (1948).

214. S.W.A. CASES II 289 (Tanaka, dissenting opinion). In support of this conclusion Tanaka cites Judge Jessup's statement:

Since this book is written *de lege ferenda*, the attempt is made throughout to distinguish between the existing law and the future goals of the law. It is already the law, at least for Members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter. . . . P. JESSUP, *MODERN LAW OF NATIONS*, 91 (1948).

logically inconceivable; the Charter presupposes the existence of human rights and freedoms which shall be respected; the existence of such rights and freedoms is unthinkable without corresponding obligations of persons concerned and a legal norm underlying them. Furthermore, there is no doubt that these obligations are not only moral ones, and that they also have a legal character by the very nature of the subject-matter.

Therefore, the legislative imperfections in the definition of human rights and freedoms and the lack of mechanism for implementation, do not constitute a reason for denying their existence and the need for their legal protection.²¹⁵

The Judge found that the "evidence of a general practice" provision of Article 38(1)(b)²¹⁶ was sufficiently met by virtue of the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community.²¹⁷ The enumerated resolutions of the General Assembly condemning the practice of *apartheid*²¹⁸ plus the inclusion in all the trust territories agreements of a provision concerning the norm of official non-discrimination on the basis of membership in a group or race²¹⁹ and the various human rights declarations²²⁰ were considered sufficient "evidence of general practices" under the terms of Article 38(1)(b) to establish a judicially enforceable international custom. Judge Nervo also indicated that racial discrimination as a matter of official government policy is violative of a norm or rule or standard of the international community,²²¹ the source of which is the Charter²²² and resolutions²²³ of the United Nations.

These views have been criticized, however, as ignoring the plain meaning of the language of the Charter: the members pledge themselves only to pursue the general objective of securing observance of human rights and do not vest the United Nations with the power to concern itself with particular

215. S.W.A. CASES II 289, 290 (Tanaka, dissenting opinion).

216. Article 38(1)(b) of the Statute of the International Court.

217. S.W.A. CASES II 292 (Tanaka, dissenting opinion). Recognition was given to the fact that there did exist conventions establishing such a norm, as did the Genocide Convention, but these bound only the signatories. *Id.* at 287. However the Charter of the United Nations was considered such a convention, binding the Respondent thereto. *Id.* at 287, 289.

218. *Id.* at 292.

219. *Id.*

220. *Id.* at 293.

221. S.W.A. CASES II 464 (Padilla Nervo, dissenting opinion).

222. *Id.* at 468.

223. *Id.* at 470.

infringements of human rights.²²⁴ This criticism finds support in that the Charter provides not for the *protection* of human rights, but only for their *promotion*.²²⁵

Nowhere in the entire Charter is to be found an unequivocal indication of the intention to ensure human rights by compulsory protection. Indeed, the very organs which are entrusted with the *promotion* of these rights, the General Assembly and the Economic and Social Council, are, by the terms of the Charter, deprived of executive and legislative powers. The Security Council alone is endowed with such executive and legislative powers; yet it is vested only with the authority to initiate action when a violation of human rights constitutes a threat to international peace and security.²²⁶ Thus, the Charter is not a basis for enforcement of human rights, because it creates no internationally enforceable rights.²²⁷

The Charter neither defines the human rights and fundamental freedoms which the members are bound to observe, nor contains an enumeration of guiding principles.²²⁸ However, this is not to say that the Charter does not lay down binding obligations which form the cornerstone of any system of human rights to be implemented by political means within the United Nations.²²⁹

Much has been done by way of such implementation of the human rights provisions of the Charter, ranging from decisions and recommendations of a preparatory, procedural or co-ordinating character to declarations and recommendations dealing individually with allegations regarding violations

224. This view is reflected in the words of Clark M. Eickelberger, the General Secretary of the American Association for the United Nations, when he wrote:

Primarily, the protection of human rights, except in the trusteeship areas, is a matter for the good faith of the nations, the development of public opinion and the hard work of the Human Rights Commission. C. EICKELBERGER, *THE UNITED NATIONS CHARTER; WHAT WAS DONE AT SAN FRANCISCO* 20 (1945).

See also Borchard, *Historical Background of International Protection of Human Rights*, 243 *ANNALS* 112 (Jan. 1946).

