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Notes

Namibia, South Africa, and the Walvis Bay Dispute

Walvis Bay is a port situated on the coast of the emerging nation of Namibia.1 The Republic of South Africa currently occupies and controls both Namibia and Walvis Bay.2 Namibia will soon be an independent nation free from South African control; the Pretoria government, however, alleges that the colonial title it inherited from the United Kingdom gives it sovereignty over the Bay,3 despite the common history, culture, and economic and political systems shared by the Bay and Namibia. This Note argues that the South African claims are invalid and that, legally, the Bay belongs to and therefore must remain with Namibia.

The South African legal claim is based on carefully selected historical facts and legal theories. South Africa omits certain colonial historical facts that undermine its claim, and it overlooks contemporary international law that requires precolonial history to be considered in decolonization disputes. This Note will show that South Africa has relinquished its title to the Bay under three theories of current international law: 1) the norms of international estoppel bar South Africa from separating Walvis Bay and Namibia; 2) the boundaries of non-self-governing territories granted independence may be determined on

1. This Note will use “Walvis Bay” or “the Bay” to refer to the harbor, city, and surrounding enclave as claimed by the British in 1878. See I. Brownlie, African Boundaries 1273-88 (1979) (describing area claimed by British). This Note will use the name “Namibia” to refer to the geographic area designated on many maps by the colonial appellation “South West Africa.” The name Namibia is now used by the indigenous groups in the territory and has been recognized by the United Nations as the official name of the territory. G.A. Res. 2372, 22 U.N. GAOR, Supp. (No. 16A) 1, U.N. Doc. A/6176/Add.1 (1968). 2. See J. Dugard, The South West Africa/Namibia Dispute 18 (1973). The legal status of Walvis Bay is a recent subject of debate in the international community. This Note represents the first published attempt to present a complete analysis of the factual and legal issues involved in that debate. There are a number of islands off the coast of Namibia that also have been subjected to South African administration since colonial times. While some of the arguments presented in this Note may thus be applicable to them, this Note will address exclusively the status of Walvis Bay.

3. See id. at 17.
the basis of precolonial sovereignty; and 3) South Africa has violated the duties imposed on it by the United Nations Charter and thus has forfeited its authority over Walvis Bay.

I. The Use of International Estoppel Against South Africa

The traditional legal norm of estoppel prevents South Africa from severing Walvis Bay from Namibia. Before estoppel can be invoked against a party, three elements must exist: a party, aware of a right that could be enforced, must choose not to assert it or must assert it ineffectively; a party must know that its nonassertion or ineffective assertion may be interpreted as an abandonment of the right; and a party must induce other parties to rely on the nonassertion or ineffective assertion of the right sufficiently so that belated enforcement would prejudice or harm them.4

A. The Facts of Unification

Historical as well as contemporary facts establish that all the elements of estoppel are present in the case of Walvis Bay. In 1884, South Africa held an enforceable right to incorporate Walvis Bay into itself and, by its own rendition of the facts, was aware of this right at that time.5 It failed, however, to assert this right. Instead, it took steps to incorporate the Bay with the territory that now comprises Namibia, steps that caused the inhabitants of both to develop a complete interdependence. These subsequent actions of incorporating the Bay with Namibia rather than itself undermine South Africa's original right to the Bay.

5. South Africa's rendition of the facts is as follows: On March 12, 1878, the Commander of the British ship Industry took possession of the Bay in Her Majesty's name. On December 14, the British annexed the Bay to the Cape of Good Hope Colony. Five years later, on August 7, 1884, the Governor of the Cape of Good Hope confirmed this action by annexing the Bay to the Colony. By the South Africa Constitution Act of 1909, which created the Union of South Africa, the Colony of the Cape of Good Hope along with the Bay became parts of the Union of South Africa. When the Union of South Africa became the Republic of South Africa, South Africa contends, Walvis Bay was still a part of the Cape Province. See Dept. of Foreign Affairs, Republic of South Africa, The Legal Status of Walvis Bay, at E3-E4 (Sept. 1977) (unpublished memorandum) (on file with Yale Law Journal). The fact of formal annexation, on which South Africa relies, is merely indicative of its awareness of its right to incorporate the Bay. Formal incorporation, however, never took place. See pp. 907-08 infra. Basic positivist arguments, similar to those of the government, are put forward in other works by South Africans. See, e.g., D. Prinsloo, WALVIS BAY AND THE PENGUIN ISLANDS (1977); Note, The Legal Status of Walvis Bay, 2 S. Afr. Y.B. INT'L L. 187 (1976).
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The statements and actions of South Africa establish a pattern of conduct directed towards the total unification of Walvis Bay and Namibia. Although South Africa has controlled Walvis Bay since 1884, it had no power over hinterland Namibia until Germany lost its sovereignty over the area after World War I. South Africa was then given German South West Africa—now Namibia—as a class “C” mandate, which permitted it to administer the territory as though it were an integral part of itself. Shortly after South Africa acquired the mandate in 1922, it announced that Walvis Bay would be administered from Windhoek, the Namibian capital, as though the Bay and its inhabitants were part of the mandated territory. Later that year South Africa reported, to the Permanent Mandates Commission of the League of Nations, on Walvis Bay as an integrated part of the mandated territory. When asked about the integration, its representative stated that the Bay had been attached to the mandated territory for administrative reasons.

