Notre Dame Law Review

Volume 49 | Issue 5 Article 15

6-1-1974

Book Review

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BOOK REVIEW

SOUTH WEST AFRICA AND THE UNITED NATIONS: AN INTERNATIONAL MANDATE IN DISPUTE. By Solomon Slonim. Baltimore and London: The Johns Hopkins University Press, 1973. Pp. xix, 409 (including Appendices, Bibliography, and Index). $13.50.

In 1922 the redoubtable South African soldier-statesman Jan Christiaan Smuts remarked that, as a result of the League of Nations approval given to his Union's mandate over the former German territory of South West Africa, the relations between Mandatory and mandated Territory amounted to ". . . annexation in all but name."[1] It was this final qualification which has afforded the United Nations its most intransigent dispute which is still effectively unresolved more than half a century after Smuts made this triumphant assertion.

The diplomatic origins of the mandate system which evolved during the 1919 Paris Peace Conference are as familiar to students of international law and relations as are the disparate interpretations accorded to the Covenant of the League of Nations and to the mandate agreements themselves. The various problems which arose almost immediately upon conclusion of the three types of mandate arrangements—such as the question of the nationality of inhabitants of mandated territories of the second ("B") and third ("C") class, one of which was South West Africa—proved difficult of resolution. Equally difficult, especially during the operative years of the League of Nations, was the question of where ultimate sovereignty over the mandated areas lay. Early in the history of the mandate system these two problems reached confluence in the case of *Rex v. Christian*,[2] in which an inhabitant of the Territory of South West Africa under mandate was held to be validly convicted of treason against the State Mandatory despite the fact that all acts complained of took place entirely within the Territory. This extension of effective sovereignty by South Africa over the Territory, only a matter of months after the confirmation of its mandate, marks the first application of what has since uncompromisingly remained that State's legal conception of its rights of administration in South West Africa. Solomon Slonim has chosen not to address such basic, if derivative, problems in his book. Instead, the reader is offered a review of the jurisprudential and institutional history of this mandate as it evolved within the several organs of the United Nations.

The role played by the United States in both the establishment of the mandate provisions in the League Covenant and later in securing the inclusion of even more elaborate trusteeship terms in the United Nations Charter has often been overlooked. In this work Dr. Slonim draws attention to the influence of Woodrow Wilson in influencing the former result but fails to discuss the latter episode. The author suggests that President Wilson's apprehension in 1919 regarding the prospect of full Japanese sovereignty over the three great archi-

1 S. SLONIM, SOUTH WEST AFRICA AND THE UNITED NATIONS: AN INTERNATIONAL MANDATE IN DISPUTE 37 (1973).

2 [1923-1924] Ann. Dig. 27 (No. 12) (Supreme Court, Appellate Division, South Africa).

pelagos of the west central Pacific (the Marianas, Marshalls, and Carolines) was deeply felt. His desire for a mandatory regime over this area, Slonim proposes, necessarily compelled Wilson to bargain for similar application of the mandate system to all other important former German colonies and protectorates so as to avoid the appearance of acting discriminatorily against Japanese interests. As a result mandates for Western Samoa, Nauru, New Guinea, and South West Africa were arranged. This view has much to recommend it, and its policy ramifications at the 1945 San Francisco Conference on International Organization were not inconsiderable.

Just as the case of *Rex v. Christian* illustrates the early assertion of sovereign rights by the Union of South Africa in South West Africa, so too did the incident out of which that case arose (the notorious Bondelzwarts Affair of 1922) first test the concept of international accountability of Mandatory States for their "sacred trusts." A brief account of this odious affair is provided by Dr. Slonim, who considers that the discussions which took place in the Permanent Mandates Commission of the League of Nations after this incident forged the tools of international mandate supervision. Slonim concludes, quite correctly in this reviewer's opinion, that the result of the action then taken by the Commission—forcing South Africa to account for its actions before an international body—set the precedent which, ". . . represents the most dramatic and far-reaching achievement of the whole mandates system."[3]

