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Walvis Bay: South Africa's Claims to Sovereignty

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I. INTRODUCTION

After more than a century of colonial domination, the Mandated Territory of South West Africa/Namibia¹ is close to receiving its independence. South Africa continues to administer the Territory as it has since its military forces conquered and occupied it in 1915 during World War I. In the negotiations between South Africa and the United Nations over Namibian independence, differences have arisen between the parties over whether the Territory includes either (1) the port and settlement of Walvis Bay, an enclave of 1124 square kilometers in the center of Namibia's Atlantic coast, or (2) the Penguin Islands, twelve small guano islands strung along 400 kilometers of the Namibian coast between Walvis Bay and the Orange River, the Orange River being part of the boundary between South Africa and Namibia. South Africa claims both Walvis Bay and the Penguin Islands as parts of its Province of the Cape of Good Hope, and thus under South African sovereignty. The United Nations, speaking for the people of Namibia, claims that Walvis Bay and the Penguin Islands are part of the Mandated Territory and thus must be part of an independent Namibia. A number of articles have been written about the legal status of these disputed areas², and this article will take a

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1. Formerly known as German South West Africa, then the Mandated Territory of South West Africa, and since 1968 it has been called Namibia by virtue of a United Nations General Assembly Resolution which changed the name. G.A. Res. 2372, 22 U.N. GAOR Supp. (No. 16A) at 1, U.N.Doc. A/6176/Add. 1 (1968), 1968 U.N. Y.B. 787; South Africa still calls the Territory by the name of South West Africa. This article will use the name Namibia when speaking currently of the Territory and South West Africa when speaking historically. Maps of Namibia and the Penguin Islands follow this article immediately preceding the Appendices.

2. Note, *The Legal Status of Walvis Bay*, 2 SOUTH AFRICAN YEARBOOK OF INTERNATIONAL LAW 187 (1976)(hereinafter SAYIL); D.S. PRINSLOO, FOREIGN AFFAIRS ASSOCIATION, *Walvis Bay and the Penguin Islands: Background and Status* (1977); Huaraka, *Walvis Bay and International Law*, 18 IND.J.INT'L L. 160 (1978); Botha, *Walvis Bay: miscellany*, 12 COMP. & INT'L L. J. S. AFR. 255 (1979) (hereinafter CILSA); Note, *Namibia, South Africa, and the Walvis Bay Dispute*, 89 YALE L.J. 903 (1980)(hereinafter Note, *Namibia*); E. Landis, *If it Quacks Like a Duck . . . Walvis Bay, Namibia and Estoppel* (June 19, 1981)(unpublished paper provided by the United Nations Council for Namibia); K. Asmal, *Walvis Bay: Self-Determination and International Law*, 37 U.N. GAOR Council for Namibia 29, U.N.

critical look at the positions taken and legal issues presented in these disputes.

It is important to first examine why these disputed areas are important enough to warrant the controversy that has been generated. The explanation is both economic and political. Walvis Bay is the only deep water port on the southwest coast of Africa between Cape Town in South Africa over 1000 kilometers to the south and Lobito in Angola over 1000 kilometers to the north. Walvis Bay's sheltered anchorage is the principal trade route for Namibia's seaborne exports and imports. Its modern port facilities are connected by paved road and railroad with the principal towns, mines, and farming areas of Namibia as well as with South Africa. It is the base of a sizeable fishing fleet and associated fish processing industry and is used as a base by Eastern European fishing fleets.³ There is no other location, including the southern shallow water port of Luderitz, Namibia's only other port, which can serve the vital role for Namibia's economy that is served by Walvis Bay. In other words, the nation that controls Walvis Bay, in effect, controls Namibia.⁴

Walvis Bay has a significance far beyond that of Namibia's port. There is a proposal to connect the railway system of Namibia via Botswana with the railway system serving Botswana, Zimbabwe, and Zaire which is presently served by the ports of Angola (via the Benguela Railway), Tanzania (via the Tazara or TanZam Railway), Mozambique, and South Africa.⁵ The Benguela Railway is presently unreliable because of the Angolan civil war, and the Tanzanian and Mozambique ports cannot handle the existing traffic.⁶ This leaves South Africa with enormous economic power over the black states of southern Africa which are dependent upon the South African railway system and ports for international trade.⁷ The construction of this direct rail link to Walvis Bay in an independent Namibia would be an important step in lessening this dependence by providing a modern port on the Atlantic Ocean closer to North and South American and north European ports than the South African, Tanzanian, and Mozambiquan ports.

As for the Penguin Islands, South African sovereignty over them after Namibian independence would include extensive fishing zones in Namibian waters and the potential for economic development in island

Doc. A/AC.131/SLI/L.2 (1982); R. MOORSOM, INTERNATIONAL DEFENSE AND AID FUND FOR SOUTHERN AFRICA, *Walvis Bay, Namibia's Port*, (1984).

3. MOORSOM, *supra* note 2, at 10-11, 27-30; J. J. J. WILKEN & G. J. FOX, *THE HISTORY OF THE PORT AND SETTLEMENT OF WALVIS BAY* 28-37, 55-65 (1978); DEPARTMENT OF FOREIGN AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA, *SOUTH WEST AFRICA SURVEY 1967*, 82. The author visited a Polish fishing vessel at Walvis Bay in 1978.

4. This situation is well documented in MOORSOM, *supra* note 2, at 58-70.

5. *Id.* at 69.

6. AFRICA SOUTH OF THE SAHARA 1986 209, 232, 679-80, 954 (15th ed. 1985).

7. MOORSOM, *supra* note 2, at 68-70. All of these rail lines are of the same gage and are connected to the South African rail system. Malawi, Swaziland, and Lesotho are also connected to this common gage rail system.

coastal waters by dredging for diamonds.⁸ Further, two of the islands — Penguin and Seal — sit at the entrance of Luderitz Bay thereby having a commanding position over Namibia's only other port.

II. LEGISLATIVE AND CONSTITUTIONAL HISTORY OF WALVIS BAY

Walvis Bay⁹ has a rich history¹⁰ beyond the scope of this article. It is only the legal history that will be examined here. That history began on March 12, 1878, when the officer commanding the H.M.S. *Industry* of the Royal Navy landed at Walvis Bay, hoisted the British flag, and proclaimed the annexation to the British Empire of the "Port or Settlement of Walfisch Bay", the boundary of the annexed territory being described in the Proclamation¹¹.

This annexation was confirmed on December 14, 1878, by Letters Patent from Queen Victoria.¹² These Letters Patent authorized the Governor and Parliament of the British Colony of the Cape of Good Hope to annex Walvis Bay, and that with such annexation Walvis Bay would form part of the Colony of the Cape of Good Hope. At this time Walvis Bay was inhabited by some European merchants as well as some Hottentots

8. G.- M. COCKRAN, *SOUTH WEST AFRICAN MANDATE 2* (1976); Letter from the British Consul in Lüderitz to the Prime Minister of the Colony of the Cape of Good Hope (Feb. 20, 1910). Cape of Good Hope (Cape Colony) Original Correspondence, 1807-1910, Document 8939, CO 48/606, (microfilm pages 162-166) Public Record Office, Kew, Richmond, Surrey, England. MOORSOM, *supra* note 2, at inside back cover, shows the 200 mile fishing zones in the Atlantic Ocean claimed by South Africa westward from the Penguin Islands; *see also* J. PRESCOTT, *THE MARITIME POLITICAL BOUNDARIES OF THE WORLD* 332 (1985). Such exclusive economic zones may be challenged by virtue of the principle set out in the 1982 United Nations Convention on the Law of the Sea, U.N. Doc. A/Conf.62/122 art. 121(3) (1982), which provides that:

Rocks, which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

9. In its history, Walvis Bay had many spellings — Walfish, Walfisch, Walvisch, Walvich, Walwitsch, Walwich, Woolich, Woolwich, Walewich, Walfischbaai, and Whale Bay. WILKEN & FOX, *supra* note 3, at 22-22; PRINSLOO, *supra* note 2.

10. *See* WILKEN & FOX, *supra* note 3.

11. That boundary was described as follows:

... on the south by a line from
a point on the coast 15 miles south
of Pelican Point to Scheppmansdorf;
on the east by a line from
Scheppmansdorf to the Rooibank,
including the Plateau, and thence
to 10 miles inland from the
mouth of the Swakop River; on the
north by the last 10 miles of the
course of the said Swakop River.

69 BRITISH AND FOREIGN STATE PAPERS 1177 (hereinafter cited as 82 B.F.S.P. 35). *See* Appendix "A". Because the "Plateau" was in fact a riverbed, the Germans disagreed with the British interpretation of this description, 82 B.F.S.P. 35, 40; 173 CONSOLIDATED TREATY SERIES 271, 277 (1978)(hereinafter 173 C.T.S. 271).

12. 70 B.F.S.P. 495. *See* Appendix "A".

and Damaras, indigenous tribes.¹³ Following the annexation, a British resident magistrate was appointed.¹⁴ In 1884, the Parliament of the Colony of the Cape of Good Hope enacted legislation authorizing the Governor of the Colony to proclaim that Walvis Bay, as described in the 1878 Letters Patent, is annexed to and forms part of the Colony.¹⁵ On August 7, 1884, the Governor of the Cape of Good Hope duly signed a Proclamation declaring that Walvis Bay and the surrounding territory, as described in the 1878 Proclamation, the 1878 Letters Patent, and the 1884 Cape Statute, had become and was part of the Colony of the Cape of Good Hope.¹⁶ Walvis Bay had become part of the Colony of the Cape of Good Hope.

Germany, in the meantime, moved to build a colonial empire of its own in Africa, and South West Africa became Germany's first colony. In August and September 1884, ahead of efforts by the Colony of the Cape of Good Hope to annex the territory between the Orange River and Walvis Bay, Germany claimed the coast of South West Africa from the Orange River north nearly to the frontier of Portuguese Angola (excepting Walvis Bay).¹⁷ Germany also proceeded to acquire colonies in East and West Africa adjacent to other British colonies. As a result, in 1890, Germany and Great Britain entered into an Agreement whereby the respective spheres of influence in Africa were recognized including British sovereignty over Walvis Bay, and the boundaries between their colonies were fixed. The Germans, however, had been unwilling to accept the southern boundary of Walvis Bay which had been precisely fixed by a British survey in 1886; and, thus, the Agreement provided that the delimitation of the southern boundary would be reserved for arbitration, unless it had been settled by consent within two years.¹⁸ In 1909 the dispute over the southern boundary of Walvis Bay, not having been settled by consent, was referred to the King of Spain for arbitration.¹⁹ In 1911, the arbitrator announced his award confirming the previously fixed British

13. WILKEN & FOX, *supra* note 3, at 6; H. VEDDER, *THE NATIVE TRIBES OF SOUTH WEST AFRICA* 115 (1928). For a history and description of the native tribes and peoples of South West Africa/Namibia, see also H. VEDDER, *SOUTH WEST AFRICA IN EARLY TIMES* (1966); I. GOLDBLATT, *HISTORY OF SOUTH WEST AFRICA FROM THE BEGINNING OF THE NINETEENTH CENTURY* (1971); Counter-Memorial of South Africa, *South West Africa Cases* (Eth. v. S. Afr./Lib. v. S. Afr.), 1966 I.C.J. Pleadings, vol. 2, 311-380.

14. WILKEN & FOX, *supra* note 3, at 12.

15. Walfish Bay and St. John's River Territories Annexation Act 35 of 1884; 75 B.F.S.P. 408. The St. John's River Territory was another territory outside of South West Africa annexed to the Colony of the Cape of Good Hope in the same Act. See Appendix "A".

16. Proclamation 184 of 1884, Colony of the Cape of Good Hope Government Gazette No. 6519, (Aug. 8, 1884); 75 B.F.S.P. 407. See Appendix "A".

17. 75 B.F.S.P. 546-49. The diplomatic correspondence between Germany and Britain regarding the establishment of the German Colony of South West Africa can be found at 75 B.F.S.P. 528-53. See also W. O. AYDELOTTE, *BISMARCK AND BRITISH COLONIAL POLICY, THE PROBLEM OF SOUTH WEST AFRICA* (1974).

18. 82 B.F.S.P. 35, 40; 173 C.T.S. 271, 277. See Appendix "A".

19. 102 B.F.S.P. 91, 3 AM. J. INT'L L. SUPP. 306 (1909).

boundary.²⁰

Meanwhile, in 1910 the British forged the Union of South Africa out of four of its colonies in southern Africa: the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony (the Orange Free State).²¹ In creating the Union, a unitary rather than a federal state, the British Parliament provided that the four colonies would become provinces of the Union with "the same limits as . . . at the establishment of the Union."²² Thus, the Union of South Africa had become a British Dominion, and Walvis Bay was part of that Dominion.

In August 1914, Britain's declaration of war against Germany put the entire British Empire at war, South Africa and the other British Dominions not receiving an independent status in international law until 1919 with their signing of the Treaty of Versailles.²³ On Christmas Day 1914, South African forces landed at Walvis Bay as part of an invasion force against German South West Africa²⁴, and in July 1915, following the South African invasion, the Germans surrendered.²⁵

By Article 119 of the Treaty of Versailles which formally ended World War I, Germany renounced her colonies²⁶, Article 22 of the Covenant of the League of Nations (which was part of the Treaty of Versailles) establishing a system of mandates for them under the League of Nations which also had been created in the Treaty.²⁷ South Africa, with the signing of the Treaty of Versailles, enacted legislation to carry the Mandate for German South West Africa into effect pending formal establishment of the mandate system.²⁸ In 1920, the Council of the League of Nations confirmed the South African Mandate over South West Africa. That Mandate provided in part:

20. Walfish Bay Boundary (Ger. v. U.K.), 11 U.N.R.I.A.A. 263, 104 B.F.S.P. 50 (1911); see I. BROWNLIE, *AFRICAN BOUNDARIES, A LEGAL AND DIPLOMATIC ENCYCLOPEDIA* 1273-88 (1979); Barnard, *Die Walvisbaai Grensbekil (1884-1911)*, 1 TYDSKRIF VIR AARDYKSKUNDE (No.10) 46 (1962).