In 1928, South Africa again indicated that Namibia and Walvis Bay were united. The South African representative to the Permanent Mandates Commission declared that “Walvis Bay . . . was essential to the economic development of the mandated territory” and that “the trade of South West Africa would be severely injured were it not to control Walvis Bay.” In addition, he asserted that “the fact of the incorporation of Walvis Bay in South West Africa” permitted the South West Africa Administrator to make representations on behalf of Walvis Bay to the Union Minister. By 1929, the Permanent Mandates Commission was persuaded by such statements that Walvis Bay was an integral part of South West Africa. Thus, by its own statements South Africa endorsed the unification of the economic, political, and social structures of Walvis Bay and Namibia. These public endorse-

11. Id.
ments led the residents of Namibia and Walvis Bay to expect that the unification would be permanent.

In addition to its public statements on the incorporation of Walvis Bay into Namibia, South Africa took action to unify the two. After the 1922 proclamation merging Walvis Bay with Namibia, South Africa enacted laws that developed a South West African constitution and drew electoral boundaries. These laws included Walvis Bay in the mandated territory, and thus Walvis Bay residents have always voted in Namibian elections. The residents of Walvis Bay have never been granted South African voting privileges. The unification resulting from these laws was so complete that by 1928 the administration of Walvis Bay was entirely in the hands of the Administrator of South West Africa.

This integration of Namibia and Walvis Bay has promoted a significant and continuing dependence between the two. The Bay relies on Namibia for the seasonal labor force for its fishing industry. Hinterland Namibia is dependent on the Bay as its only deep water port and as a crucial factor in the maintenance of its international trade. Similarly, the Bay is demographically integrated with Namibia; many of the Bay residents were born elsewhere in Namibia and will be Namibian citizens regardless of the status of the Bay. Furthermore, because the laws of South West Africa have been applied in Walvis Bay, the political and bureaucratic organizations in the Bay look to the

13. See J. Dugard, supra note 2, at 83 (discussing South West Africa Constitution Act No. 42 of 1925).
15. See notes 11 & 12 supra; J. Serfontein, Namibia 422-23 (1976) (Walvis Bay part of Namibian Omaruru constituency).
16. See Permanent Mandates Commission, Minutes, 6th League of Nations Publications (14th Sess.) 68 (1928) (remarks of South African representative) (example of unified administration is that population of Walvis Bay is included in population statistics of Namibia).
17. See Windhoek Advertiser, Sept. 7, 1977 (six thousand migrant laborers from northern Namibia brought to Walvis Bay under one year contracts to provide labor for fishing industry) (on file with Yale Law Journal).
18. See p. 921 infra.
19. See pp. 920-21 infra (discussing lack of transportation alternatives).
20. See J. Serfontein, supra note 15, at 422 (estimating that over 90% of residents of Narraville, unincorporated “Coloured” suburb of Walvis Bay, were born in other parts of Namibia). Residents who are Namibian citizens feel as much a part of Walvis Bay as anyone born in the Bay and vice versa. See, e.g., Transcript of Conference on Southern Africa sponsored by the New York Bar Association and the Lawyers' Committee for Civil Rights under Law, Session VII, Nov. 9, 1978, at 6-7 (statement by native Namibian that he grew up knowing no difference between Walvis Bay and Namibia) (on file with Yale Law Journal).
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Namibian capital of Windhoek for administration rather than to the South African capital of Pretoria.\textsuperscript{21}

B. The Reasons for Unification

Although it may seem illogical that South Africa would relinquish its rights over the Bay by unifying it with the mandated territory, its actions are easily understood in light of its goal of regional dominance and its attitude toward the mandate system. If South Africa had not been interested in Namibia, it would never have annexed Walvis Bay.

As early as 1876, the Colony of the Cape of Good Hope\textsuperscript{22} was interested in possessing all of Namibia—Bay and hinterland—in order to monopolize southern African interior trade.\textsuperscript{23} Great Britain formally annexed Walvis Bay at the Cape's instigation.\textsuperscript{24} Had Germany not annexed the hinterland, Britain would have maintained informal control over the rest of Namibia as well.\textsuperscript{25} After the loss of the hinterland,\textsuperscript{26} the Cape Colonists expended little energy to develop or in-

\textsuperscript{21} Despite its professed intention to bring Walvis Bay under South African administration, South Africa has not yet carried out its threat. Compare Windhoek Advertiser, Apr. 26, 1976 (Prime Minister Vorster announces South African intentions to administer Walvis Bay from Pretoria) (on file with Yale Law Journal) with Johannesburg Star, Sept. 3, 1977 (at time of official change, only Dep't of Posts and Telecommunications switched to South African administration) (on file with Yale Law Journal).

\textsuperscript{22} Prior to 1909, present day South Africa was a number of separate colonies: Orange, Transvaal, Natal, and Cape of Good Hope. See A. VANDENBOSCH, SOUTH AFRICA AND THE WORLD 3-8 (1970). The Cape of Good Hope, or the Cape Colony, is the colony with the longest history of interest in Namibia.

\textsuperscript{23} The Cape sent an explorer, William Coates Palgrave, to ascertain the possibility of British rule over the entire area. See W. PALGRAVE, REPORT OF W. COATES PALGRAVE ESQ., SPECIAL COMMISSIONER TO THE TRIBES NORTH OF THE ORANGE RIVER OF HIS MISSION TO DAMARALAND AND GREAT NAMANALAND IN 1876, at 3 (1969). Palgrave noted in his report that, "[i]n a short time it would enable us to control nearly the whole of the interior trade." Id. at 88.

\textsuperscript{24} See G. COCKRAM, SOUTH WEST AFRICAN MANDATE 8 (1976) (discussing attempts of Cape Colonists to induce British to annex Namibia, resulting in annexation of Walvis Bay).