225. One author attributes the failure of the framers to adopt such mandatory language to the possibility that the proposal, if it had been accepted, might have been interpreted as giving the United Nations the right to impose actively upon the members the observation of human rights and freedoms, and that "such would raise hopes beyond which the United Nations could successfully accomplish." J. ROBINSON, *HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE CHARTER OF THE UNITED NATIONS* 36-38 (1946).

226. U.N. CHARTER art. 39.

227. M. MOSKOWITZ, *supra* note 187, at 32.

228. P. DROST, *HUMAN RIGHTS AS LEGAL RIGHTS* 29 (1951), wherein the author stated:

Perhaps the fact that treaty obligations are not described in detail, is no reason to deny the binding character of such treaty provisions, but in complete absence of any description whatsoever no obligations can be assumed.

229. *Id.* at 31.

of human rights in specific states or territories.²³⁰ Of the many conventions, special agencies and other international legal instruments resulting from these recommendations,²³¹ the two most salient have been the Genocide Convention²³² and the Declaration of Human Rights.²³³

iii. *Genocide Convention and the Declaration of Human Rights.*

The Genocide Convention is a treaty seeking to eradicate the ultimate deprivation of human rights: the destruction of national, ethnic, racial or religious groups "as such."²³⁴ The scope of the Convention extends to public officials and rulers, as well as to private individuals.²³⁵ All are indictable for conspiracy, attempt, and complicity, as well as for the crime of genocide itself,²³⁶ and the signatories are pledged to incorporate this newly recognized international crime into domestic law.²³⁷ Disputes as to the interpretation, application, or fulfillment of the Convention are required to be submitted to the International Court of Justice,²³⁸ with the ultimate enforcement of the Convention resting with the General Assembly and the Security Council.²³⁹ Jurisdiction of the Court is extended to individuals, so that persons charged with the crime of genocide may be brought before it where such jurisdiction has been recognized by the signatories.²⁴⁰

230. M. MOSKOWITZ, *supra* note 187, at 23.

231. The following are exemplary of the many conventions and special agencies promulgated and established pursuant to the recommendations made by or on behalf of the international community: The Commission on the Status of Women; the Sub-Commission on the Prevention of Discrimination and Protection Of Minorities; The Commission on Human Rights; The *Ad Hoc* Committee on Slavery; The *Ad Hoc* Committee on Forced Labour; The International Refugee Organization; The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *open for signature* March 21, 1950, 96 U.N.T.S. 271; The Convention Relating to the Status of Refugees, *done* July 28, 1951, 189 U.N.T.S. 150; The Convention on the Political Rights of Women, *open for signature* March 31, 1953, 193 U.N.T.S. 135; The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *done* September 7, 1956, 266 U.N.T.S. 40; The Convention on Nationality of Married Women, *open for signature* February 20, 1957, 309 U.N.T.S. 65; The Convention Relating to the Status of Stateless Persons, *done* September 28, 1954, 360 U.N.T.S. 117.

232. 78 U.N.T.S. 277.

233. 3 U.N. GAOR 875 (1948).

234. On genocide, see P. DROST, *THE CRIME OF STATE: GENOCIDE* (1959); Gross, *General Assembly Adopts Convention on Genocide*, 19 DEP'T STATE BULL. 755 (1948); LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79-95 (1944); Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145 (1947).

235. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* December 9, 1948, 78 U.N.T.S. 277, Art. IV.

236. *Id.* Art. III.

237. *Id.* Art. V.

238. *Id.* Art. IX.

239. *Id.* Art. VIII.

240. *Id.* Art. VI. The relatively novel concept of jurisdiction of an international

The Genocide Convention constitutes the world's first attempt to eliminate planned destruction of human groups.²⁴¹ To date the Convention is in force among sixty-seven nations and has been signed by six others which have not as yet ratified it, one such nation being the United States.²⁴² Though the Convention grows in stature as more and more nations elect to be bound by its terms, it fails to provide any standard or norm of enforceable human rights other than the emphatic proscription of acts calculated to bring about the destruction of any human group.²⁴³ But the Convention does provide a very important initial step for the protection of individual rights the violation of which constitutes a crime cognizable in international law. Indeed, the signatories of the Convention "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."²⁴⁴

court over *individuals* in times of peace was recognized by the Nuremberg Charter and Judgment which enumerates crimes against humanity. However, the jurisdiction of the Nuremberg Tribunal was limited to "inhumane acts in connection with the planning or waging of aggressive war." U.N. INT'L LAW COMM'N, THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL 68 (1949). Article 6 of the Charter lists the crimes as follows:

Crimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. *Id.* at 65.