21. South Africa Act of 1909; 9 Edward VII c. 9, 102 B.F.S.P. 5.

22. South Africa Act of 1909, ¶¶ 4, 6; 102 B.F.S.P. 7. The Cape of Good Hope Parliament was succeeded by the Union Parliament, South Africa Act of 1909, ¶19; 102 B.F.S.P. 8. The Provinces were granted very restricted powers by way of Provincial Councils. South Africa Act of 1909, ¶85; 102 B.F.S.P. 22-23. H. R. HAHLO & E. KAHN, *THE UNION OF SOUTH AFRICA, THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 129 (1960).

23. Schaffer, *Succession to Treaties: South African Practice in the Light of Current Developments in International Law*, 30 INT'L & COMP. L.Q. 593, 612-14 (1981). During the Anglo-German diplomatic exchange over the establishment of the German Colony of South West Africa, the German Embassy in London apologized to the British Foreign Office because German officials had communicated directly with officials of the Colony of the Cape of Good Hope instead of through the British Government in London. 75 B.F.S.P. 550.

24. WILKEN & FOX, *supra* note 3, at 195.

25. GOLDBLATT, *supra* note 13, at 201-04.

26. 112 B.F.S.P. 1, 73.

27. 112 B.F.S.P. 13, 22.

28. Treaty of Peace and South-West Africa Mandate Act 49 of 1919; 113 B.F.S.P. 313; see Verein Für Schutzgebietenanleihen e.V. v. Conradie, N.O., 1937 A.D. 113, 142-45.

Article 1:

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

Article 2:

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.

* * *

Article 7:

The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.²⁹

Now, instead of Walvis Bay being an enclave surrounded by foreign territory, South Africa found itself with Walvis Bay in the center of the coast of its newly acquired Mandated Territory. South Africa viewed the Mandate as only a prelude to eventual annexation of South West Africa.³⁰ In 1922, the South African Parliament enacted legislation which provided that:

From a date to be fixed by the Governor-General by proclamation in the *Gazette* (which date shall also further be notified by the Administrator of the mandated territory in the *Official Gazette* thereof) the port and settlement of Walvis Bay which forms part of the province of the Cape of Good Hope shall be administered as if it were part of the mandated territory and as if inhabitants of the said port and settlement were inhabitants of the mandated territory;³¹

Accordingly, the Governor-General of the Union of South Africa proclaimed October 1, 1922, as the effective date of the transfer of

29. 113 B.F.S.P. 1109. See Appendix "C".

30. J. DUGARD, *THE SOUTH WEST AFRICA/NAMABIA DISPUTE, DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS* 82 (1973). And, in fact, South Africa sought unsuccessfully in 1946 to obtain United Nations permission to annex South West Africa. *Id.* at 96-112.

31. The South-West Africa Affairs Act 24 of 1922, ¶1(1); 116 B.F.S.P. 399. See Appendix "A". This Act provided in ¶1(4) that no act of the Union Parliament would apply to Walvis Bay unless expressly so declared by the act or by proclamation. In 1944, this section of the South-West Africa Affairs Act of 1922, was amended to provide that acts of the Union Parliament in force in the Mandated Territory would also be in force in Walvis Bay unless the act or proclamation otherwise provided. South-West Africa Affairs Amendment Act 28 of 1944, ¶1.

administration.³²

In 1925, the South African Parliament enacted a constitution for South West Africa.³³ That constitution provided in part that:

Notwithstanding anything to the contrary contained in any law —

(a) The port and settlement of Walvis Bay shall be deemed to form part of the territory [of South West Africa] for the purposes of this Act;³⁴

In 1949, South West Africa was granted representation in the Parliament of the Union of South Africa for the first time³⁵, and in granting such representation the following definition was used: "the territory" means the territory of South-West Africa, and includes the port and settlement of Walvis Bay.³⁶ This was the first parliamentary representation for Walvis Bay in either the Union Parliament³⁷ or the Parliament of the Colony of the Cape of Good Hope.³⁸

The Union of South Africa severed its ties to the British Crown and the Commonwealth in 1961 when it became the Republic of South Africa, the boundaries of the respective provinces remaining unchanged.³⁹ In 1968, South West Africa was given a new constitution by the South African Parliament.⁴⁰ This Constitution had the identical provision as the

32. Proclamation 145 of 1922, Union of South Africa Government Gazette No. 1262 (Sept. 15, 1922). See Appendix "A". On October 2, 1922, the Administrator of the Mandated Territory issued his own Proclamation pursuant to the South-West Africa Affairs Act of 1922, which extended the law of South West Africa to Walvis Bay. Walvis Bay Administration Proclamation 30 of 1922, South West Africa Government Gazette No. 94, (Oct. 2, 1922). See Appendix "A".

33. South-West Africa Constitution Act 42 of 1925, ¶43; 121 B.F.S.P. 687.

34. *Id.* at ¶43(a).

35. South-West Africa Affairs Amendment Act 23 of 1949, ¶¶27-33. This Act provided that the territory of South West Africa, defined to include Walvis Bay (1), would have six members in the House of Assembly and four members in the Senate of the Parliament of the Union of South Africa.

36. *Id.* at ¶1.

37. The white adult population of Walvis Bay was taken into consideration for determining the numbers of members to represent the Province of the Cape of Good Hope in the House of Assembly of the Parliament of the Union of South Africa because the original quota of members was based on population figures which included this population. *Report Presented by the Government of the Union of South Africa Concerning the Administration of South West Africa for the Year 1929*, 10 LEAGUE OF NATIONS O.J. 1655, paras. 750-51 (1929). The statement in Note, *Namibia*, *supra* note 2, at 906, that "[t]he residents of Walvis Bay had never been granted South African voting privileges" is incorrect insofar as the white adult population is concerned because that group has had representation in the South African Parliament (through the members from South West Africa) since 1949, South-West Africa Affairs Amendment Act 23 of 1949, ¶¶27-33.

38. The population of Walvis Bay was too insignificant to warrant representation in the Cape Parliament. HOUSE OF ASSEMBLY DEBATES, COLONY OF CAPE OF GOOD HOPE 279-80 (1899).

39. Republic of South Africa Constitution Act No. 32 of 1961, ¶1.

40. South-West Africa Constitution Act 39 of 1968.

1925 Constitution deeming Walvis Bay to be part of South West Africa.⁴¹

In anticipation of Namibia being granted independence, South Africa in 1977 transferred the administration of Walvis Bay from that of South West Africa back to that of the Province of the Cape of Good Hope.⁴² The white electorate of Walvis Bay were transferred to a Province of the Cape of Good Hope electoral district until 1982 when Walvis Bay became a separate parliamentary constituency.⁴³ This is the situation as of today, the South African government maintaining the position that Walvis Bay is an integral part of the Republic of South Africa; and that it will remain so notwithstanding that from 1922 until 1977 Walvis Bay had been integrated into South West Africa to such an extent that it had become by design the port through which the lifeline of Namibia's trade must flow.⁴⁴ As we shall see, the South African position has been rejected by the United Nations which maintains that an independent Namibia must include Walvis Bay.

III. LEGISLATIVE AND CONSTITUTIONAL HISTORY OF THE PENGUIN ISLANDS

The Penguin Islands have a shorter legal history than Walvis Bay. In the mid-nineteenth century, guano was a valuable commercial commodity. The Government of the Colony of the Cape of Good Hope, concerned about the exploitation of guano found on the coastal islands of the Colony, enacted an ordinance in terms of which all guano found in the Colony which was not on private property would be property of the Crown.⁴⁵

North of the Orange River (and, thus, outside of the Cape Colony) lay a number of guano islands along what is now the coast of Namibia. De Pass, Spence and Company of Cape Town, in the business of exploiting

41. *Id.* at ¶36.

42. Walvis Bay Administration Proclamation R.202 of 1977, Republic of South Africa Government Gazette No. 5731 (Aug. 31, 1977). For a summary of other changes in the law resulting from this transfer of administration, see 1977 ANNUAL SURVEY OF SOUTH AFRICAN LAW 42, 1978 ANNUAL SURVEY OF SOUTH AFRICAN LAW 51, 1979 ANNUAL SURVEY OF SOUTH AFRICAN LAW 41, 1980 ANNUAL SURVEY OF SOUTH AFRICAN LAW 41, 1981 ANNUAL SURVEY OF SOUTH AFRICAN LAW 32, and 1982 ANNUAL SURVEY OF SOUTH AFRICAN LAW 24.

43. Walvis Bay Administration Proclamation R.202 of 1977, §5, Annexule, Republic of South Africa Government Gazette No. 5731 (Aug. 31, 1977); Walvis Bay Administration Proclamation 248 of 1977, Annexule sec. 5, Republic of South Africa Government Gazette No. 5752 (Sept. 30, 1977); Constitution Amendment Act 99 of 1982, ¶2; see also 1982 ANNUAL SURVEY OF SOUTH AFRICAN LAW 24.

44. MOORSOM, *supra* note 2, at 14-15.

45. Ordinance for Declaring Certain Guano to be the Property of Her Majesty the Queen 4 of 1845. ¶5 of this Ordinance was repealed by the South African Parliament in 1934, Cape Statute Law Revision Act 25 of 1934, and the remainder of the Ordinance was repealed by the Pre-Union Statute Law Revision Act 78 of 1967. For a brief history of guano exploitation in southern Africa at this time, see J. A. S. PHILLIPS, DEUTSCH-ENGLISCHE KOMÖDIE DER IRRUNGEN UM SÜDWESTAFRIKA 26-29 (1986). The United States of America, in the nineteenth century, enacted legislation, subject to the President's discretion, allowing guano prospectors to claim guano islands for the United States. Guano Islands Act, 48 U.S.C. ¶¶1411-19 (1982).

guano islands, urged the Cape Government to annex these islands to the Cape Colony.⁴⁶ In 1861, the Governor of the Colony of the Cape of Good Hope issued a Proclamation which provided:

. . . whereas it is expedient that, subject to the pleasure of Her Majesty in that behalf, Her dominion shall also be declared over a cluster of small Islands or Rocks adjacent to the said Island of Ichaboe, now therefore, I do hereby proclaim, declare, and make known, that the sovereignty and dominion of Her said Britannic Majesty, Queen Victoria, shall be, and the same are hereby declared over the following Islands or Rocks adjacent to Ichaboe, that is to say, Hollamsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession, Albatross Rock, Pomona, Plumpudding, and Roastbeef or Sinclair's Island. This Proclamation of Her Majesty's sovereignty and dominion to take effect forthwith, but to be subject to Her Majesty's gracious confirmation and disallowance.⁴⁷

The geography recited in this Proclamation was rather inaccurate because Ichaboe Island is not adjacent to the other eleven islands which are spread along 400 kilometers of the coast and hardly can be said to be clustered.⁴⁸ Further, Sinclair Island and Roast Beef Island are shown on modern South African maps as different islands approximately 30 kilometers apart.⁴⁹

For unknown reasons, this Proclamation was not forwarded to London for confirmation by Queen Victoria. In 1863, during the American Civil War, an American warship, the U.S.S. *Vanderbilt*, during pursuit of the Confederate raider, the C.S.S. *Alabama*, seized a British merchant ship at Penguin Island carrying cargo which the *Alabama* had taken from an American merchant ship. Coal which had been likewise taken by the

46. PRINSLOO, *supra* note 2, at 8; 60 B.F.S.P. 1122-23. Law and order was needed on these islands because of often violent competition between guano prospectors. Watson, *The Guano Islands of Southwestern Africa*, 20 GEOGRAPHICAL REV. 631, 638-640 (1930). These islands are small. The largest is Possession Island with a surface area of only 90 hectares. Moorsom, *supra* note 2, at 36.

47. Proclamation 53 of 1861, Colony of the Cape of Good Hope Government Gazette No. 3277 (Aug. 13, 1861); 60 B.F.S.P. 1123. See Appendix "B". Hollamsbird has been spelled Hollam's Bird, Hollams Bird, Hollandbird, Holland's Bird, and today the Island is known as Hollandsbird Island. Mercury Island has been known as Merkur Island. Ichaboe has been spelled Itschabo, Itshabo, and Ichabod. Halifax Island is also known as Guano Island. Albatross Rock has been known as Albatros Rock, Albatross Rocks, Albatross Island, Albatros Island, and Bol Island. Plumpudding has been shown as Plum Pudding, Plum-pudding, and Plumpuding. Sinclair's Island is also known as Sinclair Island. Roastbeef Island is sometimes written as Roast Beef Island. In referring to specific maps, the name as shown will be used in this article.

48. The British Government noted this discrepancy in 1864. 60 B.F.S.P. 1121-22.

49. PRINSLOO, *supra* note 2, after listing the islands as set out in Proclamation 53 of 1861, (at 5), shows Sinclair Island and Roast Beef Island as separate islands, (at 9) without explaining the discrepancy. There is a question as to whether the modern maps correctly identify Roast Beef Island because Sinclair and Roast Beef Islands were identified as one and the same in years past in both literature and maps. See L. GREEN, *ON WINGS OF FIRE* 52-53 (1967); 2 RAND McNALLY & Co.'s INDEXED ATLAS OF THE WORLD 228 (1907).