\textsuperscript{25} In 1883, Herr Adolf Luderitz requested protection from the German government for a factory he planned to open at the Bay of Angra Pequena. Although Britain indicated that it would consider the intrusion of another foreign power in the country as an infringement of Her Majesty's legitimate right, Germany, in April of 1884, extended protection to Angra Pequena, later Luderitz Bay. See E. RITCHIE, supra note 6, at 87. The Cape attempted to annex the entire coast in July of that year but these attempts came too late to halt German advances. HOUSE OF ASSEMBLY DEBATES, CAPE OF GOOD HOPE 353-56 (1884). Germany laid claim to all of the South West Africa territory but the Bay. The division of the Bay from the rest of the territory was confirmed by the Berlin Conference of November 1884 to February 1885. The major colonial powers gathered there to resolve their differences on the partitioning of the African continent. See S. CROWE, THE BERLIN WEST AFRICAN CONFERENCE 1884-1885, at 57-60, 191 (1942).

\textsuperscript{26} Another example of the Cape Colony's persistent efforts to acquire all Namibia—Bay and hinterland—is the fact that it took the Cape six years to formally annex Walvis
tegrate Walvis Bay with their colony; they believed that Germany could not make a viable colony of Namibia without the Bay and preferred to wait until they could acquire control over all Namibia before merging both with the mother colony.

South Africa's attitudes toward the mandate system also help to explain its actions in merging Walvis Bay into Namibia. The mandate system did not permit annexation; it allowed administering powers to govern the territories only until the residents of each territory were able to govern themselves. South Africa, however, viewed its mandate for Namibia as a prelude to annexation. It believed that the mandate's explicit provision against annexation would not be enforced and thus felt that it could annex the mandated territory, Namibia, and ignore any territorial disputes over Walvis Bay. Indeed, after World War II, when the other mandatory powers placed their mandated territories under United Nations Trust agreements, South Africa petitioned the United Nations for permission to annex Namibia. When the United Nations refused, South Africa attempted to ignore its authority, an act in contravention of international law.
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For all of these reasons, South Africa did not believe that, in merging Walvis Bay with Namibia, it was jeopardizing its rights to the Bay; the merger was but an intermediate step before the formal annexation of Namibia. However, mistaken beliefs cannot excuse South Africa from responsibility for the consequences of its actions. South Africa, aware of its right to incorporate Walvis Bay into itself, chose not to assert its rights effectively, but rather incorporated the Bay into Namibia. It does not matter that mistaken beliefs existed; the first element of international estoppel law is satisfied by this ineffective assertion.

Similarly, the second element is satisfied because South Africa should have seen that its affirmative acknowledgments—by word and action—of the unification of the Bay and the territory were reasonably relied on by the residents of the Bay and Namibia as authoritative indications that the unification was permanent. The standard of international law is not proof of actual knowledge but proof that the facts were so notorious that the country should have expected that others would view the right as abandoned. Its statements and actions were proclaimed to the world community before the League of Nations. Moreover, its actions were more obvious to Namibia and Walvis Bay residents than inconspicuous claims to the contrary in official reports; it is not reasonable to expect the residents to take such statements seriously while ignoring the objective reality in their country.

Because these claims did indeed fail to dissuade the residents of the Bay and the territory from the belief that the Bay would continue as part of Namibia, residents of both areas have relied on this unifica-


35. See, e.g., BUREAU OF STATISTICS, REPUBLIC OF SOUTH AFRICA, POPULATION CENSUS, 6TH SEPTEMBER, 1960, at vi (1963) (stating in introductory notes and in small print, "Walvis Bay is an integral part of the Republic of South Africa. As it is geographically detached from South Africa and administered from Windhoek as if it were part of South West Africa, the figures for Walvis Bay are included for purposes of expediency in the figures for South West Africa"); there is no further mention of Walvis Bay.

36. See, e.g., SOUTH WEST AFRICA BUSINESS DIRECTORY 1974, at 3 (1974) (including advertisement placed by Town Clerk of Walvis Bay stating in large type "Walvis Bay:
tion in various segments of their lives; all aspects of the political, economic, and educational systems of Walvis Bay and Namibia are interdependent. 37 Separating the Bay and Namibia after so many years of private reliance would result in serious dislocation. 38 Because this integration has occurred in reliance on South Africa's continual failure to assert effectively its right to incorporate Walvis Bay, it is estopped from suddenly changing that conduct by asserting claims to the Bay.

II. Precolonial Sovereignty and Modern Independence

The precolonial social and political integration of Walvis Bay and Namibia also support the legal recognition of the modern unity of the Bay and Namibia. Before the area was colonized, the Bay was part of the sovereign area of the Nama people. 39 Although Namibia clearly encompasses all the rest of the Nama lands, South Africa seeks to prevent inclusion of Walvis Bay in the new nation. The Bay should be accorded its right of self-determination as an integral part of Namibia.

A. The Doctrine of Legal Ties

International law gives authority over non-self-governing (NSG) territories to the General Assembly of the United Nations and assigns to it the duty of facilitating the independence of such territories. 40 As a preliminary step, the Assembly must determine which regions within or combinations of NSG territories constitute "peoples" entitled to recognition as national units. 41 The Assembly has several options in drawing the boundaries. Traditionally, colonially defined boundaries were employed, 42 but these often ignored the social and
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political organization of the indigenous peoples. This indifference to local populations often roused historic frictions after a country gained independence; violent skirmishes and even civil wars resulted.