This enumeration of war crimes is said to constitute an acknowledgement of fundamental rights of man recognized by international law:

Crimes against humanity are crimes regardless of whether they were committed in accordance with and in obedience to the national law of the accused. Such acts were deemed to violate the sanctity of human personality to such a degree as to make irrelevant reliance upon the law of the State which ordered them. To lay down that crimes against humanity are punishable is, therefore, to assert the existence of rights of man grounded in a law superior to the law of the State. Thus, upon analysis, the enactment of crimes against humanity in an international instrument signifies the acknowledgement of fundamental rights of the individual recognised by international law. Lauterpacht, *The Subjects of the Law of Nations*, 64 L.Q. REV. 97, 104 (1948).

See also UNITED NATIONS WAR CRIMES COMM'N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 174, 192 (1948); Brand, *Crimes Against Humanity and the Nuremberg Trials*, 28 ORE. L. REV. 93, 119 (1949); Lowenthal, Harris, Woolsey & Farr, *The Nuremberg Verdict*, 60 HARV. L. REV. 857, 884 (1947).

241. Comment, *Genocide: A Commentary on the Convention*, 58 YALE L. J. 1142, 1156 (1949).

242. STATUS OF MULTILATERAL CONVENTIONS IN RESPECT OF WHICH THE SECRETARY-GENERAL ACTS AS DEPOSITARY, at IV-4, IV-5, IV-6, U.N. Doc. ST/LEG/3, Rev. 1 (1963). The other non-ratifying signatories are: Bolivia, Dominican Republic, New Zealand, Paraguay, and Uruguay.

243. Genocide consists of any one of the following acts, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about

The Universal Declaration of Human Rights²⁴⁵ constitutes a normative pronouncement of moral principles concerning the economic, social and cultural rights of man.²⁴⁶ But, by its own definition, it is simply a declaration of past achievements and future aspirations,²⁴⁷ giving authoritative expression to the fact that human rights are indivisible and universal.²⁴⁸

In that it is a synthesis of classical and social rights,²⁴⁹ the Declaration has received such universal acclaim that it has gained very considerable significance.²⁵⁰ However, it is submitted that the Declaration yet lacks the recurrent observance characteristic of accepted principles of customary international law, thereby leaving the concept of human rights in a position which commands much commendation but little legal commitment on the part of nation-states.

3. *Apartheid: A Per Se Violation of the Norm?*

Even Judge Tanaka was not willing to accept Applicants' inflexible proposition that the Respondent's practice of *apartheid* constitutes a *per se* violation of an international norm and, as a result, a violation of the terms of the Mandate.²⁵¹ Rather, he recognized that the policy of *apartheid* or separate development is not *per se* illegal, and concluded that:

The important question is whether there exists, from the point of view of the requirements of justice, any necessity for establishing an exception to the principle of equality, and the Respondent must prove this necessity, namely the reasonableness of different treatment.²⁵²

its physical destruction in whole or in part;

4. Imposing measures intended to prevent births within the group;
5. Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 235, Art. II.

244. *Id.* at Art. I.

245. The Declaration was adopted by the United Nations General Assembly on December 10, 1948. 3 U.N. GAOR 875 (1948).

246. J. ROBINSON, HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE CHARTER OF THE UNITED NATIONS 39 (1946).

247. DEP'T OF STATE, UNIVERSAL DECLARATION OF HUMAN RIGHTS 1-2 (1949).

248. U.N. GEN. ASS. OFF. REC. 14th Sess., Comm'n on Human Rights, at 3 (E/CN.4/SR.609).

249. *See* Malik, *International Bill of Human Rights*, 5 U.N. BULL. 519, 521 (1948).

250. E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 34-54 (1964). Such a general acclaim and widespread recognition of the principles of the Declaration has led one author to contend that the Declaration is now customary international law. Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS 15 (1965).