Alabama and left on Penguin Island was also seized. During the seizure, an American naval officer killed an officer on the British ship, and the British Government made an unsuccessful effort to obtain compensation for the British officer's widow.⁵⁰ Because of this incident, the 1861 Proclamation was brought to the attention of the British Government, and the Proclamation was disallowed.⁵¹

In 1866, the Royal Navy landed on Penguin Island and proclaimed sovereignty over all of the twelve islands named in the 1861 Proclamation except Ichaboe Island, and the Governor of the Colony of the Cape of Good Hope proclaimed all twelve of these islands again annexed to the Colony of the Cape of Good Hope.⁵² This was confirmed in 1873 by an Act of the Parliament of the Colony of the Cape of Good Hope (which made no mention of the other eleven islands clustering adjacent Ichaboe Island).⁵³ However, this Act was passed in ignorance of the Letters Patent issued in 1867 which (1) authorized the Parliament of the Colony of the Cape of Good Hope to annex these twelve islands and (2) appointed the Governor of the Cape Colony as Governor of the "Island of Ichaboe and the Penguin Islands."⁵⁴ As a result of the oversight as to the 1867 Letters Patent, the Parliament of the Colony of the Cape of Good Hope in 1874 repealed the 1873 Act and authorized the Governor to reannex all twelve islands at which time the laws of the Colony of the Cape of Good Hope would be in effect thereon.⁵⁵ Accordingly, the Governor once again proclaimed the islands annexed to the Colony of the Cape of Good Hope.⁵⁶

50. The diplomatic correspondence arising from the incident can be found at 60 B.F.S.P. 1118-30. See also PHILLIPS, *supra* note 45, at 31 *et seq.*

51. Proclamation 27 of 1864, Colony of the Cape of Good Hope Government Gazette No. 3573 (May 10, 1864). See Appendix "B".

52. Proclamation 66 of 1866, Colony of the Cape of Good Hope Government Gazette No. 3814 (July 17, 1866). The twelve islands listed are identical to the listing in the 1861 Proclamation except that "Hollamsbird Island" is now "Hollandsbird Island". See Appendix "B". PRINSLOO, *supra* note 2, at 10, is incorrect in asserting that the Captain of the H.M.S. *Valorous* proclaimed sovereignty over all twelve of the islands in 1866. The 1866 Proclamation did not include Ichaboe Island over which sovereignty had been proclaimed in 1861. See *Preamble to the Ichaboe and Penguin Islands Act 4 of 1874*.

53. Annexation of Ichaboe and Penguin Islands Act 1 of 1873. The twelve islands listed are identical to those of the 1866 Proclamation. See Appendix "B".

54. 67 B.F.S.P. 554.

55. Ichaboe and Penguin Islands Act 4 of 1874; 67 B.F.S.P. 557. The islands were, however, "deemed" to be foreign ports for the purposes of the Colony's customs laws. Ichaboe and Penguin Islands Customs Act 5 of 1874; 67 B.F.S.P. 559. This same provision had been included in the repealed 1873 Act. See Appendix "B". Walvis Bay was only exempted from the Colony's customs law from 1885. Walfish Bay Customs Act 34 of 1885; Proclamation 129 of 1885, Colony of the Cape of Good Hope Government Gazette No. 6636 (Aug. 14, 1885). This exemption was granted in order to encourage the Germans to use its port, but this exemption drew opposition in the Cape Parliament. HOUSE OF ASSEMBLY DEBATES, COLONY OF CAPE OF GOOD HOPE 229 (1890) and HOUSE OF ASSEMBLY DEBATES, COLONY OF CAPE OF GOOD HOPE 219 (1894). This exemption was repealed by Proclamation 363 of 1898, Colony of the Cape of Good Hope Government Gazette No. 8090 (Jan. 3, 1899).

56. Proclamation 45 of 1874, Colony of the Cape of Good Hope Government Gazette No. 4674 (July 10, 1874). See Appendix "B".

The Penguin Islands, as these twelve islands had become known, were finally a part of the Colony of the Cape of Good Hope, but then came the Germans.

The establishment of the Colony (or "Protectorate" as the Germans called their colonies) of German South West Africa in 1884 was the product of diplomatic maneuvering during a time of constant correspondence between not only the British and German Foreign Offices, but also between the British Foreign Office and the British Colonial Office.⁵⁷ A Mr. De Pass of De Pass, Spence and Company, the guano exploiters, was concerned about company rights acquired in the territory which was to become German South West Africa; and in 1883, the Colonial Office responded to a query from the Foreign Office in response to a German query noting DePass's claims as well as the British claim to the Penguin Islands based on the 1867 Letters Patent, which response in turn was communicated to the German Foreign Office.⁵⁸ At the end of 1883, the German ambassador in London replied to the British Foreign Secretary, noting the British claims to Walvis Bay and the Penguin Islands and questioning whether the British Government had sanctioned the annexation of the Penguin Islands.⁵⁹

The British continued to claim sovereignty over the Penguin Islands, but suggested the Establishment of an Anglo-German commission to settle all conflicting claims⁶⁰ which included claims on the mainland of South West Africa. The German Proclamation of August 7, 1884, however, over the first part of South West Africa annexed extended German sovereignty

. . . from the north bank of the Orange River to the 26 degrees south latitude, 20 geographical miles inland, including the islands belonging thereto by the law of nations.⁶¹

The area encompassed in this Proclamation included on its face all of the Penguin Islands except Hollandsbird and Mercury Islands which are north of 26 degrees south latitude. The following month Germany extended its claim north nearly to the border of Portuguese Angola excluding *only* the British territory of Walvis Bay.⁶² Thus, it appeared that the Germans had not accepted the British claim to the Penguin Islands.

The British Foreign Secretary responded to this Proclamation on September 19, 1884, with instructions to the British Embassy in Berlin to call attention to the German Government that the Penguin Islands were a part of the British Colony of the Cape of Good Hope as well as to suggest a mixed commission to settle the claims of British subjects in South West

57. 75 B.F.S.P. 528-53. See also PHILLIPS, *supra* note 45, at 65-66, 90-92.

58. *Id.* at 528-31.

59. *Id.* at 531-34 (British translation from the German).

60. *Id.* at 536-37.

61. *Id.* at 546. See Appendix "B".

62. *Id.*

Africa.⁶³ Four days later, the Foreign Office communicated to the Colonial Office that the Germans had recognized that their Proclamation of annexation did not include the Penguin Islands.⁶⁴

On October 8, 1884, the German Charge d'Affairs in London communicated acceptance of the British proposal for a mixed claims commission and that note stated that:

The duties incumbent on the Mixed Commission will, in the opinion of His Majesty's [German] Government, include the investigation of the question what islands off the coast referred to, shall, as being subject to British sway, be excepted from the German Protectorate. The Undersigned has given expression to the views that His Majesty's [German] Government lays no claim to the several islands which, according to the information then at hand, had been already in the year 1874 incorporated with Cape Colony. More recent information, which has reached the Government of the Undersigned, however, leaves it doubtful whether the premises on which the statement made reposed were correct, and whether the facts, title of acquisition on which the

63. *Id.* at 547.

64. *Id.* at 549. The Germans referred to ten islands as being excluded. Ten of the Penguin Islands are south of 26° south latitude, only Hollandsbird and Mercury Islands lie north of that latitude. Nine days later, on October 2, 1884, the British Foreign Secretary sent the following instructions to the British Embassy in Berlin:

In my despatch of the 19th ultimo, referring to my earlier despatch of the 13th ultimo, on the subject of Baron Plessen's announcement in regard to the establishment of the German Protectorate over the south-west coast of Africa from the 26th degree of south latitude northwards to Cape Frio, with the exception of Walfish Bay and the other British Possessions, you were instructed to make a communication to the German Government to the effect that the islands on the coast form part of Cape Colony, and are consequently British territory.

I now enclose a copy of a despatch from the Governor of the Cape to the Secretary of State for the Colonies, accompanied by a Minute of Ministers to the Governor, referring to the Proclamation by the Captain of the German ship *Elisabeth* of the assumption, by Germany, of the Protectorate of the coast from the Orange River to the 26th degree of south latitude, including the islands on that portion of the coast.

The representation which in my despatch of the 18th ultimo, above referred to, you were instructed to make to the German Government, with special reference to their Protectorate north of the 26th degree of south latitude in regard to the claim of Her Majesty's Government to the islands on the coast, will apply equally to the case of the islands between the 26th degree and the Orange River, and of which the principal are Ichaboe, Long Island, Seal Island, Penguin Island, Halifax, Possession Island, Albatross Rock, Pomona, Plum Pudding, and Roast Beef (or Sinclair Island). These islands have, as you will see by the accompanying correspondence, been acquired by the Cape Colony under the authority of Her Majesty's Letters Patent of the 27th February, 1867, and the Act of the Cape Parliament No. 4 of 1874, and are no doubt identical with the 10 islands referred to by Baron Plessen in his verbal communication recorded in the letter to the Colonial Office of which a copy is hereto annexed.

I have accordingly to request that you will make a communication to the German Government in the sense of the foregoing remarks, and you will at the same time say that a further communication will be made to them with reference to Baron Plessen's verbal statement of the 20th ultimo in regard to Shark Island, and probably some islets and other territory in the same vicinity.

Id. at 550-51.

British claims were founded, are to be deemed legally valid. The Mixed Commission will, according to the view of His Majesty's [German] Government, have to examine and report upon these points.⁶⁵

A joint Anglo-German claims commission was appointed with notice being given in both London⁶⁶ and Cape Town⁶⁷ of the Commission's meetings. Meanwhile, the British Foreign Secretary continued to correspond with the German Foreign Office via the German Embassy in London and noted that the commission would have to decide the validity of a lease given by the Governor of the Colony of the Cape of Good Hope to De Pass, Spence and Company to exploit guano deposits on a number of unnamed rocks and islets off the coast of South West Africa.⁶⁸ The joint Anglo-German claims commission was unable to reach agreement, but the British and German Governments agreed to have a new joint claims commission in Berlin try again to reach a settlement.⁶⁹ On July 15, 1886, the new joint claims commission reached agreement and signed a five paragraph Protocol disposing of claims arising out of activity by British subjects in what had become German South West Africa.⁷⁰ Only the fourth paragraph of the Protocol which dealt with the "unnamed rocks and islets" is of interest here. That paragraph provided:

That Messrs. De Pass, Spence and Co., and their assigns, be free to make use, as they have hitherto done, of these islets and rocks, including Shark Island, without payment until the expiry of their lease, that is to say, until the 30th June, 1895; and if the British Government waive all claim to the sovereignty of these islands and rocks, and acknowledge the sovereignty of Germany over them, then that the latter Power should consent to confer no private rights over them to any persons other than the lessees for the time being of the 12 British islands named in the Letters Patent of the 27th February, 1867.

Upon this understanding the British Commissioner will recommend his Government to acknowledge forthwith the sovereignty of Germany in these islets and rocks.⁷¹

By November 13, 1886, the British and German Governments had exchanged notes accepting this Protocol.⁷²

This Protocol is significant because of the reference in the fourth

65. *Id.* at 552 (British translation from the German).

66. 76 B.F.S.P. 1009. This notice stated that the Commission would not concern itself with claims arising at "... the British territory of Walfish Bay and the Penguin and Ichaboe Islands (forming part of the Cape Colony)," *Id.*

67. 77 B.F.S.P. 8-9. This notice did not have the limitation contained in the notice issued in London. 76 B.F.S.P. 1009 and PHILLIPS, *supra* note 45, at 105 *et seq.*

68. 77 B.F.S.P. 1283-84.

69. 77 B.F.S.P. 1287-88.

70. 77 B.F.S.P. 1042-44, 168 C.T.S. 129-32. See Appendix "B".

71. 77 B.F.S.P. 1043, 168 C.T.S. 131. See Appendix "B". On the same day, the British Commissioner forwarded the Protocol to London recommending that the British Government approve the settlement. 77 B.F.S.P. 1289.

72. 77 B.F.S.P. 1044-45, 168 C.T.S. 132-33. See Appendix "B".

paragraph to "the twelve British islands named in the Letters Patent of the 27th February, 1867." Although indirect, this is clear recognition by Germany of British sovereignty over the Penguin Islands. A review of the unpublished German Memorandum prepared for the negotiations which resulted in this Protocol as well as the unpublished British Memorandum in response and the unpublished British Report to the Protocol makes this quite clear.⁷³ It is surprising, however, that the 1890 Agreement between Germany and Great Britain⁷⁴, by which the respective spheres of influence in Africa and the joint colonial boundaries were fixed with precision, contains no mention of the Penguin Islands. Territory north of the Orange River was reserved to the German sphere of influence with only Walvis Bay in that area being identified as British territory. As the Penguin Islands lie north of the Orange River, from the face of the 1890 Agreement, one would conclude that the Penguin Islands were German. Notwithstanding this clear implication that the Penguin Islands were German territory, in fact, both the British and the Germans continued to regard them as British.⁷⁵

The Penguin Islands faded from public view until 1962 when the South African Government published a map of southern Africa showing South Africa's claims to the Penguin Islands⁷⁶, a map which was corrected and republished in 1965.⁷⁷ In 1980, South Africa took the position with the United Nations that, since their annexation, the Penguin Islands had been part of the Cape of Good Hope; and upon the granting of independence to Namibia, South Africa will retain them along with Walvis Bay.⁷⁸

73. The German Memorandum only challenged British claims to the islands off the coast of South West Africa other than the Penguin Islands. The British Memorandum argued that these other islets and rocks were British by virtue of the British annexation of the Penguin Islands to which they are "adjacent". The British Commissioners' Report spoke of the twelve Penguin Islands as being "unquestionably British". The original of the Protocol, the German and British Memoranda, and the British Commissioners' Report can be found in the Embassy and Consular Archives Germany (Prussia) Correspondence, 1784-1913, FO 244/415, Public Record Office, Kew, Richmond, Surrey, England. In 1897, the German Colonial Company of South West Africa leased these unnamed islets and rocks to the Government of the Colony of the Cape of Good Hope for a period of ten years. 103 B.F.S.P. 983. The Germans were very insecure about their claim to these islets and rocks and wanted this lease in part to obtain British recognition of German sovereignty over them. 1 SANDER, GESCHICHTE DER DEUTSCHEN KOLONIAL-GESELLSCHAFT FÜR SÜDWEST-AFRIKA VON IHRER GRÜNDUNG BIS ZUM JAHRE 1910 117-18 (1912).