The discord fostered by this adherence to colonially defined borders has caused the Assembly, in facilitating the independence of NSG territories, to consider the social and political organization that existed in the territory prior to colonization. The General Assembly passed Resolution 1514 in order to provide the authority for such an inquiry into the historical organization, which is labeled “legal ties.” The analysis of legal ties considers both the existence of past social and political organizations and the patterns of allegiance within these organizations.

The legal ties necessary to establish the sovereign rights of an indigenous people were recently clarified by the International Court of Justice in the Western Sahara (Advisory Opinion) decision. In analyzing a decolonization situation, the court affirmed the sovereign rights of a “people” to the territory they inhabit if, at the “critical date,” they maintained a sufficiently developed social and political organization.

In determining the legal ties between Namibia and Walvis Bay, the

43. Id. at 45.
44. Nigeria was created by British colonists from several previously independent kingdoms. M. CROWDER, THE STORY OF NIGERIA 11 (1978). This ethnic diversity was largely responsible for the bitter 1967-70 civil war. Id. at 259-77.
46. See Western Sahara (Advisory Opinion), [1975] I.C.J. 12, 41-68 (examining evidence of legal ties). The opinion noted that legal ties may exist that do not amount to ties of sovereignty. Id. at 64.
47. Id. The Western Sahara is a region on the west coast of Africa that had been colonized and administered by Spain. When Spain withdrew, both Morocco and Mauritania claimed historic rights of sovereignty over the territory. The Court rejected these claims. Id. at 42-57 (Moroccan claim), 57-65 (Mauritanian claim). Spain opposed the claims by arguing that because the Western Sahara had been separate and legally distinct from both Morocco and Mauritania at the time of colonization, its modern independence should be recognized. Id. at 61. The Court’s rejection of the Moroccan and Mauritanian claims implicitly recognizes the legitimacy of the Spanish argument.
48. The organization need not match the structure of the classical European state. Id. at 39. The decision rejects the views of nineteenth century writers who maintained that sovereignty appertained only to “civilized” peoples. The English writers were especially fond of these views. For example, Westlake linked his definition of sovereignty to that of his definition of civilization: there is no sovereignty “where [Europeans] find no native government capable of controlling white men or under which white civilization can exist.” J. WESTLAKE, THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 145 (1914). In rejecting these views, the Court returned to the position of precolonial writers that “whenever a country is inhabited by people who are connected by some political organization . . . such country is not to be regarded as territorium nullius and open to acquisition by Occupation.” M. LINDLEY, supra note 7, at 17.
critical date at which past organizations are to be examined must first be established.\textsuperscript{49} 

Critical date analysis is applied in two distinct situations. In what may be termed the noncolonial situation, two existing powers both assert sovereignty over an area of land that has no indigenous population.\textsuperscript{50} In such cases, the claims are examined as of the date at which the second claimant attempts to exercise sovereignty.\textsuperscript{51} In a post-colonial situation, however, the General Assembly seeks to return sovereign rights to the inhabitants of the territory; it applies critical date analysis to different contestants and for different ends.\textsuperscript{52} Unlike the noncolonial situation, the analysis in a post-colonial dispute concerns the residents of an NSG territory. Determination of the critical date is made solely to help the General Assembly create strong cohesive nations by clarifying prior legal ties.\textsuperscript{53} Thus the date that most clearly exemplifies the prior social and political organization of the territory best fulfills the purpose of determining the critical date in post-colonial situations.\textsuperscript{54} The date need not be the official time of colonization.

The Walvis Bay/Namibia dispute is of the post-colonial type. Before the advent of colonialism in southern Africa, both the southern half of Namibia and Walvis Bay were populated by the Nama. The area was thus not terra nullius.\textsuperscript{55} Although the critical date under the noncolonial analysis would be 1884, the year in which both England

\textsuperscript{49} Western Sahara (Advisory Opinion), [1975] I.C.J. 12, 38.
\textsuperscript{51} The issue is resolved by determining whether the first claimant had previously established sovereignty over the area by effectively occupying it. If it had, the second claimant is defeated. If there had been no prior effective occupation, the territory was terra nullius at the critical date and the second power's claim of sovereignty is recognized. See, e.g., Legal Status of Eastern Greenland, [1933] P.C.I.J., Series A/B, No. 55, at 44 (critical date at which Norway asserted sovereignty); Island of Palmas (United States v. The Netherlands), 2 R. Int'l Arb. Awards 829 (1928) (critical date terminology).
\textsuperscript{52} See Western Sahara (Advisory Opinion), [1975] I.C.J. 12, 38 (“[the Court] is not... concerned to establish a 'critical date' in the sense given to this term in territorial disputes; for the questions do not ask the Court to adjudicate between conflicting [claims]”; court set critical date solely to locate controversy in correct historical context).
\textsuperscript{53} See id. at 37 (goal of opinion to aid General Assembly decision on independence of Western Sahara).
\textsuperscript{54} This purpose is reflected in the choice of a critical date in the Western Sahara opinion. The language of the court suggests that the critical date may be set at the beginning of a series of continuous acts that culminate in colonization, rather than at the exact date of colonization. See id. at 38 (considering Spanish acts antecedent to colonization).
\textsuperscript{55} See id. at 39 (applying terra nullius analysis to post-colonial situation; terra nullius is a territory belonging to no one). In Walvis Bay, the Topnaar, a tribe of the Nama, had an established settlement for over a century prior to the coming of Europeans. See B. Tindall, The Journal of Joseph Tindall 40 (1959).
and Germany finally asserted colonial claims, a better date for examining past legal ties is 1810, the date at which the political and social organization of the indigenous population was most clear. After 1810, the existing legal ties were disrupted by the European settlement of the Cape of Good Hope, which forced a wave of migration of the indigenous South African people, the Orlams, northward into present day Namibia. Thus, the political and social organizations that existed in 1884 do not accurately reflect the precolonial ties of the indigenous population of Namibia. The year 1810, therefore, is the most appropriate critical date.