251. S.W.A. CASES II 309 (Tanaka, dissenting opinion).

252. *Id.*

In answering the question negatively the Judge stated that discrimination according to the criteria of "race, colour, national or tribal origin" in establishing the rights and duties of the inhabitants of the territory could not be considered reasonable and just; therefore the practice of *apartheid* in this respect was unreasonable and unjust.²⁵³ However, the Judge was quick to point out that the "Court could not examine and pronounce the legality or illegality of the policy of apartheid as a whole; it can decide that there exist some elements in the apartheid policy which are not in conformity with the principle of equality before the law or international standard or international norm of non-discrimination and non-separation."²⁵⁴

CONCLUSION

The case of South West Africa abounds with examples of the violation of generally recognized and accepted moral principles which decry such practices as pass laws and involuntary servitude.²⁵⁵ However, the world community remains without recourse to any effective resolution of this unfortunate situation since these moral principles have not been embodied in legal principles whereby the United Nations might exact compliance from South Africa.

The norm of equality among men seems to be evolving into a rule of customary international law, but the South West Africa Cases demonstrate that it has not yet fully evolved. Yet, the spirit of brotherhood has been inspirational in the promulgation of a number of treaties, several of which are directly concerned with the rights of man.²⁵⁶ These treaties reflect a growing awareness among nations that there exists a certain minimum level of treatment which each state should accord its own nationals—thus the gradual evolution of a general principle of law "recognized by civilized nations."²⁵⁷

It remains for members of the world community to assume the initiative in this widely neglected area of human rights. Victims of their own inaction and dereliction, nation-states must not simply resign themselves to the acceptance of a similar situation. Conventions must be offered to fill the glaring gaps in international law which allow conditions such as *apartheid* to develop and subsist. But until that time the International Court of Justice will remain as helpless and ineffectual as it was discovered to be in the

253. *Id.* at 314.

254. *Id.* at 315.

255. See Appendix *infra*.

256. See note 232 *supra* for treaties directly or indirectly concerned with the protection and promotion of human rights.

257. I.C.J. STAT. art. 38(1)(c).

instant cases. Finding itself in an embarrassing position, the Court withdrew as gracefully as possible on a mere procedural point. Similarly, yet another matter of procedure stands as a menacing obstacle to the resolution of like problems on their merits—that of Article 2(7) of the Charter of the United Nations²⁵⁸ which both prohibits intervention on the part of that body in matters which are essentially within the domestic jurisdiction of any state²⁵⁹ and also releases members from submitting such matters to settlement under the Charter.²⁶⁰

Since the Statute of the International Court of Justice is “an integral part of the present Charter”²⁶¹ and the Court is “the principal judicial organ of the United Nations,”²⁶² Article 36 of the Statute, which provides for the jurisdiction of the Court, may be considered as “contained in the present Charter.”²⁶³ Thus, it would appear that Article 2(7) applies to the Statute of the Court, since a decision rendered by the Court in accordance with Article 36 of the Statute would undoubtedly constitute a “settlement under the present Charter.”²⁶⁴ If two litigants disagree on whether a dispute arises out of a matter essentially within the domestic jurisdiction of one of them, then the jurisdiction of the Court is disputed, and Article 36(6) of the Statute applies.²⁶⁵

258. The appropriate section of the Charter preventing interference by the world community into the internal matters of Member Nations reads as follows:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII [which chapter provides for action on the part of the Security Council with respect to threats to the peace, breach of peace, and acts of aggression]. U.N. CHARTER art. 2, para. 7.

259. This restriction upon the United Nations finds support in the traditional concept of sovereignty wherein each sovereign nation was free to deal with its nationals as it wished; non-intervention in the domestic affairs of foreign nations is concomitant with the doctrine of sovereignty. *See Dorsey, Chinese Recognition: Law and Policy in Perspective*, 23 U. PITT. L. REV. 17, 87 (1961).

260. *See H. KELSEN, THE LAW OF THE UNITED NATIONS 770-92 (1950)*, in which the author points out the basic inconsistencies of the working of both this article and Article 15(8) of the Covenant from which Article 2(7) has apparently been derived. Article 15(8) reads as follows:

If the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall report, and shall make no recommendation as to its settlement. COVENANT art. 15, para. 8.

261. U.N. CHARTER art. 92.

262. *See id.* arts. 7, 92.