No conflict of consequential nature arose out of South Africa's management of its mandate prior to 1945. In that year the United Nations Conference on International Organization produced the Charter of the United Nations containing, *inter alia,* the terms of the International Trusteeship System. South Africa became an original Member of the Organization. The Charter provided, in now well-known part: "The trusteeship system shall apply to such territories in the following categories as *may* be placed thereunder by means of trusteeship agreements: a. territories now held under mandate; . . . ."[4]

It is today a commonplace to observe that the Charter failed to insist upon the transformation of all League mandates into United Nations trusteeships. Less often noted is the reason why this was so. The language of the Charter was drafted in permissive rather than compulsory terms not because of any recalcitrant posture adopted by South Africa, but rather as the coincident wish of the United States of America.

The United States, it will be recalled, was at the time of the San Francisco Conference still at war with the Japanese Empire. During the course of these hostilities, the United States had secured belligerent occupation over nearly all of the Pacific islands held by Japan under League mandate. As a result a domestic struggle had arisen in Washington concerning the post-war status of these islands. The Departments of State and of the Interior pressed for a policy of non-annexation, while the Departments of War and of the Navy publicly called for the islands to be proclaimed formally part of the territories of the United States. This understandably emotive issue was to a degree later settled by provid-

3 S. SLONIM, *supra* note 1, at 49.
4 U.N. CHARTER art. 77(1)(a) (emphasis added).

ing in Charter Articles 82 and 83 for the establishment of special "strategic" trusteeship arrangements under the aegis of the Security Council. But, as no submissions regarding trusteeships were discussed at Dumbarton Oaks, and since indeed the final Charter Articles relating to trusteeship were approved largely as drafted by the United States Delegation, it is perhaps not surprising in light of the contemporary domestic debate that the United States did not desire imperative language to be employed in Charter Article 77. Had this been done, it might well have forced the then new Truman leadership into the position of placing these islands under trusteeship despite active domestic opposition to such disposition. These circumstances provide a refutation of Dr. Slonim's statement that the trusteeship provisions of the Charter undoubtedly owed much to the arrival of newly independent states into the halls of international diplomacy.[5]

In 1945 it remained clear that South Africa had not surrendered its long-standing goal of annexing South West Africa to the Union. During the Conference at San Francisco, the South Africa Delegation actually proposed that the mandate be terminated and the Territory incorporated into South Africa.[6] This incident marks the beginning of the protracted modern struggle for control of the Territory.

Solomon Slonim's book is largely confined to a consideration of the three requests by the General Assembly, and one from the Security Council, for Advisory Opinions of the International Court of Justice on matters relating to action taken by those bodies with regard to South West Africa.[7] It is the sole contentious proceeding before the International Court of Justice in which the mandate for South West Africa was considered, however, which provides the central focus of this study.[8] In the greater part of his work, Dr. Slonim treats with meticulous exposition the inter-relationship of these six judicial pronouncements, carefully summarizing the views of the Court and those of its Judges who wrote separate statements or issued concurring or dissenting opinions. The approach adopted by the author is, in the main, broadly one of allowing the documents, from pleadings and oral argument to Opinions or Judgments, to speak for themselves. Only infrequently does the author permit his own views to be drawn into the arena of debate.

After reading Slonim's useful summary of the 1950 Advisory Opinion, one is confronted with an example of the limitations imposed by his restrictive technique. The author considers in turn each of three bases which have been alternatively suggested by publicists as providing the *ratio decidendi* adopted by the

5 S. SLONIM, *supra* note 1, at 348. Of the 50 States which participated in the United Nations Conference on International Organization, only Syria and Lebanon were newly independent.

6 *Id.* at 76.