74. 82 B.F.S.P. 35, 40; 173 C.T.S. 271, 277. See also Appendix "A".

75. See *infra* pp. 273-278; Letter from British Consul, *supra* note 8.

76. *Infra* note 162.

77. *Infra* note 163.

78. Letter from South African Permanent Representative to United Nations Secretary-General (May 29, 1980), U.N. SC Doc. S/13968, Annexure ¶¶1-3. This letter also erroneously bases South Africa's claim to the Penguin Islands on the 1866 Proclamation. Likewise, M. Shaw, *Title to Territory in Africa*, INT'L LEGAL ISSUES 137 (1986), erroneously states that the Penguin Islands were annexed by the Colony of the Cape of Good Hope in 1866.

IV. LEGAL FACTORS TO BE APPLIED IN DETERMINING SOVEREIGNTY

A. *Introduction*

In the previous sections, the legal and constitutional history of Walvis Bay and the Penguin Islands was presented. So far, this article has ignored the political, economic, and other non-legal factors involved in the disputes in question. This has been done solely to give a legal perspective to the issues. South Africa's domestic policies, which were also imposed on South West Africa⁷⁹, arouse very strong emotional responses which clutter an objective legal analysis and tend to cause observers to first take their position and then justify it. That many people outside of South Africa find the South African determination to retain Walvis Bay and the Penguin Islands to be politically unwise and bound to leave a legacy of ill-feeling between South Africa and an independent Namibia is not a basis for deciding for or against South Africa as to the legal issues here. If the rule of law is to have meaning in the international sphere, analysis must be objective and South Africa's domestic policies must be ignored except to the extent (and no further) that these policies violate relevant international law. In this section, these other factors will be examined to the extent they impact on the legal issues presented.

B. *The Acquisition of Walvis Bay and the Penguin Islands*

The manner of acquisition of Walvis Bay has been the subject of dispute, the South African view being that Walvis Bay was *terra nullius* in 1878; that is, it belonged to no state.⁸⁰ Others have taken the position that Walvis Bay was not a *terra nullius*.⁸¹ What is the significance of whether Walvis Bay (or the Penguin Islands) was *terra nullius* at the time of annexation?

Traditionally, it has been said that there are five modes of acquiring territory in international law — accretion, cession, conquest, occupation, and prescription.⁸² This nice compartmentalization appears to lend itself to easy application. One looks to the requirements of each mode and unless the acquisition in question fits one of the modes, there has been no valid acquisition. Accretion, cession, and conquest have no application here. The first is obviously inapplicable; it is undisputed that no one ceded Walvis Bay to the British; and there certainly was no resistance by anyone to British occupation which resulted in a conquest. As for occupation, that mode has the requirement that the territory be a *terra nullius*.⁸³ Thus, if a land was inhabited, as the Walvis Bay area was by the

79. DUGARD, *supra* note 30, at 431-33.

80. PRINSLOO, *supra* note 2, at 20; SAYIL, *supra* note 2, at 189.

81. Huaraka, *supra* note 2, at 164; Note, *Namibia*, *supra* note 2, at 912.

82. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 134 (2nd ed.1973); 1 D. P. O'CONNELL, *INTERNATIONAL LAW* 465 (1965).

83. 1 J. B. MOORE, *A DIGEST OF INTERNATIONAL LAW* 300 (1906); 1 O'CONNELL, *supra* note 82, at 468-70. M. F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRI-*

Topnaar Namas, an indigenous African tribal group, it could not have been a *terra nullius*.⁸⁴

This "analysis", however, is not only arbitrary, but it is based on a selective application of international law as espoused by the writers. By the late nineteenth century, many writers had construed the term *terra nullius* to include lands inhabited by natives which were not considered as states by European standards.⁸⁵ Also, in determining whether land was *terra nullius*, it was necessary to find the "critical date" at which the determination is to be made.⁸⁶ As will be seen, "critical date" is irrelevant to the issues here.

Modern writers reject this arbitrary classification of modes of acquisition because (1) it is often little more than a poor substitute for analysis, and (2) when tribunals decide cases these classifications are ignored because the facts of any given case rarely permit such organization.⁸⁷ In particular, occupation and prescription are often indistinguishable or interwoven; and, in reality, the *right* to sovereignty is often established by nothing more than the *fact* of sovereignty.⁸⁸ This is the situation in the case of Walvis Bay where it is undisputed that there has been an unopposed, effective, and unbroken administration since 1878 by the British Empire and then its successor, South Africa.⁸⁹ The question really is whether the mode of acquisition is important, or is the fact of an effective occupation and administration the key?

Possession and administration are the two essential facts that consti-

TORY IN INTERNATIONAL LAW 43-44 (1926).

84. This is the argument of Huaraka, *supra* note 2, at 164. He ignores prescription as a mode of acquisition, *see infra* note 92, and thus concludes that South Africa never acquired sovereignty over Walvis Bay. That the Walvis Bay area was so inhabited, *see supra* note 13, and MOORSAM, *supra* note 2, at 17. For a description of the Nama people and their social organization, *see* Counter-Memorial of South Africa, South West Africa Cases (Eth. v. S.A./ Lib. v. S.A.), 1966 I.C.J. Pleadings Vol. II, 336-40.

85. 1 L. OPPENHEIM, INTERNATIONAL LAW 555 (Lauterpacht 8th ed. 1955); 1 O'CONNELL, *supra* note 82, at 470; M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 143 (5th ed. 1984); Cooper v. Stuart, (1889) 14 A.C. 286, 291 (P.C.) (treating Australia, by implication, as having been *terra nullius*). Contrast Cooper v. Stuart with *In re* Southern Rhodesia, [1919] A.C. 211, 215-16 (P.C.) (natives of Southern Rhodesia, now Zimbabwe, not destitute of any recognizable form of sovereignty). Shaw, *supra* note 78, at 31-38, has a good discussion of the various positions taken on this issue.

86. BROWNLIE, *supra* note 82, at 133-34; Clipperton Island (Mex. v. Fr.), 2 U.N.R.I.A.A. 1105 (1931) (decision in French), 26 Am. J. INT'L L. 390 (1932) (english trans.). Note, *Namibia*, *supra* note 2, at 913. The Note even rejected 1878 as a possible "critical date", choosing instead 1884, but then 1884 was rejected in favor of 1810.

87. BROWNLIE, *supra* note 82, at 134-35; 1 O'CONNELL, *supra* note 82, at 465.

88. O'CONNELL, *supra* note 82, at 465-68.

89. MOORSOM, *supra* note 2, at 13-15; Huaraka, *supra* note 2, at 170; Asmal, *supra* note 2, at 29. The Germans, however, did play havoc with Walvis Bay in late 1914 after the outbreak of World War I. WILKEN & FOX, *supra* note 3, at 171-96. That there has been an effective occupation of Walvis Bay was expressly recognized in the 1911 boundary arbitration. Walvis Bay Boundary (Ger. v. U.K.), 11 U.N.R.I.A.A. 263, 307-08, 104 B.F.S.P. 50, 101-02 (1911).

tute an effective occupation of a territory, the formal mode of acquisition sometimes being uncertain.⁹⁰ It has been argued that the failure to obtain an agreement of cession from the natives at Walvis Bay is fatal to South African claims of sovereignty,⁹¹ a view that exhorts form over substance. As one writer has pointed out, such an agreement is usually neither understood nor appreciated by the natives, and even if understood, it has moral value only.⁹² In the final analysis, sovereignty is determined by evidence of the display of state activity.⁹³ This was formally recognized by the European powers in the 1885 Act of Berlin by which the European powers set the rules for the completion of the colonial occupation of Africa.⁹⁴ The South African argument that sovereignty over Walvis Bay is theirs by virtue of effective occupation appears to be unassailable.⁹⁵

The fifth mode of acquisition requires some elaboration. Prescription is the acquisition of the territory of another whereas occupation is the acquisition of *terra nullius*.⁹⁶ For one writer, the basis of prescription in international law is recognition of a fact by the family of nations.⁹⁷ An-

90. 1 OPPENHEIM, *supra* note 85, at 557-58; BROWNLIE, *supra* note 82, at 141-42; 1 O'CONNELL, *supra* note 82, at 471-80. This question is important, as O'Connell notes, because the international law which applies to the creation of rights (i.e., occupation as a mode of acquisition) is the law at the time the rights are created while the international law to be applied to the existence of rights (i.e., effective occupation) is the law applicable during the existence of those rights. *Island of Palmas (Neth. v. U.S.)*, 2 U.N.R.I.A.A. 829, 845-46, 22 AM. J. INT'L L. 867, 883-84 (1928); BROWNLIE, *supra* note 82, at 131-33.

91. Huaraka, *supra* note 2, at 164-65.

92. 1 OPPENHEIM, *supra* note 85, at 558; *but see* Shaw, *supra* note 78, at 37, where it is noted that such agreements negate the possibility of a territory being *terra nullius*. The absence of such an agreement, however, does not foreclose the acquisition of inhabited territory by other modes of acquisition such as prescription. *Id.* at 38; LINDLEY, *supra* note 83, at 45.

93. *Walvis Bay Boundary (Ger. v. U.K.)*, 11 U.N.R.I.A.A. 263, 307-08, 104 B.F.S.P. 50, 101-02 (1911); *Island of Palmas (Neth. v. U.S.)*, 2 U.N.R.I.A.A. 829, 838-40 22 AM. J. INT'L L. 867, 874-77 (1928); *Honduras Borders (Guat. v. Hon.)*, 2 U.N.R.I.A.A. 1307, 1327-29 (1933); *Minquiers and Ecrehos (Fr. v. U.K.)*, 1953 I.C.J. 47, 20 I.L.R. 94; *Rann of Kutch (Ind. v. Pak.)*, 17 U.N.R.I.A.A. 1, 481-82, 50 I.L.R. 2, 446-54 (1968); Munkman, *Adjudication and Adjustment - International Judicial Decision and the Settlement of Territorial and Boundary Disputes*, 46 BRIT. Y.B. INT'L L. 1, 99-100, 103, 106 (1972-73); Murty, *Evidence of Traditional Boundaries and Some Problems in its Interpretation*, 8 IND. J. INT'L L. 479, 486-89 (1968). Shaw, *supra* note 78, at 17-24.

94. 3 AM. J. INT'L L. SUPP. 7 (1909); 1 O'CONNELL, *supra* note 82, at 479-80; *see* S. CROWE, *THE BERLIN WEST AFRICAN CONFERENCE 1884-1885* (1942).

95. PRINSLOO, *supra* note 2, at 20; SAYIL, *supra* note 2, at 189; CILSA, *supra* note 2, at 271 n.89; the assertion by Huaraka, *supra* note 2, at 170, that effective occupation is a political consideration not based on international law existing at the time of acquisition makes no sense. The determination as to Walvis Bay is made as of today, not as of a past date. He appears to have confused "occupation" as a mode of acquisition with the concept of "effective occupation" in which the mode of acquisition is sometimes uncertain. *See supra* note 90.

96. AKEHURST, *supra* note 85, at 144. For a discussion of the role of prescription in international law, *see* Y. Z. BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* 6-37 (1965).

97. 1 OPPENHEIM, *supra* note 85, at 576; *see* 1 O'CONNELL, *supra* note 82, at 489-91; Munkman, *supra* note 93, at 95, 105. It has been said that every act of recognition creates

other writer rejects prescription as a mode of acquisition by finding that, for our purposes, its role can be assumed by acquiescence and estoppel, the former, along with recognition, supplementing effective occupation.⁹⁸ In reality, this is just another way of applying the concept of an effective occupation, i.e., who is in fact sovereign has sovereignty.

This brings us to an important point overlooked by the opponents of South Africa's claim to sovereignty over Walvis Bay. Modes of acquisition are irrelevant where the original acquisition is not challenged.⁹⁹ In viewing the dispute over Walvis Bay and the Penguin Islands, there seems to be little realization that the issue is not whether and how the British (and thus South Africa) acquired sovereignty; but whether, upon Namibia being granted independence, will Walvis Bay and the Penguin Islands be part of Namibia or South Africa. The issue is in essence prospective only, the past providing relevant evidence in determining this question, but not being determinative in and of itself without regard to the prospective issue. And the issue arises as to Walvis Bay solely because of South Africa's *de facto* integration of Walvis Bay into South West Africa in 1922.

The issue is, in fact, reduced to determining whether Walvis Bay and the Penguin Islands were part of the Mandated Territory of South West Africa at the time the Mandate was established in 1920. The Mandate, as noted previously, was defined as comprising the territory which constituted German South West Africa. The record seems clear as to both Walvis Bay and the Penguin Islands that Germany had recognized them as British territory and thus they were part of South Africa in 1920.

The next question is whether anything has occurred since the establishment of the Mandate which would have resulted in the Mandate being increased in size by the addition of Walvis Bay or the Penguin Islands. As for the Penguin Islands, there is no difficulty because the South Africans did virtually nothing which could be construed as a renunciation of sovereignty. It is as to Walvis Bay that the problem arises because of South Africa's *de facto* integration of Walvis Bay into South West Africa so totally that Namibia has become and will remain overwhelmingly dependent upon the port for its economic survival. Here, the political and economic issues must be noted, but it is the legal issues that concern us. It is appropriate to start with an examination of the status of Walvis Bay

an estoppel. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 468, 473 (1958). See Schwarzenberger, *Title to Territory: Response to a Challenge*, 51 AM. J. INT'L L. 308, 316-18 (1957).

98. BROWNLIE, *supra* note 82, at 159, 164-65. Acquiescence, recognition, and estoppel and their interrelationship in international law are discussed at length in BLUM, *supra* note 96, at 38-98. See also Rann of Kutch (Ind. v. Pak.), 17 U.N.R.I.A.A. 1, 449-54, 498, 549, 50 I.L.R. 2, 409-15, 466, 494-95 (1968); Honduras Borders (Guat. v. Hon.), 2 U.N.R.I.A.A. 1307, 1327-29 (1933). Acquiescence may give rise to an estoppel. MacGibbon, *supra* note 97, at 501; Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BRIT. Y.B. INT'L L. 176 (1957).