263. *See H. KELSEN, supra* note 260, at 527.

264. *Id.*

265. According to this provision, a dispute as to the jurisdiction of the Court shall be settled by the decision of the Court itself. I.C.J. STAT. art. 36, para. 6.

When the Court is called upon to determine whether or not a matter referred to it is within the domestic jurisdiction of a state two viewpoints are usually urged concerning the interpretation and application of Article 2(7).²⁶⁶ The first proceeds upon the assumption that Article 36(6) confers on the Court the power to decide disputes concerning its jurisdiction, and for this purpose the Court has to apply and interpret Article 2(7) of the Charter. In other words, the Court has the power to bind the parties to its determination of which matters are essentially within the domestic jurisdiction of a state.

The second view reasons that since Article 2(7) does not confer upon an organ of the United Nations the power to determine what matters are essentially within the domestic jurisdiction of a state, only the state concerned is authorized to decide this question. Consequently, the Court must decide the dispute over the jurisdiction in favor of the party which claims that the matter is essentially within its domestic jurisdiction. The main proponents of this viewpoint, the United States and France, have embodied it in their declarations accepting the jurisdiction of the Court.²⁶⁷ This interpretation of Article 36 of the Statute in connection with Article 2(7) of the Charter means that a party to a dispute before the Court, in spite of its declaration to recognize as "compulsory" the jurisdiction of the Court in all legal matters, may withdraw any such dispute from the jurisdiction of the Court by simply declaring that the dispute concerns a matter which is essentially within its domestic jurisdiction. However, South Africa apparently would be estopped from asserting this contention since in its ratifying statement the Union reserved from the compulsory jurisdiction of the Court only "disputes with regard to questions which *by international law* fall exclusively within the jurisdiction of the Union of South Africa."²⁶⁸

Thus, under present day international law, when a nation's law and legislation are restricted in their application and effect to the recognized territory of that nation, such comes within the purview of domestic concern and is constituted an element of sovereignty, precluding interference by other nations.²⁶⁹ The result of this aspect of international law is to allow a nation-state to treat its nationals as it so desires, short of treatment which has

266. The views herein expressed have been set out by Hans Kelsen in his work on the United Nations and its problems. H. KELSEN, *supra* note 260, at 528-29.

267. See Y.B. OF THE U.N. 609, 612 (1946-1947). These declarations exclude from the jurisdiction of the Court all disputes with regard to matters which are essentially within the domestic jurisdiction of France and the United States "as understood by the Government of the French Republic" and "as determined by the United States of America" respectively.

268. *Id.* at 611 (emphasis added).

269. U.N. CHARTER art. 2, para. 7.

external repercussions or violates the so-called doctrine or humanitarian intervention.²⁷⁰ However, the area of complete domestic concern is swiftly diminishing, and it is the duty of the world community to insure the demise of such restrictive concepts as domestic jurisdiction as it is presently interpreted. This would entail a reinterpretation of the present concept of domestic jurisdiction, substituting in its stead a universal rule of nonintervention with more objective standards than those which currently exist. Obviously there is a need for a general convention in this particular area. But, regardless of the lack of objective standards, it is submitted that while the South African Government might have argued that whatever policies it pursued in the Union were a matter of domestic concern, and thus without the competence of the United Nations to supervise, the same could hardly have been said with relation to South West Africa. As long as the territory of South West Africa remains a matter of international concern by virtue of the Mandate, the application of *apartheid* can hardly be considered a domestic question.²⁷¹

APPENDIX

The following constitute examples of the *apartheid laws* of South Africa generally applicable to the territory of South West Africa. They appear in the dissenting opinion of Justice Mbanefo, at pages 487 to 489.

- (a) The census classification groups the population as "*Whites*", "*Natives*", "*Coloureds*" and "*Asiatics*". *Whites* are defined as persons who in appearance obviously are, or who are generally accepted as white persons, but excluding persons who although in appearance are obviously white, are generally accepted as coloured persons. *Natives* are persons who in fact are, or who are generally accepted as members of any aboriginal race or tribe of Africa. *Coloureds* are all persons who are neither Whites, Natives nor Asiatics. Applicants say that rights and burdens are allotted, by Government policy and actions, on the basis of membership in a racial group irrespective of individual quality or capacity.
- (b) Natives are not entitled to obtain permanent residential rights or ownership in urban areas in the Police Zone. This restriction applies to any association, corporate or incorporate, in which a Native has any interest and relates to rural townships as well as urban areas.