7 Advisory Opinion concerning the International Status of South-West Africa, [1950] I.C.J. 128; Advisory Opinion concerning Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, [1955] I.C.J. 67; Advisory Opinion concerning Admissibility of Hearings of Petitioners by the Committee on South West Africa, [1956] I.C.J. 23; Advisory Opinion concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16.

8 South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, [1962] I.C.J. 319; South West Africa, Second Phase, Judgment, [1966] I.C.J. 6.

Court in this instance. Dr. Slonim passes judgment himself on none of these suggestions, nor does he offer any variant of his own. Instead he looks ahead to the international and institutionally concurrent effects of the Advisory Opinion in relation to South West Africa. Similarly, the author deals in rapid order with both the Advisory Opinion on *Voting Procedure* and that on *Oral Petitions*. His documentary research is again comprehensive, if succinctly presented, and he leaves these cases after brief consideration. No attempt is made to consider the implications of these cases outside of the South West Africa context.

The factual background against which the contentious jurisdiction of the International Court of Justice was invoked by Ethiopia and Liberia in 1960 against South Africa is well described. All three of these States had been Members of the League of Nations, and jurisdiction was allegedly founded in Article 7 of the South West Africa mandate agreement which provided that "any dispute whatever" arising out of the interpretation or provisions of the mandate between or among League Members would be settled by the Permanent Court of International Justice in the absence of a negotiated settlement. The International Court of Justice in its 1950 Advisory Opinion had held this clause to be still in force.[9]

As is well known, in 1962 the Court rejected all of the South African preliminary objections put forward in this case, concluding in accord with the 1950 Advisory Opinion that the Court enjoyed the competence to entertain the case on its merits. This phase of the contentious case is dissected with care by the author and the results set out with lucidity. By way of analysis, however, Dr. Slonim offers but one sentence as his view of the issues central to this proceeding: "In essence, the difference of opinion centered on the applicability of the principle of effectiveness to the relevant instruments and whether jurisdiction of the Court could be affirmed on this basis alone."[10] The author does not seek to acquaint the general reader with this principle, nor does he attempt to demonstrate to the specialist the manner in which the principle was here effectuated.

The discussion of the 1966 *South West Africa Cases (Second Phase)* forms the core of Slonim's work. In a particularly well organized section entitled "The Court Battle: The Metamorphosis of Nuremberg into *Brown v. Board of Education*," the author attempts to show that the charges against the Court describing its 1966 judgment as unjust, politically grounded, or racially motivated, were ill-founded, and that criticism should better have been directed at counsel for the Applicant States of Ethiopia and Liberia. Slonim produces from the 12 volumes of pleadings, oral argument, and other documents generated by this case, an illuminating synoptical study of the subtle changes in both strategy and tactics which were introduced by counsel for Applicants during the several years this case was *sub judice*. Dr. Slonim reminds the reader that the Applicants agreed to accept all averments of fact made by South Africa in reply to the Memorials and the arguments submitted on behalf of Ethiopia and Liberia. This decision was made in order to avoid the possibility that the Court might otherwise have accepted a South African proposal that the Court should itself conduct

9 [1950] I.C.J. 128 at 138.
10 S. SLONIM, *supra* note 1, at 297.

an inspection of the factual circumstances in South West Africa.[11] It was this decision which in retrospect appears to have been crucial.

From this point, Applicants were forced to abandon what Slonim chooses to call their "Nuremberg" thesis, i.e., that the policy of *Apartheid* as introduced into South West Africa operated to the detriment of the inhabitants in violation of the mandate. Having accepted the "facts" as averred by South Africa, Applicants proceeded to redirect the thrust of their complaint, adverting analogously to the *Brown v. Board of Education*[12] rationale. South Africa had contravened the mandate by introducing the policy of separation, it was argued, and Applicants claimed that this policy was repugnant to customary international law *per se*. The author proceeds to demonstrate the measure of ease with which South Africa was able to successfully refute this charge. Dr. Slonim, revealing sympathy for the Positivist stance adopted by South Africa, tells us that the Mandatory was able to parry the Applicants' attack simply by producing oral evidence which proved to the Court's satisfaction that no norms of "non-discrimination" or of "non-separation" were recognized in customary international law. The author's choice of this issue as the legal pivot upon which the case turned is disingenuous as it unfortunately fails to conform with the facts of the case.