99. AKEHURST, *supra* note 85, at 142; Western Sahara, (Advisory Opinion,) 1975 I.C.J. 12, 123, 59 I.L.R. 30, 140 (Sep. Op. J. Dillard).

in South African municipal law.

C. *Walvis Bay in South African Municipal Law*

It has been argued that Walvis Bay was never formally incorporated into the Colony of the Cape of Good Hope.¹⁰⁰ The basis of this argument is not clear, but this assertion is certainly incorrect. There is no suggestion that the incorporation was not properly promulgated; and it is undisputed that Walvis Bay was administered as part of the Colony or Province of the Cape of Good Hope from 1884 until 1922. It has been further argued that Walvis Bay was never accorded the treatment or status as an integral part of the Colony of the Cape of Good Hope or the Union of South Africa, the inhabitants of Walvis Bay, for example, never having the vote.¹⁰¹ This argument does not withstand examination and is factually incorrect.

The Colony of the Cape of Good Hope expanded gradually in pieces with periodic annexations steadily increasing its size. With these annexations, the franchise was sometimes extended to white adults at the time of annexation¹⁰² and sometimes not.¹⁰³ In this regard, Walvis Bay was treated no differently than some other territories annexed to the Cape. Further, the laws of the Colony of the Cape of Good Hope were not made uniformly applicable throughout the Colony. Some laws were excluded from parts of the Colony with provision for extension to those excluded parts at a later date.¹⁰⁴ And in 1949, Walvis Bay finally gained representation in the Union Parliament.¹⁰⁵

That Walvis Bay was part of the Cape of Good Hope, at least prior to

100. Note, *Namibia*, *supra* note 2, at 904 n.5.

101. *Id.* at 917.

102. The British Kaffraria Incorporation and Parliamentary Representation Amendment Act 3 of 1865; Griqualand West Annexation Act 39 of 1877; British Bechuanaland Annexation Act 41 of 1895.

103. Xesibe Country Annexation Act 37 of 1886; Transkeian Annexation Act 38 of 1877; Pondoland Annexation Act 5 of 1894. For an act extending the franchise to previously annexed territory, see Transkeian Territories Representation Act 30 of 1887.

104. *E.g.*, Act 12 of 1890 To Provide for the Registration of Brands, and to facilitate the identification and recovery of Lost or Stolen Horses, Cattle and Ostriches; and Act 28 of 1886 to More effectually Prevent the Spread of Scab Disease in Sheep and Goats, Act 25 of 1889 to Extend the provisions of the "Scab Acts" to Field-Cornetcies adjoining areas or districts wherein the said Acts are in force, and Act 7 of 1890 to Amend the "Scab Acts Extension Act, 1889." Even when a law was brought into effect throughout the Colony on the same date, sometimes separate proclamations were made for some parts of the Cape. *E.g.*, Proclamations 222 and 223 of 1903, Colony of the Cape of Good Hope Government Gazette No. 8568 (Aug. 7, 1903). The first Proclamation extended a new customs law to Walvis Bay and five other parts of the Cape; the second Proclamation set the same date as the first for the same law to go into effect generally in the Colony. 96 B.F.S.P. 1225. Some parts of the Colony of the Cape of Good Hope had their laws made by the Governor pursuant to a grant of power by statute, *e.g.*, the Transkeian Territories, Tembuland and Pondoland Laws Act 29 of 1897.

105. South-West Africa Affairs Amendment Act 23 of 1949, §§ 27-33.

1922 according to South African municipal law, can be seen in the criminal case of *Rex v. Mahoney*¹⁰⁶ in which the defendant was convicted in an inferior court in Walvis Bay of an offense under a South West Africa law, which by a 1921 proclamation provided that the laws enacted for South West Africa would have effect in Walvis Bay. The case was sent for review to the High Court of South West Africa which refused to review it on the ground that Walvis Bay was not part of the Mandated Territory. The case was then sent to the Cape Provincial Division of the Supreme Court of South Africa, the jurisdiction of which was limited to the Province of the Cape of Good Hope.¹⁰⁷ The Cape Provincial Division reviewed the case and reversed the conviction because of an improper promulgation of the law in question in Walvis Bay which was "Union territory" and not part of the Mandated Territory of South West Africa.¹⁰⁸

With the transfer of the administration of Walvis Bay to that of South West Africa in 1922, the port and settlement was "deemed" to be part of South West Africa, and it became *de facto* part of South West Africa. The leading case concerning the status of Walvis Bay after 1922, a criminal prosecution from Walvis Bay involving the evasion of customs duties, is *Rex v. Offen*¹⁰⁹ in which the Appellate Division of the Supreme Court of South Africa, South Africa's highest court, was called upon to construe the 1922 Act transferring the administration of Walvis Bay. The Chief Justice of South Africa in that case said:

. . . If we examine the words of sec. 1 of the Act of 1922 we do not find that Walvis Bay is made a part of the mandated territory. The section says: "(1) . . . the port and settlement of Walvis Bay, which forms part of the Province of the Cape of Good Hope, shall be administered as if it were part of the mandated territory and as if the inhabitants of the said port and settlement were inhabitants of the mandated territory."¹¹⁰

This construction is consistent with the use of the word "deemed" generally in South African law where it has been recognized that the word can mean ". . . that the persons or things to which it relates are to be considered to be what really they are not, . . ." ¹¹¹

The final case is *Regina v. Akkermann*¹¹² in which the defendant was convicted of entering the territory of South West Africa without a required permit, the accused having entered Walvis Bay. The High Court of South West Africa, in construing the 1922 Act and the Proclamation thereunder, held that:

106. 1921 C.P.D. 557.

107. South Africa Act of 1909, ¶98; 102 B.S.F.P. 25.

108. 1921 C.P.D. 557, 562.

109. 1935 A.D. 4, *aff'g* 1934 S.W.A. 73.

110. 1935 A.D. 4, 6.

111. Chotabhai v. Union Government, 1911 A.D. 13, 33, citing *Rex v. Norfolk County Council* (1891), 65 L.T.R.(n.s.) 222, 224, 60 L.J.Q.B. 379, 380-81 (Cave, J.).

112. 1954 (1) S.A. 195 (S.W.A.) at 196.

. . . this legislation, passed by virtue of Act 24 of 1922 (Union), was intended to state and did in fact state that for all practical, legal, statutory, legislative and procedural purposes whether civil or criminal, the port and settlement of Walvis Bay shall, as from a certain date, be regarded, unless specifically excluded, as if it were an integral part of the Territory of South West Africa. . . . Put differently, for the purposes of criminal law, this legislation in my opinion proclaimed that after a certain date any act or omission which would, if committed within the Territory constitute a crime, would, under the same law, likewise constitute a crime, if committed or omitted within the port and settlement of Walvis Bay. When this interpretation is applied to [the law allegedly violated], the word "Territory" must be interpreted to include the port and settlement of Walvis Bay.¹¹³

These court decisions were made years before sovereignty over Walvis Bay became an international issue so that there can be no suggestion that they were influenced by political or other nonlegal factors. The gist of these decisions interpreting the statutes and proclamations in question is that Walvis Bay, while part of the Province of the Cape of Good Hope and thus under the sovereignty of South Africa, was for all purposes other than sovereignty part of the Mandated Territory of South West Africa.

A close analogy in international law is found in Article III of the 1903 Panama Canal Treaty whereby Panama, in ceding the Canal Zone to the United States of America in perpetuity, granted to the United States ". . . the rights, power and authority . . . which the United States would possess and exercise if it were the sovereign of the territory [the Canal Zone] . . ."¹¹⁴ There was never any doubt that Panama had retained sovereignty during the 75 years that the United States of America administered the Canal Zone.¹¹⁵ The use of "if" in both of these cases was intended to describe a situation *de facto* which was not intended to change the situation *de jure*.¹¹⁶

D. *Walvis Bay in International Law Since 1922*

Until 1977, when South Africa transferred the administration of

113. *Id.* at 196 (Claassen, J.). By virtue of Walvis Bay Administration Proclamation 30 of 1922, 13, South West Africa Government Gazette No. 94 (Oct. 2, 1922), judicial review of inferior court cases was transferred from the Cape Provincial Division of the Supreme Court of South Africa to the High Court of South West Africa.

114. 96 B.F.S.P. 553, 554-55; 194 C.T.S. 263, 264.

115. 1 OPPENHEIM, *supra* note 85, at 458-59; BROWNLIE, *supra* note 82, at 116-17; see *Canal Zone v. Coulson*, 1 C.Z. 50, 55 (1907), although careless language can be found in cases to the effect that the United States of America acquired sovereignty (rather than just the powers of the sovereign) over the Canal Zone. *General Petroleum Corp. v. S.S. "David"*, 3 C.Z. 601, 604 (1925); *Dixon v. Goethals*, 3 C.Z. 23, 24, *appeal dismissed per curiam*, 221 F. 1021 (5th Cir. 1915), *aff'd per curiam*, 242 U.S. 616 (1916); *Wilson v. Shaw*, 204 U.S. 24, 32-33 (1907) (by implication).

116. J. GAYNER, COUNCIL ON AMERICAN AFFAIRS, *Namibia: The Road to Self-Government*, 35-36 (1979).

Walvis Bay back to that of the Province of the Cape of Good Hope, there was no issue concerning South African sovereignty over Walvis Bay. During the Third Session of the Permanent Mandates Commission of the League of Nations in 1923, a member of the Commission observed that Walvis Bay, although not part of the Mandated Territory, was included in the coverage of South Africa's Annual Report to the League, and a South African representative replied that Walvis Bay had been attached to the Mandated Territory for administrative reasons.¹¹⁷ In its Report to the Council of the League of Nations following the Third Session, "[t]he Commission . . . noted that the territory of Walvis Bay had been treated as if it formed part of the Mandated Territory, whereas it was not, in fact, included in that territory."¹¹⁸

Five years later, during the Fourteenth Session of the Permanent Mandates Commission, there was an extensive discussion of the administration of Walvis Bay as part of the Mandated Territory when, in fact, as one member of the Commission noted, Walvis Bay was not part of that Territory.¹¹⁹ The South African representative reiterated that Walvis Bay ". . . was merely included in the territory of South-West Africa for administrative purposes." Another member questioned what right the voters of Walvis Bay had to vote as part of the Mandated Territory when it was part of the Union, a concern shared by a third member of the Commission. The importance of the port to South West Africa was discussed, the South African representatives confirming that the port of Swakopmund just north of Walvis Bay had fallen into disuse and Walvis Bay had been developed as the principal port of South West Africa. The South African representative stated that Walvis Bay was essential to the economic development of South West Africa, and he expressed concern that if the inhabitants of Walvis Bay did not have a voice in the affairs of South West Africa, they might seek to transfer the administration of Walvis Bay back to that of the Union which would result in South West Africa losing control of its most important port.

In 1929, during the Fifteenth Session of the Permanent Mandates Commission, the Commission, after one member questioned the South

117. Permanent Mandates Commission Minutes 6A, 103 (3rd Sess., 1923). Presumably, this observation was the result of the following paragraph in the *Report of the Administrator of South West Africa for the Year 1922 to the UNION PARLIAMENT*, (at 3), (which Reports until 1922 or 1923 were also submitted to the Council of the League of Nations as South Africa's annual Report on South West Africa):

By Proclamation No. 30 the laws of the territory of South West Africa as existing on the 2nd October, 1922, were proclaimed in force at Walvis Bay which was declared to be a portion of the district of Swakopmund, all laws hereafter enacted in the mandated territory to operate at Walvis Bay unless expressly excluded.

(The Permanent Mandates Commission Minutes were published in both English and French with the pagination corresponding in both editions.)

118. 4 LEAGUE OF NATIONS O.J. at 1394 (1923).

119. Permanent Mandate Commission Minutes 6A, 68-71 (14th Sess., 1928). The Commission's Report to the Council of the League of Nations, to which the Minutes were appended, made no mention of Walvis Bay. 10 LEAGUE OF NATIONS O.J. 505 (1929).

African representatives about voting rights,¹²⁰ requested “. . . clear explanations as regards the right of the inhabitants of Walvis Bay — administered as an integral part of the Mandated Territory — to participate in the elections to the Parliament of the Union and in those of the Legislative Council of South West Africa respectively.”¹²¹ And in 1938, during the 34th Session of the Permanent Mandates Commission, in response to

120. Permanent Mandates Commission Minutes 6A, 75 (15th Sess., 1929).

121. *Id.* at 294. In the *Report Presented by the Government of the Union of South Africa Concerning the Administration of South West Africa for the Year 1929*, 10 LEAGUE OF NATIONS O.J. 1655, paras. 748-52 (1929), South Africa gave the following response to this request:

REPLIES TO SPECIAL OBSERVATIONS OF THE PERMANENT MANDATES COMMISSION.

1. Legal Relations Between the Mandatory Power and the Mandated Territory.

* * *

2. General Administration.

(a) *Right of the inhabitants of Walvis Bay to participate in the elections to the Parliament of the Union.*

748. Section 1 of the South West Africa Affairs Act No. 24 of 1922 (see page 20, Laws of South West Africa, 1915-22), has been interpreted as empowering the complete disassociation of Walvis Bay judicially, administratively, and in consequence, electorally, from the Cape Province. In terms of Proclamation No. 145 of 1922, issued under Section 1(1) of Act No. 24 of 1922, the port and settlement of Walvis Bay was administered as from the 1st October, 1922, as if it were part of the mandated territory of South West Africa, and as if the inhabitants of the said port and settlement were inhabitants of the said territory. Subsequently, it was provided in terms of Section 43(a) of the South West Africa Constitution Act No. 42 of 1925, that the port and settlement of Walvis Bay shall be deemed to form part of the territory for the purposes of that Act. The Schedule to Act No. 42 of 1925, provides for the registration of voters for the election of elective members of the Assembly of the territory.