Having established the appropriate date, it is necessary to evaluate the legal ties at that time. The analysis of legal ties proceeds along two dimensions: 1) were the existing organizations sufficiently developed to possess sovereignty; 2) did the patterns of ultimate allegiance within these organizations unify the areas under consideration? The Western Sahara decision does not specify the threshold of adequate legal ties. Presumably, the threshold of adequate legal ties that the International Court of Justice would recognize as indicative of a sovereign organization would not need to reach the threshold of the classical European state. On the other hand, the Court would not want the mere presence of random inhabitants at the critical date to constitute sufficient legal ties. Between these clear cases, however, a case-by-case approach, according to the type of evidence specified in the Western Sahara case, is necessary to evaluate the diverse ways that peoples organize themselves.

B. The Indigenous Culture of Namibia

The Western Sahara opinion indicates the type of evidence that is relevant to the inquiry into legal ties: 1) recognition by foreign powers; 2) a sophisticated, uniform political organization; 3) a uniform

56. See notes 5 & 25 supra.
57. See H. Vedder, South West Africa in Early Times 223, 365 (1938) (history of migrations); Hoernle, The Social Organization of the Nama Hottentots of Southwest Africa, 27 Am. Anthropologist 1, 4 (1925) (describing impact of migrations on traditional Nama culture). Although the Orlams were originally closely related to the Nama inhabitants, they were greatly influenced by the early Dutch settlers of the Cape Colony and thus were culturally and politically distinct from the Nama by the time of migration. Id.
58. See H. Vedder, supra note 57, at 364-65 (history of nineteenth century Namibia).
59. This analysis is implicit in the reasoning of the I.C.J. in the Western Sahara opinion. See Western Sahara (Advisory Opinion), [1975] I.C.J. 12, 47-62.
60. See note 48 supra (Western Sahara opinion rejects narrow view of sovereign rights).
61. The Court's use of the terra nullius test exemplifies such a minimum threshold test. See note 55 supra.
cultural identity; and 4) geographical contiguity. An analysis of the available evidence on Namibia and Walvis Bay in 1810 demonstrates a sophisticated and unified indigenous culture. These legal ties are sufficient to warrant the General Assembly’s affirmance of the modern unification of the areas.

The existence and distinctiveness of “Great Namaqualand,” as the Nama area, which included Walvis Bay, was known, was recognized by early European explorers. The autonomy of this area was confirmed by later writers. In addition, contemporary foreign sovereign authorities accorded recognition to the area. Therefore, to outsiders, Great Namaqualand possessed a significant degree of sovereignty.

Internally, the Nama possessed a sophisticated political organization. Within Great Namaqualand, they were historically divided into seven tribes. The vast land area and nomadic way of life did not promote centralization of authority among the tribes; rather, they formed a functional confederation. The Red Nation was historically the senior and paramount tribe. The Topnaar Nama occupied the region that included Walvis Bay.

The political organization of the Nama was uniform throughout Namaqualand. Each tribe had a chief and tribal council. The chief presided over the council and, in times of war, commanded the army and negotiated peace. In peacetime, the council, run by majority decision, was the ultimate authority within the tribe. The Topnaar...
Nama were ruled in the customary fashion until their political organization was destroyed by the colonial process.\textsuperscript{71} Topnaars continue to live in the area of Walvis Bay.\textsuperscript{72}

The Nama of Great Namaqualand also formed a culturally distinct entity. They possessed a uniform and rigid social code.\textsuperscript{73} They all spoke a dialect of the Khoisan language\textsuperscript{74} and shared a common religion.\textsuperscript{75}

Geographically, the Topnaar region, of which Walvis Bay was a part, formed the northwest corner of Great Namaqualand. Great Namaqualand was a large rectangular region covering the southern and central portions of modern Namibia.\textsuperscript{76} The Topnaar region was thus contiguous with the rest of the Nama lands. Moreover, it was located at the lower ends of the Swakop and Kuisip rivers, both of which drained large portions of Great Namaqualand and served as pre-colonial highways between the Bay and the rest of the Nama region.\textsuperscript{77} Therefore, Walvis Bay was an integral and undifferentiated part of Great Namaqualand. This unification was corroborated by contemporaneous political maps,\textsuperscript{78} an element accorded great significance in the \textit{Western Sahara} opinion.\textsuperscript{79}

By all the elements of the \textit{Western Sahara} "legal ties" test, the Nama

71. Alexander, in 1837, described the Topnaars as "a large tribe of red men, speaking the Namaqua language, and who inhabit the shores about Walvisch Bay." 2 J. Alexander, supra note 63, at 72, 100. The Topnaars fished, harvested a desert melon called 'naras, and kept large herds of cattle and sheep. In 1854, Anderson found the remaining Topnaars subsisting on fish and 'naras; their herds had been destroyed and their numbers reduced by the wars caused by the influx of the Orlams. J. Wallis, \textit{Fumble My Foe} 47-48 (1936); accord, W. Palgrave, supra note 23, at 6.

