BOOK REVIEWS


Since the 1971 Advisory Opinion of the International Court of Justice was handed down, the policy of the United Nations towards South-West Africa has vacillated between coercion and negotiation. But neither coercion, in the form of economic and diplomatic sanctions, nor negotiation, in the form of discussions between the South African Government and the Secretary-General, has brought the United Nations nearer to its aim of independence for 'Namibia'. The present is essentially a time for the reconsideration and reappraisal of United Nations' goals and strategies, for an examination of the past with a view to establishing areas of consensus and identifying practicable measures for the settlement of the dispute. Slonim's study therefore appears at an opportune time and should assist decision-makers in their task of reassessment, as it is the only up-to-date, comprehensive, scholarly study of the dispute between South Africa and the United Nations over South-West Africa.¹

The South-West African dispute has been characterized by an interaction between law and politics which makes either a 'purely legal' or 'purely political' approach unacceptable. Herein lies the merit of Slonim's study: he has succeeded in placing both law and politics in their correct perspectives. Although the six appearances of the South-West Africa issue before the International Court of Justice are thoroughly described and analysed, they are not viewed in isolation from their political significance; conversely, full attention is given to the insistence of the political organs of the United Nations on a legal basis for their action.

The author identifies three phases in the dispute: first, the attempt on the part of the United Nations to persuade South Africa to accept the principle of international accountability in respect of South-West Africa; secondly, the move to outlaw apartheid in South-West Africa, by means of contentious proceedings; and thirdly, the termination of the mandate. In the main, Slonim's work is devoted to an examination of these three phases, prefaced by an historical introduction.

¹ But see now the reviewer's The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations, details of which can be found under the heading 'Books Received'—Editor.
The historical section traces in detail the opposing views of President Woodrow Wilson and the dominion ministers at the Paris Peace Conference and describes the compromise settlement that was ultimately reached. As Slonim shows, the subsequent dispute may in large measure be attributed to the vague compromise of the Paris Peace Conference, which ‘could satisfy annexationists and internationalsimultaneously’. The nature and operation of the mandates system under the League of Nations are also examined, with special reference to issues which later concerned the dispute with the United Nations, such as the meaning of the ‘Tanganyika Clause’ and legal nature of the mandate agreement. Surprisingly, however, there is little mention of the disagreement between South Africa and the League of Nations over the location of sovereignty in the mandates system and there is no reference to R v Christian 1924 AD 101.

The ‘accountability phase’ of the dispute, which covers roughly the period 1946–59, is followed through events before the political and judicial organs of the United Nations. Each advisory opinion is described and analysed, while attention is focused on the major political debates. This section is characterized by a skilful analysis of trends, strategies and voting behaviour within the political organs. The changing pattern of South Africa’s approach is likewise well examined.

The 1960–6 phase is the focal point of the study. While most commentators on the controversial 1966 decision have approached it from the 1962 and 1966 judgments of the International Court and the separate opinions of judges, Slonim looks at it in a broader perspective, with particular reference to the pleadings and the applicants’ change in strategy, which he describes as a shift from a Nuremberg-type accusation to a Brown v Board of Education approach. His critical examination of the evolution of the applicants’ case from allegations of the oppressive nature of apartheid to an assertion that apartheid violates a norm of non-discrimination, generated in the political organs of the United Nations, is the first thorough examination of a vital, but frequently overlooked, aspect of the contentious proceedings. From this he concludes that the 1966 majority was correct in its finding that the applicant States lacked the necessary locus standi to enforce the conduct provisions of the mandate and that the Court did not act improperly in departing from the finding to the contrary in the 1962 judgment. While one may agree with Slonim that ‘a sound appreciation of the pleadings on the merits and of the manner in which the ultimate issues . . . were formulated before the Court affords a new perspective on the relationship between the 1962 and 1966 decisions’ (at 297), he does not satisfactorily answer the main objection to the 1966 decision, namely that the Court acted improperly in reversing its decision of 1962. The Court may have had more factual information at its disposal in 1966 than in 1962, but the fact remains that the Court in 1962 gave no indication, or even hint, that its finding on the third pre-
liminary objection relating to the merits was 'provisional' and would be joined to the merits: instead, the Court of 1962 regarded this as a final decision. Although South Africa's submissions in 1965 may have questioned the standing of the applicants, it is clear that the question of the finality of the 1962 decision on this matter was not fully canvassed by counsel for either party in the 1965 proceedings. Even if the majority were right in 1966 that the 1962 decision was only 'provisional' on the question of standing (which the reviewer does not accept), surely the proper course for the Court to have adopted would have been to request counsel for both sides to make submissions on this matter before handing down a final judgment.