The author himself notes that not even one of the dissentient Judges on the Court accepted "unqualifiedly" the thesis advanced by Applicants that the alleged norms of non-separation and non-discrimination had crystallized into customary international law through the "consensus" of States. Why then were any dissenting opinions forthcoming? Simply because the Court did not base its judgment on the merits of the case as Dr. Slonim urges his readers to infer, but rather upon the threshold question of *jus standi*. The *South West Africa Cases* were decided by the Court on the basis that: ". . . the Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject matter of the present claims, and that, accordingly, the Court must decline to give effect to them."[13]

The author examines the seven separate dissenting opinions appended to the 1966 Judgment, and finds that none of them effectively contradicts the rule posited in the Judgment that the Court possesses an inherent right to decide the disposition of a case on a basis not advanced by either party. Additionally, Dr. Slonim finds in the alternative that the South African oral pleadings had implicitly incorporated an objection to the standing of Applicants before the Court. It is predictable then, given these precursory views, that the author should align himself against the seven dissenters by denying that the issue of standing should have been considered to be *res judicata* on the basis of the 1962 Judgment (by which the Court rejected preliminary objections to jurisdiction). Dr. Slonim instead maintains that the 1966 Judgment represents ". . . a genuine conclusion of the argument on the merits."[14] Here the author's analysis is comprehensive

11 *Id.* at 244-245.
12 387 U.S. 483 (1954).
13 [1966] I.C.J. 6 at 51.
14 S. SLONIM, *supra* note 1, at 297.

and the underlying argument well marshalled. The reader may himself decide if it is convincing.

In the final sections of his treatise, the author recounts the various Resolutions of the General Assembly and Security Council which proclaimed the termination of South Africa's mandate, and considers the resultant 1971 Advisory Opinion on the effect of these actions. One feels that Dr. Slonim would like to strike hard at this Advisory Opinion, but he contents himself with somewhat confusedly criticizing the Court for failing to determine on what basis the General Assembly might validly terminate the mandate, after having earlier admonished the reader to note that the Court was specifically not asked to perform this task.[15]

In conclusion, the author's apparent distaste for the 1971 Advisory Opinion leads him to question the value of attempts to resolve essentially political disputes by legal means, suggesting that such enterprises are possibly counterproductive. Dr. Slonim, apparently as the result of this study, also questions the efficacy of empowering the International Court of Justice both to hear contentious cases and to issue legal advice to other organs and agencies of its constituent organization. But the same 1971 Advisory Opinion, it will be recalled, not only resolved many issues concerning Namibia (South West Africa), but also decided two constitutionally important issues relating to interpretation of the Charter itself.[16] It would seem that, given such a record, the Court's dual function may be more easily defended than attacked.

Solomon Slonim's book, while offering no substantially new factual or analytical material to scholars, will yet be welcomed by all interested in the development of international law and the maintenance of the international juridical order. Dr. Slonim's admirable summaries of the copious pleadings, oral arguments, documents, Orders, Advisory Opinions, and Judgments which comprise only part of the bitter fruit borne by this dispute, are detailed and comprehensive, clear and easily readable. The author's wide use of primary materials enhances the value of his work, as does his painstaking documentation of secondary sources. This book is to be recommended to all who wish a concise source of reference to the legal and diplomatic history of the South West Africa dispute in the United Nations.

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15 *Id.* at 330, 339, 343.
16 [1971] I.C.J. 3 at 22, 52-53.