72. O. Levinson, supra note 64, at 4.

73. See Hoernle, supra note 57, at 9 (anthropologist's study of Nama culture).


75. This religion was based on the deity Tsuni-//goam. See id. at 30-52; H. Vedder, supra note 57, at 58-60.

76. Great Namaqualand was bounded by the Atlantic Ocean, the Orange River, the Kalahari, and an unoccupied area on the north that ran across the width of modern Namibia at the latitude of the present capital of Windhoek (then nonexistent). See H. Vedder, supra note 57, at 51, 365.

77. See 2 J. Alexander, supra note 63, at 106-10 (explorer used riverbeds for travel); H. Vedder, supra note 57, at 38 (describing riverbeds as "highways").

78. See, e.g., 1 J. Alexander, supra note 63, at 1 (map reflecting early confusion of some tribal names); B. Tindall, supra note 55, at 194 (map for period 1839-55); H. Vedder, supra note 57, at 166 (map of Great Namaqualand area, circa 1820); id. at 242 (map for period 1820-1880); J. White, \textit{The Land God Made In Anger} 64 (1969) (showing Topnaar area around Walvis Bay as part of Great Namaqualand in 1880). Maps of this area prior to the colonial period are scarce.

possessed sovereign rights over the whole of Great Namaqualand, of which Walvis Bay was an integral part. The relationship of Walvis Bay to Namibia is not analogous to that of the Western Sahara and Mauritania. Mauritania was formed from several nonhomogeneous and previously independent entities; the Western Sahara was an independent entity at the critical date and was never a part of Mauritania. Mauritania thus did not have historic legal ties that would justify the General Assembly's unification of the Western Sahara with Mauritania. See Western Sahara (Advisory Opinion), [1975] I.C.J. 12, 59.

Namibia was also created by colonial joinder of several previously independent and nonhomogeneous entities. Unlike the Western Sahara, however, Walvis Bay was not a separate entity at the critical date but a part of one of the entities, Great Namaqualand, that was joined to form Namibia. Namibia thus seeks only to reincorporate a historical part of one of its constituent entities, not to incorporate a previously unrelated entity.

A. **Walvis Bay as a Non-Self-Governing Territory**

Walvis Bay is not an integral part of South Africa, but a non-self-governing territory. Two United Nations General Assembly resolutions establish the three criteria for determining whether a territory is non-self-governing: 1) the territory must be geographically separate from the administering state; 2) its people must be ethnically or culturally distinct from those of the administering state; and 3) its status must be arbitrarily subordinate to that of the administering state. Applying these three criteria to the objective status of Walvis Bay

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80. The relationship of Walvis Bay to Namibia is not analogous to that of the Western Sahara and Mauritania. Mauritania was formed from several nonhomogeneous and previously independent entities; the Western Sahara was an independent entity at the critical date and was never a part of Mauritania. Mauritania thus did not have historic legal ties that would justify the General Assembly's unification of the Western Sahara with Mauritania. See Western Sahara (Advisory Opinion), [1975] I.C.J. 12, 59.

Namibia was also created by colonial joinder of several previously independent and nonhomogeneous entities. Unlike the Western Sahara, however, Walvis Bay was not a separate entity at the critical date but a part of one of the entities, Great Namaqualand, that was joined to form Namibia. Namibia thus seeks only to reincorporate a historical part of one of its constituent entities, not to incorporate a previously unrelated entity.


over a number of relevant time periods establishes that Walvis Bay is a non-self-governing territory.

Between 1878 and 1922, Walvis Bay was successively an NSG territory of the United Kingdom, the Cape Colony, and South Africa. Walvis Bay was geographically separate and ethnically and culturally distinct from each. Walvis Bay was also arbitrarily subordinate; South Africa never accorded the Bay the treatment or status of an integral part of itself. Furthermore, because Walvis Bay was under South African control, as South Africa argues and admits, its residents could not have exercised their right of self-determination.

Moreover, even if Walvis Bay were not an NSG territory of South Africa before 1922, it became one after that year. In 1922, South Africa enacted the South West Africa Administration Act, which joined Walvis Bay for administrative purposes with the mandated territory of South West Africa. Walvis Bay was still geographically

83. It could be argued that Walvis Bay, at present, is not ethnically and culturally distinct from South Africa. The residents in both Walvis Bay and South Africa could be viewed as multiracial groups and therefore similar. This Note, however, argues that the relevant ethnic and cultural group in South Africa is solely European while the relevant group in Walvis Bay is multiracial but predominantly African.

In 1884, when Walvis Bay was an NSG territory of first the United Kingdom and then of the Cape Colony, the Bay, the U.K., and the Cape were culturally and ethnically distinct: the Bay was all African; the U.K. and the Cape were all European. In recent times, however, colonialism in Walvis Bay has resulted in a multiracial population. South Africa also describes her residents as multiracial.

Although South Africa has a multiracial residential population, her African residents have no political rights. See A. Vandenburg, supra note 22, at 24-28. Moreover, her apartheid policies do not allow Africans in South Africa to be citizens of South Africa but rather citizens of a number of so-called “tribal homelands” or “bantustans.” Id. If Africans have no say in the South African government and, in fact, are not even considered citizens of South Africa, they should not be counted as part of the relevant ethnic or cultural group used in the analysis described in Resolution 1541, G.A. Res. 1541, 15 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/4684 (1960). Only the European population in South Africa should be recognized.

In contrast to a European population, Walvis Bay has a multiracial population. This population is predominantly African. Thus the population of Walvis Bay is distinct ethnically and culturally from the European group in South Africa.