749. In so far as Walvis Bay, in its relation to the Union, is concerned, it may be stated that Act No. 35 of 1884 (Cape), provided for the annexation to the Colony of the Cape of Good Hope of the port and settlement. Section 1 provided that the territory should be subject to the laws of the Colony and Section 2 *inter alia*, that those laws might, unless otherwise provided by Act of Parliament, be repealed, altered, amended and modified, and new laws applicable to the territory might be made and might be repealed, altered, amended and modified by the Governor, and that no Act thereafter passed by the Parliament of the Colony should extend or be deemed to extend to the territory unless expressly so stated.

750. It may be pointed out, that at no time, have the electoral laws of the Union or of the Colony of the Cape of Good Hope been applied by Act or Proclamation to Walvis Bay, as required by Section 2 of Act No. 35 of 1884 (Cape), and no Delimitation Commission has at any time assigned Walvis Bay to any electoral division in the Union. The British residents at Walvis Bay cannot, therefore, in the absence of the requisite machinery, be enrolled as voters in the Union.

751. The European adult population of Walvis Bay was taken into consideration by the Fifth Delimitation Commission, but only for the purpose of determining the number of members to represent the Cape Province in the Union House of Assembly, as the original quota was based on figures which included the Walvis Bay European male adult population.

(b) *Right of the inhabitants of Walvis Bay to participate in the elections to the Legislative Assembly of South West Africa.*

752. By virtue of Section 43(a) of the South West Africa Constitution Act No. 42 of 1925, the inhabitants of Walvis Bay are entitled to participate in the elections to the Legislative Assembly of the Mandated Territory.

a question from a member of the Commission, the South Africans reiterated that Walvis Bay came under South West Africa for "administrative purposes".¹²²

Quite clearly the Permanent Mandates Commission was concerned about South Africa administering Walvis Bay as part of South West Africa when it was not part of the Mandated Territory.¹²³ Of far more importance is that South Africa could not unilaterally alter the Mandate by adding Walvis Bay (or the Penguin Islands) to the Mandated Territory, the consent of the Council of the League of Nations being required for any modification of the terms of the Mandate.¹²⁴ Had South Africa wished to enlarge the Mandate by adding Walvis Bay (or the Penguin Islands) to South West Africa, there was the precedent in 1923 whereby the Mandate for the Belgian portion of German East Africa (now Rwanda and Burundi) was increased in size and the Mandate for the British portion of German East Africa (now the Tanganyika portion of Tanzania) correspondingly decreased in size by resolution of the Council of the League of Nations following an Anglo-Belgian request for such modification.¹²⁵ There was never a request to the Council of the League of Nations to enlarge the Mandate for South West Africa, and no such modification was ever made.

When the League of Nations dissolved itself in 1946 recommending that the League of Nations Mandates be transformed into United Nations Trusteeships,¹²⁶ South Africa refused to comply and found itself in conflict with the United Nations. In 1966, the United Nations General Assembly terminated the South African Mandate over South West Af-

122. Permanent Mandates Commission Minutes 6A, 82-83 (34th Sess., 1938).

123. The statement in the Note, *Namibia*, *supra* note 2, that the Permanent Mandates Commission had been persuaded by 1929 that Walvis Bay "was an integral part of South West Africa" is incorrect because it is clear from reading the Minutes, (See sources cited *supra* notes 117-122.) that the Commission considered Walvis Bay *not* to be part of South West Africa even though it was administered as if it were.

124. *Rex v. Christian*, 1924 A.D. 101, 111; Art. 7, Mandate for German South West Africa, 113 B.F.S.P. 1109, 1110, 17 AM. J.INT'L L. SUPP. 175, 176 (1923); LINDLEY, *supra* note 83, at 262. See Appendix "C". The Mandate continued in force notwithstanding the dissolution of the League of Nations in 1946. International Status of South-West Africa (Advisory Opinion), 1950 I.C.J. 128, 138, 17 I.L.R. 47, 55; South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), Preliminary Objections, 1962 I.C.J. 319, 341, 37 I.L.R. 3, 22-23. The United Nations General Assembly terminated the Mandate in 1966. G.A. Res. 2145, 21 U.N. GOAR Supp. (No. 16) 2, U.N. Doc. A/6316 (1966); 1966 U.N.Y.B. 606. The validity of this termination was upheld by the International Court of Justice in 1971 which found that South Africa's continued occupation in Namibia is illegal. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion), 1971 I.C.J. 16, 49 I.L.R. 3. It is evident that South Africa could hardly acquire a greater right to alter the boundaries of South West Africa/Namibia by virtue of its illegal occupation.

125. 4 LEAGUE OF NATIONS O.J. 1273 (1923). The diplomatic correspondence relating to this modification can be found at 118 B.F.S.P. 899-905.

126. DUGARD, *supra* note 30, at 96-97.

rica.¹²⁷ That same year, the International Court of Justice ruled against Ethiopia and Liberia in cases they had brought against South Africa concerning the administration of the Mandate.¹²⁸ The merits of these cases, which were consolidated, are not significant here, but the conduct of the parties is very significant.

Ethiopia alleged that South Africa had construed a "military landing field" in the Swakopmund District of South West Africa in violation of Article 4 of the Mandate prohibiting military bases.¹²⁹ South Africa answered this allegation by stating that the landing ground in question was in Walvis Bay which is not ". . . within the territorial boundaries of South West Africa", but which is South African territory not included in the Mandate.¹³⁰ In reply, Ethiopia and Liberia stated "[w]ith respect to the military landing ground in the Swakopmund District, [Ethiopia and Liberia] accept [South Africa's] geographical explanation."¹³¹ They went on to argue, however, that ". . . Walvis Bay must, in a military sense, be considered to be 'in' South West Africa, inasmuch as it is completely surrounded by territory subject to the Mandate. . . ."¹³² In the separate opinion by the South African judge *ad hoc* in these cases, this admission was noted as well as the obvious fact that Walvis Bay is not completely surrounded by the Mandated Territory.¹³³ This was the only mention of Walvis Bay by any of the judges.¹³⁴ This admission is another example of acquiescence and recognition by other nations of South Africa's sovereignty over Walvis Bay.

127. G.A. Res. 2145, 21 U.N. GOAR Supp. (No. 16) 2, U.N. Doc. A/6316 (1966); 1966 U.N.Y.B. 606.

128. South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. 4, 37 I.L.R. 243.

129. Memorial of Ethiopia, South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. Pleadings vol. 1, at 183. See Appendix "C".

130. Counter-Memorial of South Africa, South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. Pleadings, vol. 4, at 57-58, and *id.* at vol. 2, at 309.

131. Reply of Ethiopia and Liberia, South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. Pleadings, vol. 4, at 560. It is significant that, at this time, no nation disputed South Africa's sovereignty over Walvis Bay. *E.g.*, the United States of America has consistently recognized South Africa's sovereignty over Walvis Bay. Map of Southwest Africa, Department of State, Division of Map Intelligence and Cartography, No. 10459 (Sept. 1946); U.S. DEPARTMENT OF STATE FACT BOOK OF THE COUNTRIES OF THE WORLD 590-91 (1970); U.S. DEPARTMENT OF STATE COUNTRIES OF THE WORLD 733-34, 743-44 (1974); and DEPARTMENT OF STATE BULLETIN 3 (Sept. 1986) and *id.* map preceding p. 1.

132. Reply of Ethiopia and Liberia, South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. Pleadings, vol. 4, at 560.

133. South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. 4, 206-07, 37 I.L.R. 243, 394 (Sep. Op. J. Van Wyck). On the west, Walvis Bay is bounded by the Atlantic Ocean.

134. The only mention of the Penguin Islands in the judgment or record of the South West Africa Cases was a note in the South African Counter-Memorandum mentioning the British annexation of the Islands by way of the 1867 Letters Patent. Counter-Memorandum of South Africa, South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. Pleadings, vol. 2, at 364 n.10. The South African map included at the end of this volume shows none of the Penguin Islands, but Walvis Bay is expressly identified as South African territory.

E. *The Significance of Maps as to Walvis Bay and the Penguin Islands*

Maps are playing a greater role in international law today than ever before. The International Court of Justice has had three opportunities to discuss the significance of maps in territorial dispute cases. In the *Minquiers and Ecrehos (Fr. v. U.K.)* case¹³⁵ involving the issue of sovereignty over some islets and rocks near the Channel Islands, the Court considered a French Government map which the French had provided to the British Government and which showed the Minquiers to be British territory.¹³⁶ In the judgment, only one judge commented on the map noting that while maps are not always decisive in the settlement of legal questions relating to sovereignty, they ". . . may . . . constitute proof that the occupation or exercise of sovereignty was well known."¹³⁷

In the *Case Concerning Sovereignty Over Certain Frontier Land (Belg. v. Neth.)*,¹³⁸ Belgium and the Netherlands both claimed two small plots of land which if recognized as Belgian would create an enclave entirely surrounded by Netherlands territory. In the settlement of their boundary by a convention in 1893, there was a special map which showed clearly that these plots in question were Belgian. There was also contradictory language between a written description of the boundary, which incorporated the maps and stated that the plots were Belgian, and an earlier document which was also purportedly incorporated in the convention, but which in fact stated the plots were Dutch. The Court found, however, that on the map signed by the boundary commissioners, these plots ". . . stood out as a small island in Netherlands territory coloured to show, in accordance with the legend of the map, that they did not belong to the Netherlands but to Belgium. The situation of those plots must have immediately arrested attention."¹³⁹ In addition, the court relied on Belgian military staff maps which, since their first publication in 1874, had shown the plots as Belgian territory.¹⁴⁰ In this case, maps were decisive in the court deciding in favor of Belgium.

In the third case, the *Temple of Preah Vihear (Camb. v. Thai.)*,¹⁴¹ the 1904 boundary treaty between France and Siam (now Thailand) stated that the boundary between Siam and Cambodia (now Kampuchea, then part of French Indo-China), would follow the watershed line. A mixed commission fixed the boundary by survey; and maps were subsequently prepared by the French based on the survey and at the request of Siam, but these maps were not part of the boundary delimitation. The

135. 1953 I.C.J. 47, 20 I.L.R. 94.

136. *Id.* at 71, 20 I.L.R. at 114-15.

137. *Id.* at 105, 20 I.L.R. at 141-42 (Sep. Op. J. Carneiro).

138. 1959 I.C.J. 209, 27 I.L.R. 62.

139. *Id.* at 225, 27 I.L.R. at 75.

140. *Id.* at 227, 27 I.L.R. at 77. J. Armand-Ugon, dissenting, disagreed with giving these military maps any significance because there had been no showing that the Netherlands knew of them. *Id.* at 247, 27 I.L.R. at 90.

141. 1962 I.C.J. 6, 33 I.L.R. 48.

Temple of Preah Vihear was on the Siamese side of the watershed line, but the French map of the area in question put the Temple in Cambodia. Siamese officials received these maps and distributed them widely. In 1937, Siam published a map showing the Temple to be in Cambodia. And in 1947, Thailand submitted a map to the Franco-Siamese Conciliation Commission, dealing with areas other than the Temple, which showed the Temple to be in Cambodia. The Court found that Thailand was precluded from challenging the map evidence and ruled for Cambodia holding that the map line prevailed over the treaty line.¹⁴²

It would seem clear that maps produced by a state, or utilized or accepted by it, are going to be strong evidence, if not conclusive of boundaries or sovereignty as described thereon;¹⁴³ although if the governmental agency which drew the map did not have the "authority to draw boundaries", the map in question would not be given "decisive weight for the purpose of ascertaining or determining sovereign rights."¹⁴⁴ The question here then is what does the map evidence, especially official maps, show as to Walvis Bay and the Penguin Islands.¹⁴⁵

Turning to the maps published by the South African Government, the first map, circa 1914,¹⁴⁶ shows Walvis Bay separated from South West Africa by an international boundary;¹⁴⁷ and of the Penguin Islands, only Hollam's Bird and Possession Islands are shown and they are not identified as South African territory. In 1923,¹⁴⁸ 1935,¹⁴⁹ 1937,¹⁵⁰ 1938,¹⁵¹ and 1940,¹⁵² maps were published which showed either no boundary¹⁵³ or only

142. *Id.* at 32-33, 33 I.L.R. at 70-71.

143. See also, *Rann of Kutch (Ind. v. Pak.)*, 17 U.N.R.I.A.A. 1, 566-67, 50 I.L.R. 2, 514-15 (1968); *Island of Palmas (Neth. v. U.S.)*, 2 U.N.R.I.A.A. 829, 852, 22 Am. J. Int'l L. 867, 891 (1928); Weissberg, *Maps as Evidence in International Boundary Disputes: A Reappraisal*, 57 Am. J. Int'l L. 781 (1963). In *Honduras Borders (Guat. v. Hon.)*, 2 U.N.R.I.A.A. 1307, 1360-61 (1933), Guatemala was held to be estopped (although called "acquiescence" by the tribunal) to deny the boundary was where it had placed it on one of its official maps.

144. *Rann of Kutch (Ind. v. Pak.)*, 17 U.N.R.I.A.A. 1, 540, 50 I.L.R. 2, 485 (1968).

145. All maps cited in this article were found at one or more of the following institutions: Geography and Map Division, Library of Congress, Washington, D.C., U.S.A.; Public Record Office, Kew, Richmond, Surrey, England; Institut Géographique Nationale, Saint Mandé, Val de Marne, France. The maps cited in this article are by no means exhaustive of all published maps on this subject.

146. War Map of German South-West Africa, Government Printing Works, Pretoria (undated), scale 1:1,900,800 (30 miles = 1 inch). As South African forces conquered South West Africa in a campaign that began in December 1914 and ended in July 1915, this map was probably produced right after the outbreak of World War I in August 1914.