Slonim's account of the 1965 proceedings provides a satisfactory explanation of the 1966 judgment. He is probably correct in asserting that the tactics of applicants' counsel estranged the Court. In retrospect, it is clear that the applicants' counsel seriously erred in attempting to persuade an inherently conservative court that there was a norm of non-discrimination created by the political organs of the United Nations; it is equally clear that they should have adopted a less innovative course even at the risk of prolonging the proceedings. While this may explain the 1966 judgment and account for judicial behaviour, it does not provide an acceptable legal justification for the reversal of the 1962 decision, which remains the main charge against the majority of 1966. While the Court of 1966 may be forgiven for not wishing to pronounce on the issue of apartheid because of the form in which the applicants' case was presented, it is difficult to accept the legal reasoning of the Court for its reversal of the 1962 decision, or to understand its refusal to give an answer to questions which were not related to apartheid, such as the survival of the mandate, and the succession of the United Nations to the League's supervisory powers.

Although the reviewer is not able to share the author's views on the 1966 judgment, it is readily acknowledged that his analysis of the contentious proceedings constitutes one of the most important scholarly contributions to the debate over the decision. Certainly it contains the most careful and critical analysis of the pleadings and arguments in the 1960-6 proceedings yet published. Moreover, it includes a thorough survey of the abundant literature on the subject, which gives the reader a clear picture of the nature of the debate among academic commentators over the 1966 decision.

The final section of the book covers the revocation of the mandate and the 1971 Advisory Opinion. Unlike the contentious proceedings, which are exhaustively examined, the 1971 Advisory Opinion is dealt with rather briefly. Although one may share some of Slonim's misgivings about the reasoning of the majority Opinion of 1971, many of the weaknesses in the Opinion are alleviated by the opinions of concurring judges, such as de Castro and Dillard. Unfortunately, Slonim confines himself to an analysis of the dissenting opinions of Fitzmaurice
and Gros, which tend to present a one-sided picture and lead inevitably to a rejection of the Opinion.

The book concludes with a valuable examination of the part played by the International Court in the South-West Africa dispute. Here the author discusses the differing judicial philosophies that have been apparent on the Court, and the dichotomy between the jurisprudence of the Court in its advisory and contentious proceedings, which has been so clearly exposed by the doyen of commentators on the International Court, Leo Gross.

Slonim's study of the South-West Africa dispute may, in many respects, be likened to Quincy Wright's magisterial *Mandates under the League of Nations* (1930). It is a thorough and highly scholarly work, characterized by extensive research and incisive comments, that displays a grasp of both the law and the politics of the dispute. Many, including the reviewer, will disagree with Slonim's conclusions on the 1966 judgment, but few will disagree with the view that it is the best case that has yet been made out for that decision.

JOHN DUGARD
Professor of Law
University of the Witwatersrand, Johannesburg


Professor Helen Silving's contribution to criminal law and to what may perhaps be termed the 'contiguous zones' of criminal law such as psychology and criminology has been a truly great one. Her *Constituent Elements of Crime, Essays on Criminal Procedure and Essays on Mental Incapacity and Criminal Conduct* are all characterized by a certain pioneering and iconoclastic flavour that an outsider will hardly square with the gentle nature and the gracious looks of a person who has been called the 'grand old [sic!]' lady of American criminal law'. The same holds true also for another work of hers in a different mould, *Sources of Law*.

Professor Silving's latest contribution to criminal law (as well as to a host of contiguous fields that interlock with criminal law) exemplifies once again her commitment to an unorthodox approach, coupled to erudition that encompasses a wide sweep of non-American material, such as German, Italian, Spanish, Swiss, Polish, Israeli, Korean and South American sources and even—in vol II at 550—a reference to a South African case gleaned from a review in this journal of a previous work by her. (The reviewer, incidentally, was recently informed how