84. Except for the existence of some trade and the presence of a limited military force, South Africa never integrated Walvis Bay into herself. See House of Assembly Debates, Cape of Good Hope (1884-1904) (debates on Walvis Bay focused on use of Bay as trading post without mentioning internal development); note 27 supra (showing that South Africa did not develop or integrate the Bay). For example, no voting rights were accorded the residents of Walvis Bay equal to the voting rights of other South African citizens. See House of Assembly Debates, Cape of Good Hope 280 (1899) (bill to extend voting rights to inhabitants of Walvis Bay dismissed); Permanent Mandates Commission, Minutes, 6 League of Nations Publications (15th Sess.) 75 (1929) (South African representative admits Walvis Bay not included in electoral laws of South Africa or Cape Colony).

85. See note 5 supra.

86. See South West Africa Affairs Act No. 24 of 1922, The Laws of South West Africa 1915-1922, at 20 (1923) (Walvis Bay, which forms part of province of Cape of Good Hope, shall be administered as if part of mandated territory).
separate and ethnically and culturally distinct from the Union, thus satisfying the first two criteria of the General Assembly test. As for the third criterion, even if the Bay had enjoyed equal status with the rest of the Union, as the South African argument that the Bay has always been an integral part of South Africa would imply, it was unequivocally subordinated to the Union when it was joined with the mandated territory, which by definition was already subordinate to and ruled by the Union.87

The status of Walvis Bay as an NSG territory has continued through the present. The status and rights of residents of the Bay, although improved since 1922, remain arbitrarily subordinate to those of the residents of South Africa. Although Walvis Bay is allegedly part of the Cape Province, residents of the Bay have no input into the affairs of the Province; all their political power is exercised through the mandated territory.88 The status of South West Africa as a mandated territory, and of its residents as citizens of a mandated territory, are recognized by the world community and admitted by South Africa to be subordinate. Therefore, because, under the 1922 Administration Act, the rights of Bay residents are identical to those of residents of the territory, the rights of the Bay residents are subordinate to those of the citizens of South Africa.

B. The Violation of Duties Under the United Nations Charter

Article 73 of the United Nations Charter states that a nation administering an NSG territory has certain responsibilities to the indigenous peoples of the administered territory that are described as its “sacred trust.”89 The administering nation must not violate this trust if it expects to retain control over the territory. By installing apartheid in Walvis Bay, South Africa has violated its obligation to

87. See N. Bentwich, supra note 29, at 3-5 (describing mandate system and showing that mandated territories are subordinate to their administering authorities); H. Grimal, supra note 29, at 13-18 (same).
88. The subordinate status of the mandated territory has continued to the present. See E. Robertson, Subject List and Index of the Laws of South West Africa from 1915 to 1969, at 2-4 (1973) (noting that Namibia has always been subordinate to South Africa).
89. Article 73 establishes the following general obligations owed by an administering sovereign to a non-self-governing territory:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories... U.N. Charter art. 73.
the people to administer the Bay as a sacred trust. Thus administrative authority should revert to the General Assembly.

Article 73 represents a radical concept; it allows the United Nations to take an NSG away from an irresponsible administrative authority. Responsibility for developing conditions for self-determination by the indigenous population of an NSG territory is assumed by the administering authority along with the objective act of administration. The South West Africa Case of 1971 confirmed that Article 73 not only applies to trust or mandate territories, but also "clearly embraces territories under a colonial regime." The sacred trust that Article 73 obliges all administering authorities to assume includes the duties to respect the cultures of residents of an NSG territory, promote their overall advancement, ensure them just treatment, develop their powers of self-government, and further international peace and security.

South Africa, in administering Walvis Bay, has instituted the racial policy of apartheid. Apartheid violates the purposes and principles of the United Nations Charter and the sacred trust prescribed in Article 73. Thus, South Africa has failed to fulfill the obligations that it owes to Walvis Bay. South Africa has already forfeited its rights of administration over Namibia as a result of violations of the sacred trust imposed by the mandate. Because South Africa has also violated the

90. See Reisman, The Case of Western Somaliland, 1 Horn of Afr., no. 3, at 13, 20 (July-Sept. 1978).
91. U.N. CHARTER art. 73.
93. The obligations created by Article 73 include: "to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses; . . ." U.N. CHARTER art. 73, para. a.
94. The relevant part of Article 73 reads as follows: "to develop self-government, to take due account of the political aspirations of the people, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement; . . ." Id. para. b.
95. Id. para. c.
98. Id.; see Reisman, supra note 90, at 18-20.
sacred trust in controlling Walvis Bay, it has forfeited its rights of administration over the Bay as well.\textsuperscript{99}

Therefore the General Assembly has the authority to administer the Bay subject to the duties of Article 73. Accordingly, the General Assembly must administer the territory by respecting the will of the people and their rights to self-determination.\textsuperscript{100} The Assembly already has decided, however, that the self-determination of the people of Walvis Bay lies in recognizing its integration with Namibia.\textsuperscript{101} Such a decision is within the legal authority of the Assembly, subject only to the objections of the people of Walvis Bay.\textsuperscript{102}

IV. The Creation of a Viable Namibia

In addition to the international legal norms already examined, the General Assembly should be concerned with the viability of any new entity it creates. It should not create a state whose chance for survival and independence is significantly impaired.