147. But without the color shading that is found on the other international boundaries on the map.

148. Map of the Union of South Africa, Surveyor-General, Cape Town (1923), scale 1:1,000,000 (hereinafter Map 1923).

149. South Africa, C.M. 04.500-35, 1000-35 (rev.), scale 1:1,400,000.

150. South Africa, C.M. 0104-1937, scale 1:4,000,000.

151. South Africa, C.M. 0104-1938, scale 1:4,000,000 (hereinafter Map 1938).

152. South Africa, C.M. 0104-1940, scale 1:4,000,000 (hereinafter Map 1940).

153. See maps cited *supra* notes 150-152. Of these maps, the latter two maps, Map 1938, *supra* note 151 and Map 1940, *supra* note 152, have color shading added to interna-

a magisterial¹⁵⁴ boundary between Walvis Bay and South West Africa. The 1923 map shows none of the Penguin Islands. The other four maps show all of the Penguin Islands except Seal, Penguin, and Long Islands, plus a Roast Beef Island separate from Sinclair Island (as is the case on all South African maps which show Sinclair Island). On none of these maps are any of the islands identified as South African territory. The maps attached to the annual Reports submitted by South Africa to the Council of the League of Nations for the years 1937 to 1939, however, do show an international boundary between Walvis Bay and South West Africa.¹⁵⁵ Of the Penguin Islands, these maps show only Ichaboe Island and it is not identified as South African territory.

Then, from 1940,¹⁵⁶ international (or provincial) boundary lines are shown on the South African Government maps between Walvis Bay and South West Africa, and such boundary lines are found on the maps of 1943,¹⁵⁷ 1944 (two maps),¹⁵⁸ 1950,¹⁵⁹ 1952,¹⁶⁰ 1955,¹⁶¹ 1961,¹⁶² 1962,¹⁶³ and

tional boundary lines to highlight them. On these two maps this shading runs along the Atlantic coast of South West Africa through Walvis Bay, thus showing it distinctly as part of the Mandated Territory.

154. See maps cited *supra* notes 148 and 149. The color coding on Map 1923, *supra* note 148, indicates that Walvis Bay is not Union territory.

155. The same map was used for all three years. Reports Presented By the Government of the Union of South Africa to the Council of the League of Nations Concerning the Administration of South West Africa for the Years 1937, 1938, 1939. However, para. 1 (as read with the errata) of the 1930 annual Report, which gave a description of the boundaries of South West Africa which was confirmed in the nine subsequent annual Reports, states that the western boundary is the Atlantic Ocean, Walvis Bay not being mentioned and thus by implication included within the Mandated Territory. In the one and only Report to the United Nations, "Report by the Government of the Union of South Africa on the Administration of South West Africa for Year 1946", the same western boundary description was given in para. 2, but para. 3 stated:

... Walvis Bay, which is 374 square miles (96,867 hectares) in extent, is administered by the Administration of South West Africa, but the area remains nevertheless an integral part of the Province of the Cape of Good Hope.

156. South West Africa, Sheet No. South F-33-5, Government Printer, Pretoria (1940), scale 1:5,000,000. The boundary shown is designated as Mandated Territory boundary. South West Africa, Sheet No. South G-33-2 shows Hollams Bird and Mercury Islands. The sheet (South G-33-5) showing the remaining Islands was not found by the author.

157. South Africa, Conical Projection with Two Standard Parallels (18° and 32° S. Lat.), drawn in the Trigonometrical Survey Office (1935, rev. 1943), scale 1:4,000,000.

158. Map of the Union of South Africa, 1944, reprinted [from 1923 map]: G.P.W. - Directorate of Map Printing. U.D.F., (1944), scale 1:1,000,000, which shows a provincial boundary between Walvis Bay and South West Africa; and South Africa, UDF 655/447, Survey Depot (Tech.) S.A.E.C. (1944), scale 1:2,000,000.

159. South West Africa, 1950, Surveyor-General, Windhoek (1950), scale 1:800,000. This map shows Hollam's Bird, Ichabo, and Possession Islands, but does not identify them as South African territory.

160. South Africa, Survey Depot (Tech.) S.A.E.C. 1944, Revised Trigonometrical Survey Office (1952), scale 1:2,000,000.

161. South West Africa, 1955, Surveyor-General, Windhoek (rev. ed. 1955), scale 1:800,000. This map shows Hollam's Bird, Ichabo, and Possession Islands, but does not identify them as South African territory.

1965.¹⁶⁴ As to the Penguin Islands, maps from 1926-1927¹⁶⁵ show all of the Islands except Mercury and Long Islands. The 1943 map shows all of the Islands except Seal, Penguin, and Long Islands. The 1944 and 1952 maps do not show the Penguin Islands. The 1950, 1955, and 1961 maps show only Possession Island. On none of these maps are any of the Penguin Islands identified as South African territory. The 1962 and 1965 maps show all of the Penguin Islands, the 1962 map showing fourteen islands specifically identified as South African territory (Long Island is shown as North and South Long Islands, and Sinclair and Roastbeef Islands are shown as separate islands). The 1965 map is identical to the 1962 map except that Long Island has become one island and the separate Roastbeef Island is not identified as South African territory.

When we look at the German maps of South West Africa, both official and non-official, published in 1892,¹⁶⁶ 1894,¹⁶⁷ 1896,¹⁶⁸ 1899,¹⁶⁹ 1904,¹⁷⁰

162. South West Africa, 1961, Surveyor-General, Windhoek (rev. ed. 1961), scale 1:800,000. This map shows Hollam's Bird, Ichabo, and Possession Islands, but does not identify them as South African territory.

163. Southern Africa 1962, Trigonometrical Survey, Government Printer, Pretoria (1st ed. 1962), scale 1:2,500,000. For a non-official South African map showing the same territorial claims as this map shows, see South West Africa, 1966, lithographed by Keartland Press (Pty.) Ltd., Johannesburg, scale 1:1,000,000.

164. Southern Africa 1965, Trigonometrical Survey, Government Printer, Pretoria (2nd ed. 1965), scale 1:2,500,000. The third (1972), fourth (1979), and fifth (1983) editions of this map show the same territorial claims. For a non-official South African map showing the same territorial claims, see *Namibia/SWA Prospectus*, Africa Institute of South Africa 31-32 (1980), but see the map of South West Africa, Surveyor-General's Office, Windhoek (1964), scale 1:3,000,000, which shows only a magisterial boundary between Walvis Bay and South West Africa. All of the Penguin Islands are shown plus a separate Roastbeef Island, but none are identified as South African territory. The same map was published in 1960, but without showing the Penguin Islands. For commercial and official South African maps showing all of the Penguin Islands (excluding Roast Beef Island) as South African territory with Long Island shown as North and South Long Islands, see *READER'S DIGEST ATLAS OF SOUTHERN AFRICA* 138 and 196 (1984), and map sheets 2314 Rehoboth, 2514 Lüderitz, and 2714 Alexander Bay, Government Printer, Pretoria (1st ed. 1977), scale 1:500,000.

165. South West Africa, Sheets No. South G-33-2 and South G-33-5, drawn in the Surveyor General's Office, printed at the Ordnance Survey, Southampton (1926 and 1927 respectively), scale 1:500,000. The sheet in this series (South F-33-5) which shows Walvis Bay was not found by the author.

166. Deutsch-Südwest-Afrika, Map No. 3, 1892, R. KIEPERT, *DEUTSCHER KOLONIAL-ATLAS* (Berlin 1893), scale 1:3,000,000. This map shows Hollams Bird, Mercury, Ichaboe, Seal, Halifax, Long, Possession, Pomona, Plumpudding, and Roast Beef Islands as British territory.

167. Südwestafrikanisches Schutzgebiet, Blatt 3, 1894, LANGHANS' *DEUTSCHER KOLONIAL-ATLAS*, Nr. 17, (1897), scale 1:2,000,000. This map shows Hollam's Bird, Mercury, Ichabo, Guano or Halifax, Long, Possession, Plumpudding, Pomona, Sinclair, and Roast Beef Islands as British territory. Seal, Penguin, and Shark Islands (as well as Halifax Island) are color coded as British territory on the inset map of Lüderitz Bucht.

168. Übersichtskarte von Deutsch-Südwest-Afrika, Map No. 5, *KLEINER DEUTSCHER KOLONIALATLAS*, GEOGRAPHISCHE VERLAGSHANDLUNG DIETRICH REIMER (1896, 1898, 1899, 1900, 1905, 1906, 1908, 1910, 1911, 1913, 1914, and 1918), scale 1:500,000. Through 1906 all of the Penguin Islands plus a separate Roast Beef Island are identified as British territory. The 1908 edition does not show Seal, Penguin, or Halifax Islands. The 1910, 1911, and 1912

1909,¹⁷¹ 1910,¹⁷² 1911 (5 maps),¹⁷³ and 1914,¹⁷⁴ we find that Walvis Bay is

editions, under the title *Deutscher Kolonialatlas mit illustriertem Jahrbuch*, restore Albatros Island, but does not identify it as British territory. The 1913 edition shows Albatros Island as British territory, but Seal and Penguin Islands are not shown. The 1914 and 1918 editions are identical to the 1910, 1911, and 1912 editions except that the map is renumbered as no. 6.

169. Politisch-militärische Karte von Süd-Afrika zur Veranschaulichung der Kämpfe zwischen Buren und Engländern bis zur Gegenwart, Habenicht, Spezialkarte v. Afrika u. Langhans, Deutscher Kolonial Atlas, Gotha: Justus Perthes (1899), scale 1:4,000,000. This map shows all of the Penguin Islands as British territory.

170. Kriegskarte von Deutsch-Südwestafrika, Berlin (1904), scale 1:800,000. This set of eight strip maps shows all twelve Penguin islands plus a separate Roast Beef Island as British territory on the single sheet key for the eight strip maps. The second map is Karte von Deutsch-Südwestafrika nach amtlichen und anderen verlässlichen Quellen bearbeitet von Otto Herkt, Carl Fleming, Verlag, Buchund Kunstdruckerei, A.G., Glogau (1904 ?), scale 1:3,000,000. All of the Penguin Islands plus a separate Roast Beef Island are shown as British territory.

171. Verwaltungs u. Verkehrskarte von Deutsch-Südwestafrika, Ofraudeuz and Schindler, *Die Deutschen Kolonien* (1982), scale 1:6,000,000. Halifax, Penguin, and Seal Islands are not shown and Plumpudding Island is not identified as British territory.

172. Deutsch-Südwestafrika, Sheets No. 19 "Kuiseb - Unterlauf", No. 23 "Lüderitzbucht", and No. 27 "Pomona", bearbeitet in der Topographischen Abteilung der Kgl. Preuss. Landes-Aufnahme, Berlin (1910), scale 1:400,000. All of the Penguin Islands are shown on this map, but only Possession, Albatross, Pomona, Sinclair, and Roastbeef Islands are identified as British territory. Long Island is shown as North and South Long Islands.

173. The first map is entitled Karte des Landbesitzes und der Minenberechtigte in Deutsch-Südwestafrika, map no. 3 from the inside back cover of 2 L. SANDER, *supra* note 73, scale 1:5,000,000. This map does not show Penguin and Seal Islands, and Halifax Island is called Guano Island. Albatros Island is not identified as being British. Penguin Island is shown on map 6 (Karte der Weichbildgrenze der Ansiedlung Lüderitzbucht, scale 1:16,000), also from the inside back cover, but it is not identified as British territory. The second and third maps from 1911 are a set, Karte des Gebiets längs der Lüderitzbahn zwischen Lüderitzbucht und Schakalskuppe nach Aufnahmen des Regierungsgeologen Dr. Paul Range, Mitteilungen aus den deutschen Schutzgebieten, Band XXIV (1911), scale 1:200,000, and Karte der Namib zwischen dem 27° südl. Breite und dem Oranje-Fluss nach Aufnahmen des Regierungsgeologen Dr. Paul Range, Mitteilungen aus den deutschen Schutzgebieten, Band XXIV (1911), scale 1:400,000. Hollandsbird and Mercury Islands as well as Walvis Bay are not shown on this map's coverage. Halifax Island is not identified as British territory. Long Island is shown as three islands, the two in the north identified as North Long Island and the one in the south as South Long Island. Both North and South Long Islands are identified as British territory. The fourth map is entitled Übersichtskarte der Wildreservate von Deutsch-Südwestafrika nach dem stand vom 1. Oktober 1911, Karte 3, from the Kleiner Kolonialatlas, Verlag von Gustav Fischer, Jena (1911), scale 1:5,000,000. This map shows Hollam's Bird, Mercury, Itschabo, Guano [Halifax], Long, Possession, Pomona, Plumpudding, Sinclair, and Roast Beef Islands as British territory. Albatros Island is shown, but it is not identified as British territory. The fifth map is an official admiralty chart, Süd-Atlantischer Ozean, Westküste von Afrika, Sao Paulo de Loanda bis Kapstadt, herausgegeben vom Reichs-Marine-Amt, Berlin (1911), scale 1:3,000,000. This chart shows Hollams Bird, Mercury, Possession, Sinclair, and Roastbeef Islands as British territory. Ichabo Island and Albatros Rock are also shown, but they are not identified as British territory. There is also an undated map circa 1911 which shows Long Island as three islands in the same fashion as the previous map as well as identifying Seal, Penguin, and Halifax Islands as British territory. Karte des Sperrgebietes, Blatt 3 [of 10], Lüderitzbucht, Verlag der Geographischen Verlagshandlung Dietrich Reimer (Ernst Vohsen) Berlin (undated).

174. Deutsch-Südwestafrika from the Kleiner Kolonialatlas 1914, Geographische

shown as British territory as well as nearly all of the Penguin Islands — and Sinclair and Roast Beef Islands are shown as separate islands, both being identified as British territory. There is also a French military map,¹⁷⁵ a British military map,¹⁷⁶ and a Portuguese military map¹⁷⁷ of interest, the first identifying ten of the Islands as British territory, the second showing only two of the Islands and identifying neither as British territory, and the third showing five of the Islands as British territory.