270. See note 166 *supra*.

271. However, the Court must confine itself to the *effect* of the application of these laws on the treaty obligations imposed by the Mandate, *viz.*, the obligation of the Mandatory to promote the moral and physical well-being of the populace of South West Africa.

- (c) Probationary leases contain conditions providing for their immediate cancellation in the event of a lessee marrying a Native or Coloured person and prohibiting any transfer of the lease to Natives, Asiatics or Coloured persons.
- (d) Within the area of the Police Zone, excluding the Native reserves and the Rehoboth Gebiet, licences to prospect for minerals may be issued only to Europeans and European-owned companies.
- (e) In all mining enterprises owned by Europeans, Natives may not occupy any of the following posts: Manager; Assistant, Sectional or Underground Manager; Mine Overseer; Shift Boss; Ganger; Person in charge of boilers, engines and machinery; Surveyor; Engineer; Winding Engine Driver; Banksman or Onsetter.
- (f) In the legislation in the territory relating to registration of trade unions and settlement of individual disputes there is no provision for the registration of Native trade unions and no provision for conciliation of disputes in so far as a Native employee is concerned. The provisions concerning labour disputes and conciliation do not apply to disputes among or between Native labourers and the others. A European Inspector represents the interests of Native employees in proceedings of conciliation boards, the members of which can be only Europeans or Coloured persons.
- (g) It is a criminal offence for a Native employee to refuse to commence service under a contract of service at a stipulated time, to absent himself from his master's premises without leave or other lawful cause, to refuse to obey any order of his master or to leave his master's service with intent not to return thereto. An employee charged with any of the above may on conviction be sentenced to a term of imprisonment and on release from prison must return to his master's service unless the contract of service has been cancelled. If he fails to do so he may be sentenced to successive periods of further imprisonment, provided that no servant may be imprisoned continuously for longer than six months in all.
- (h) Only Europeans may enter into contracts of apprenticeship in the territory.
- (i) Only White persons are allowed to vote at an election of members of the Legislative Assembly. Non-Whites are excluded by law from serving as members of the Legislative Assembly, the Executive Committee or of the South African Parliament and excluded by practice from being appointed as administrator of the territory. No person other than a European may vote in any municipal council elections or qualify for election to a municipal council. According to the Respondent these are political institutions devised and intended only for the White population group. Native affairs at local government level are handled through Native Advisory Boards who possess no legislative or executive powers. Membership of local government institutions for Natives is shared equally between Natives and Whites.

- (j) An authorized officer may, whenever he has reason to believe that any Native within an urban or a proclaimed area is an idle person, without warrant, arrest that Native and cause him to be brought before a Native Commissioner or Magistrate who shall require the Native to give a good and satisfactory account of himself and if the Native fails to do so, to declare him an idle person. If the Magistrate declares him an idle person he shall by warrant addressed to any police officer order that such Native be removed from the urban or proclaimed area and sent home or to a place indicated by the Magistrate and that he be detained in custody pending his removal.
- (k) No unexempted Native may remain for more than 72 hours in an urban area unless permission to remain has been granted them by a designated person.
- (l) An unexempted male Native over the age of 14 years is not permitted to travel beyond his place of residence or employment in the Police Zone unless he is in possession of a pass issued by an authorized person [the Police Zone is more than 50 per cent of the whole Territory]. The pass must be produced on demand.
- (m) An adult male Native who is not exempted must obtain a pass to leave the territory for the Republic of South Africa. This provision does not apply to White or Coloured inhabitants.
- (n) Non-White persons working in urban areas in the Police Zone are restricted to segregated areas in the cities and buses and are not permitted to reside in what are considered to be "White" areas save on the premises of their employers in the White residential areas.
- (o) The educational system of the territory is organized in three separate divisions, and the educational facilities and opportunities are made available according to whether the child is classified as "European", "Coloured" or "Native". This is in accordance with government policy of separate development in which the child's ability is never taken into account. A consequence of this system is that Native pupils are restricted to limited vocational trained opportunities intended for members of the Native group. Opportunity for higher education virtually does not exist for the Native.