The creation of the Polish Corridor after World War I is an acknowledgment of the need for access to the sea as a condition of viability.\textsuperscript{103} Namibia is not viable as a nation without Walvis Bay, its best harbor. The inability to transport exports and imports to and from world markets would force Namibia to be both politically and economically dependent on South Africa. Namibia depends on the export of products from its ranching, fishing, and mining industries.\textsuperscript{104} With the proceeds of these exports, Namibia finances the import of

\textsuperscript{99} See Reisman, supra note 90, at 20.
\textsuperscript{100} Id. at 18-20.
\textsuperscript{102} Although evidence of the desires of Walvis Bay residents is scant, the statements of the South West African Peoples' Organization (SWAPO) are indicative of these desires. The United Nations has recognized SWAPO as the authentic representative of the Namibian people. G.A. Res. 3111, 28 U.N. GAOR, Supp. (No. 30) 93, U.N. Doc. A/9030 (1974); R. Gibson, African Liberation Movements 107-45 (1972) (recounting history of SWAPO and other less popular liberation groups). SWAPO has stated that Walvis Bay is an integral part of Namibia. OBJECTIVE: JUSTICE, June 1978 (Special Supp. No. 2).
\textsuperscript{103} The Powers at Versailles believed that Poland's access to the sea was economically and politically necessary for its independence. See R. Donald, The Polish Corridor and the Consequences 9, 10, 20-21, 141-42 (1929). Poland was economically dependent on exports and, without the Corridor, would have been dependent on the good will of its neighbors for access to trade. See A. Tomas, The "Polish Corridor" and Peace 13-14 (1930). Colonial powers, assembled at the Conference of Berlin in 1885, confirmed the importance of access to trade in creating viable countries. See S. Crowe, supra note 25, at 167.
\textsuperscript{104} See Annual Economic Review of South and South West Africa 21-23 (1971) (describing export based economy).
most manufactured goods and food.\textsuperscript{103} The Namibian economy thus depends for its survival on easy access to international trade.

Namibia's transportation alternatives are few. The airports are of limited capacity,\textsuperscript{106} and transportation of large quantities of basic commodities by air is generally uneconomical. Namibia has only two natural harbors: Walvis Bay is large, sandy-bottomed, and easily expandable; Luderitz Bay is smaller and rocky, and expansion is economically infeasible. Walvis Bay is clearly the more valuable of the two.\textsuperscript{107} The only remaining access to international trade is over land. The limited Namibian road and rail systems run through Windhoek, the capital, to Walvis Bay on the west coast and to South Africa to the south. Therefore, all feasible transportation alternatives include Walvis Bay or South Africa. The creation of alternative trade routes would be difficult; it would be nearly impossible for a newly independent developing nation to obtain the necessary capital, technology, and labor to extend the road and railways over the Angolan border to Angolan ports.\textsuperscript{108} Similar problems can be expected to prevent Namibia from building a separate port elsewhere on the coast. If Walvis Bay were South African territory, South Africa would control all Namibian access to international trade.

If Namibia were economically dependent on South Africa, political dependence could easily result as well. Changes in regulations or even border closings would be immediately useful political weapons. In essence, South Africa would have an effective veto power over the Namibian government. Moreover, the port of Walvis Bay is the only one between Angola and South Africa capable of supporting a navy or coast guard; it is thus vital to military control over Namibian territorial waters.\textsuperscript{109} Each of these factors would threaten the viability of Namibia if Walvis Bay belonged to South Africa.\textsuperscript{110}

\textsuperscript{106} See Namib Times, Apr. 1, 1977 (on file with Yale Law Journal).
\textsuperscript{107} See \textit{SOUTH WEST AFRICA HANDBOOK}, supra note 105, at 36. In 1967, 94\% of all goods entering Namibia by sea entered at Walvis Bay. Id.; O. Levinson, supra note 64, at 107.
\textsuperscript{108} This situation is similar to Zambia's partially successful attempt to build her own link to the sea. Zambia, another developing African nation and a landlocked country, wished to have access to the sea other than its existing rail line through its unfriendly neighbor Rhodesia. China offered free financing, technological assistance, and labor to build the Tazara Railroad through Tanzania. Yet, this massive aid was not sufficient. Zambia was forced to continue to rely on its Rhodesian rail link for continued economic survival. \textit{THE ECONOMIST}, Apr. 7, 1979, at 80; \textit{TIME}, Nov. 6, 1978, at 67.
\textsuperscript{109} South Africa presently uses the enclave as a means of controlling the shipping lanes off the Namibian coast. As in other parts of Namibia, South Africa has constructed a major military base at Walvis Bay. \textit{OBJECTIVE: JUSTICE}, supra note 102, at 3.
\textsuperscript{110} The use of Walvis Bay as a free port under South African sovereignty has been
The determination of international boundaries is an event of potentially widespread consequence. When boundaries are arbitrary, they become the source of international tension. To delineate international boundaries properly, historically significant patterns of sovereignty, the current de facto organization of the area, and the future prospects of the new nation should be considered. The General Assembly must determine whether to reinstate or to abolish permanently the boundary between the non-self-governing territories of Walvis Bay and Namibia. The historical unity of the areas, their present functional integration, and the prospects for future friction if the areas are divided support only one resolution: the creation of a single viable nation that unifies Namibia with Walvis Bay.

proposed. See Windhoek Advertiser, Apr. 9, (1976) (on file with Yale Law Journal); Namib Times, Apr. 1, 1977 (on file with Yale Law Journal). South African sovereignty, however, would give the South Africans great discretion to ignore the free port agreements and put economic pressure on Namibia. The same trade advantages would exist if the Bay was a Namibian free port, but South Africa would be forced to seize the port to have the same political control; such an invasion is much less likely than an abrogation of trade laws.