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BOOKS RECEIVED

NLRB REGULATION OF ELECTION CONDUCT. By Robert E. Williams, Peter A. Janus, and Kenneth C. Huhn. Report No. 8 of the "Labor Relations and Public Policy" series. An effort to discover and set forth the rules, principles, and policies applied by the NLRB in determining whether to certify the results of an election as valid or set it aside and order a rerun. The authors have compiled the results of Board decisions on all major categories of election interference. Philadelphia: Industrial Research Unit, The Wharton School, University of Pennsylvania, 1974. Pp. xiii, 443. $8.50. Paper.

FREEDOM IN A ROCKING BOAT: CHANGING VALUES IN AN UNSTABLE SOCIETY. By Sir Geoffrey Vickers. A distinguished solicitor's examination of the ordering process in human affairs. Middlesex, England: Penguin Books Ltd., 1970. Pp. 208. $1.75. Paper.

MISUSE OF PSYCHIATRY IN THE CRIMINAL COURTS: COMPETENCY TO STAND TRIAL. Formulated by the Committee on Psychiatry and Law, Group for the Advancement of Psychiatry. A brief but informative monograph covering standards for competency, problems in their application, and recommendations for change. The Committee believes that most persons initially adjudged incompetent can be brought to a competent state within six months by psychiatric treatment. New York: Group for the Advancement of Psychiatry, 1974. Pp. 69. $3.00 (with bulk discounts). Paper.

EUROPEAN COMMUNITIES ACT 1972. By Edward H. Wall. A detailed examination of the Act of Parliament which brought Great Britain into the European Communities. The book gives some indication of which areas of Community law may now be taken to be British domestic law, and which may not. London: Butterworths, 1973. Pp. vii, 111.

COMMON MARKET LAW OF COMPETITION. By Christopher Bellamy and Graham D. Child. One of the most helpful studies to date on the emerging European law of competition, this book recommends itself to those dealing with corporations having antitrust or patent/trademark exposure in Europe or Great Britain. New York: Matthew Bender, 1973. Pp. xxvi, 361.

PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL. By Ward S. Bowman, Jr. A policy-oriented analysis of resource allocation in general, and the effect of economics on court decisions. The author contends that the antitrust/patent conflict is largely illusory. Chicago: The University of Chicago Press, 1973. Pp. xii, 273.

SHEPARD'S FEDERAL TAX LOCATOR. This three-volume work indexes and cross-references statutes, regulations, decisions, and services relating to all Federal taxes except import duties. The work includes copious references to forms. Colorado Springs: Shepard's Citations, Inc., 1974.

FEDERAL FOOD, DRUG AND COSMETIC ACT: JUDICIAL AND ADMINISTRATIVE RECORD 1965-1968. By Vincent A. Kleinfeld and Alan H. Kaplan. This volume updates the classic series; it includes court decisions under the Act, statements of policy or interpretation by the FDA, forms, and statutes. New York: Commerce Clearing House, Inc., 1973. Pp. xi, 654.

PROFESSIONALIZING LEGISLATIVE DRAFTING: THE FEDERAL EXPERIENCE. Edited by Reed Dickerson. An edited version of the proceedings of the National Conference on Federal Legislative Drafting held in 1971 under the auspices of the Committee on Legislative Drafting of the American Bar Association. American Bar Association, 1973. Pp. 897.

FRANCHISING—REALITIES & REMEDIES. By Harold Brown. An examination of economic, litigational, legislative, contractual, and business aspects of the franchise process. The book is a complete revision of the author's FRANCHISING: TRAP FOR THE TRUSTING. New York: Law Journal Press, 1973. Pp. ix, 301.

REAL ESTATE SYNDICATE OFFERINGS LAW & PRACTICE. By Lewis G. Mosburg. Real estate syndication offers tax benefits, opportunity for capital appreciation, and cash flow. This book is intended to serve as a practical guide for the attorney representing a client engaged in real estate syndication. San Francisco: Real Estate Syndication Digest, Inc., 1974. Pp. xi, 266. $29.95.