Looking at the non-governmental and commercially produced maps from the United Kingdom, South Africa, and the United States of America, one finds maps which identify, by clear implication or better, the Penguin Islands as German territory,¹⁷⁸ fail to identify them as Brit-

Verlagshandlung Dietrich Reimer (Ernst Vohsen) Berlin (1914), scale 1:5,000,000. This map shows Hollam's Bird, Mercury, Itschabo, Guano [Halifax], Long, Possession, Albatros, Pomona, Plumpudding, Sinclair, and Roast Beef Islands as British territory.

175. Afrique (Region australe), Windhoek, Flle No. 53, Publié par le Service géographique de l'armée (1897), scale 1:2,000,000. Seal and Penguin Islands as well as Albatross Rock are shown but not named. Plumpudding Island is shown *north* of Pomona Island instead of south where it actually lies. Sinclair and Roastbeef Islands are shown as separate islands. Walvis Bay is shown as British territory.

176. (Provisional) Map of German South West Africa, reproduced and printed for the Geographical Section, General Staff, at the Ordnance Survey Office, Southampton (1914), scale 1:3,000,000. Only Hollam's Bird and Possession Islands are shown. Walvis Bay is clearly marked as falling outside of German South West Africa.

177. Esboço Geographico do Sudoeste Africano Allemão e Colonias Limitrophes, Braga (1915), scale 1:5,772,000. This map shows Holland's Bird, Mercury, Ichaboe, and Pomona Islands as British territory. Roast Beef Island is shown but is not identified as British territory. Walvis Bay is shown as British territory.

178. Map of Africa Shewing the Territories in Dispute between Great Britain & Germany Prior to the Arrangement Just Arrived at (July 1890) and the Exact Nature of the Arrangement, Stanford's Library Map of Africa (1890), scale 1:5,977,382. This map shows Hollandsbird, Mercury, Ichaboe, Seal, Penguin, Halifax, Possession, Albatross, Plumpudding, Pomona, and "Sinclair or Roast Beef" Islands as German territory. Another map is the lower half of a map of Africa of unknown title by Edward Stanford (1890), but approximately the same as the previous map. This map shows Hollandsbird, Mercury, Ichaboe, Seal, Penguin, Halifax, Possession, Albatross, Pomona, and "Sinclair or Roast Beef" Islands. A third map is 2 RAND McNALLY & Co.'s INDEXED ATLAS OF THE WORLD (1907), which both lists (at 231) and shows (by implication at 228) all of the Penguin Islands except Long and Plumpudding Islands (which are neither listed nor shown) as part of German South West Africa, but the map of Africa (at 224-225) shows Hollams Bird and Ichaboe Islands as British territory. Sinclair and Roast Beef Islands are shown as the same island. Walvis Bay is shown as British territory on all of these maps. It should be kept in mind that maps customarily do not specifically identify coastal islands which belong to an adjacent state as part of that state except by color coding. The Penguin Islands are so small that they usually appear as dots on maps, so color coding is generally of no assistance. Thus, there is a certain element of subjectivity in determining the significance of a failure to identify the Penguin Islands as British territory on a map. One can draw a clear implication that these 1890 maps show the Penguin Islands as German territory because they are of such a scale that the Penguin Islands would not normally be shown. In addition, the first of these maps was made for the purpose of showing the consequences of the 1890 Agreement. However, when one looks at the two Juta maps, see maps cited *infra* note 179, it is not so easy to determine the significance of the failure to identify the Penguin Islands as British territory, especially when other Juta maps of the period do identify some of the Penguin Islands as British

ish territory,¹⁷⁹ or identify them as British territory.¹⁸⁰ This confusion is of limited evidentiary value in view of the German maps, both official and commercial, which identify the Penguin Islands as British territory. Some of this confusion arises out of the failure of the 1890 Anglo-German Agreement to mention the Penguin Islands, thereby allocating them to Germany by implication. However, in both Germany and South Africa, there seems to have been no doubt that the Penguin Islands remained British as part of the British Colony of the Cape of Good Hope and then the British Dominion of the Union of South Africa.¹⁸¹

territory. See maps cited *infra* note 180.

179. Same map, two editions. Juta's Enlarged Map of South Africa from the Cape to the Zambesi (1898 and 1900), scale 1:1,900,800 (30 miles = 1 inch), and Juta's Map of South Africa from the Cape to the Zambesi (1899), scale 1:2,534,400 (40 miles = 1 inch). These maps show Hollands Bird, Mercury, Ichaboe, Seal, Penguin, Halifax, Possession, Albatross, Plum Pudding, Pomona, and "Sinclair or Roast Beef" Islands, but do not identify them as British territory. By implication, these islands appear to be German territory. See also Stanford's Map of British South Africa (1895), scale 1:5,977,382. This map shows all of the Penguin Islands (Sinclair and Roast Beef Island being shown as one island) except for Long and Plumpudding Islands. Walvis Bay is always identified as British territory.

180. Same map, four editions. Central & South Africa, Edinburgh Geographical Institute (1891, 1894, 1896, and 1899), scale 1:5,600,000. These maps show Mercury, Ichaboe, Penguin, Halifax, Possession, Pomona, Plumpudding, and Roast Beef Islands as British territory. Hollam's Bird Island is shown but not identified as British territory. Also, Bartholomew's Special Map of South Africa, Edinburgh Geographical Institute (1899), scale 1:2,500,000. This map, covering the region south of 27° south latitude, shows Plum Pudding, Pomona, Sinclair, and Roast Beef Islands as British territory. Also, A Map of Africa Showing the Boundaries Settled by International Treaties & Agreements, published for the Proceedings of the Royal Geographical Society (1890), scale 1:18,000,000. This map shows Hollam's Bird, Mercury, Ichaboe, Penguin, Seal, Halifax, Possession, Pomona, Plumpudding, and Roast Beef Islands as British territory. Finally, four British publications identify one or more of the Penguin Islands as British territory. In the first, Hollams Bird and Mercury Islands are identified as British territory, and Ichaboe, Halifax, Long, Possession, Plumpudding, Pomona, and Roast Beef Islands are shown but not so identified. NEW ENCYCLOPEDIA ATLAS AND GAZETTER OF THE WORLD 71 (special 1910 census ed. 1911). In the second, the twelve islands so identified include Roast Beef Island, but not Sinclair Island. 2 ENCYCLOPEDIA BRITANNICA 42 (11th ed. 1910). The Britannica map of South Africa shows Hollams Bird, Ichaboe, Possession, Plumpudding, and Roast Beef Islands, none of which, however, are identified as British territory. Plumpudding Island is misidentified and the island identified as Roast Beef is the same as the Roast Beef Island identified on modern South African maps lying approximately 30 kilometers south of Sinclair Island. 25 ENCYCLOPEDIA BRITANNICA following 466 (11th ed. 1911), scale 1:7,500,000. In the third, over half of the Penguin Islands are shown on very small maps and the islands are color coded as British territory. They are identified as the Guano Islands, but are not individually named except on the last map in each Part where Possession Island is identified. 4 C. LUCAS, A HISTORICAL GEOGRAPHY OF THE BRITISH COLONIES, SOUTH AFRICA, Part I at 309, and maps following 310, 320, and 331, Part III at map following 332 (new ed. 1913), and 4 C. LUCAS, A HISTORICAL GEOGRAPHY OF THE BRITISH DOMINIONS, SOUTH AFRICA, Part II at maps facing title page and following 533 (new ed. 1915). The fourth, THE STATESMAN YEARBOOK 1901 at Plate 1, identifies Ichaboe Island as British territory on a world map which shows the European colonial empires. Walvis Bay is shown or described as British territory in all of the above publications.

181. In 1899, the Cape Prime Minister stated in the House of Assembly of the Colony of the Cape of Good Hope, that the Penguin Islands were "... a valuable possession of the Colony." HOUSE OF ASSEMBLY DEBATES, COLONY OF THE CAPE OF GOOD HOPE 280 (1899).

Finally, there are a number of official United Nations maps of South West Africa/Namibia, none of which show the Penguin Islands. Nineteen such maps have been found and the thirteen maps dating from May 1950 to March 1977 show an international boundary between Walvis Bay and South West Africa/Namibia while the six maps dating from October 1977 to March 1984 show no boundary at all.¹⁸²

What conclusions can be drawn from these maps? As South Africa could not unilaterally alter the terms of the Mandate,¹⁸³ the official South African maps showing Walvis Bay as part of South West Africa as well as those failing to identify the Penguin Islands as South African territory are of very limited value.¹⁸⁴ Further, since 1940, the South African maps

182. These United Nations maps have the following numbers and dates:

238	May	1950
559	May	1954
560	May	1954
1109	Sep	1958
1208	Nov	1959
1417	Apr	1963
1548	Sep	1964
1688	Nov	1966
1689	Nov	1966
1765	Dec	1967
1689 Rev 1	Jan	1969
1765 Rev 1	Jan	1969
2927	Mar	1977
2947	Oct	1977
2947	Nov	1977
3124	Dec	1980
3168	May	1982
3228	Mar	1983
3228 Rev 1	Mar	1984

All but the first map and the last two maps carry either of the following disclaimers: "The boundaries on this map do not imply official endorsement or acceptance by the United Nations," or "The boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations." The disclaimer on the last two maps is more extensive, but of the same nature. The boundary of Walvis Bay was settled in 1911, and there has been no dispute since. It can be fairly argued that these disclaimers only relate to the "delimitation" of the boundaries shown and not to the "allocation" of territory shown. Thus, the United Nations maps which show an international boundary between Walvis Bay and South West Africa/Namibia show acquiescence and recognition by the United Nations to South African sovereignty over Walvis Bay. The first map, which lacks any disclaimer, even identifies Walvis Bay as belonging to the Union of South Africa. The next twelve maps just show an international boundary between Walvis Bay and South West Africa/Namibia. Map No. 1765 Rev 1 (1969) was republished with the same number in 20 U.N. Chronicle (No. 3) at 18 (1983), but without the international boundary between Walvis Bay and Namibia. The international boundary, however, was on the map when it was published in 1969. The copies of the United Nations maps of Namibia collected by the author are now at the Geography and Map Division, Library of Congress, Washington, D.C., U.S.A. The United Nations Map Library in New York does not have a complete set of these maps.

183. 4 LEAGUE OF NATIONS O.J. 1273 (1923).

184. *But see* Island of Palmas (Neth. v. U.S.), 2 U.N.R.I.A.A. 829, 852, 22 AM. J. INT'L L. 867, 891 (1928), where the arbitrator said ". . . official or semi-official maps . . . would be

almost always have shown Walvis Bay as not part of South West Africa/Namibia, a situation acquiesced in and recognized by the United Nations and the world, at least until 1977. It is difficult to see any basis at this time, predicated on the map evidence, to deny South African sovereignty over Walvis Bay. As to the Penguin Islands, the situation is similar although the record is much more scanty. Although South Africa did not note its claim on its maps until 1962, South Africa's claim to the Penguin Islands had been previously recognized; and so long as South Africa administered South West Africa, it just did not matter. Once South Africa's claim was asserted in 1962, it was not challenged until 1977 when the issue was raised in the United Nations. If anything, the case for South Africa is even stronger as to the Penguin Islands.¹⁸⁵

F. *The Role of Estoppel in International Law*

It has been argued that principles of estoppel in international law bar South Africa's claim of sovereignty over Walvis Bay.¹⁸⁶ The argument is predicated on South Africa's conduct in severing Walvis Bay from the Province of the Cape of Good Hope and incorporating it into South West Africa so totally that an independent Namibia is not economically viable without Walvis Bay. Having caused the people of Walvis Bay and Namibia to rely on the integration as a *fait accompli*, the argument goes, South Africa is now estopped to claim sovereignty over Walvis Bay.

The principal problem with this argument is that estoppel, like acquiescence and recognition, is not a mode of acquisition of territory, but rather forms a part of the evidence of sovereignty — acquiescence, recognition, admissions, and estoppel often blurring together in any given case.¹⁸⁷ This means that the place of estoppel in international law, especially in territorial issues, serves as an aid in the interpretation of the facts and legal instruments.¹⁸⁸ In other words, although estoppel has been called a principle of substantive law,¹⁸⁹ it is essentially procedural in that there must be a recognized basis for claiming sovereignty over disputed territory or estoppel has no application. One writer¹⁹⁰ has pointed out that the attitude of international law towards estoppel is not consistent, sometimes requiring the English law prerequisite of reliance and detri-

of special interest in cases where they do not assert the sovereignty of the county of which the Government has caused them to be issued."

185. It is interesting that the exhaustive study of African boundaries by BROWNIE, *supra* note 20, makes no mention of the Penguin Islands.

186. Note, *Namibia*, *supra* note 2, at 904-910; Landis, *supra* note 2; Asmal *supra* note 2, at 29-31.

187. BROWNIE, *supra* note 82, at 164-65; AKEHURST, *supra* note 85, at 148-50. *See also* Rann of Kutch (Ind. v. Pak.), 17 U.N.R.I.A.A. 1, 449-54, 549, 50 I.L.R. 2, 409-15, 494-95 (1968).

188. BROWNIE, *supra* note 82, at 165.

189. Argentine-Chile Frontier Case, 16 U.N.R.I.A.A. 11, 164, 38 I.L.R. 10, 76-77 (1966).

190. AKEHURST, *supra* note 85, at 149.

ment¹⁹¹ and sometimes not.¹⁹² Further, sometimes estoppel in international law has the effect of making it impossible for a party to contradict his previous statement, as in English law;¹⁹³ other times it is merely evidentiary, that is, its effect is simply to make it difficult for a party to contradict his previous statement.¹⁹⁴

A quick review of the leading international law cases on this issue demonstrates that estoppel is not a mode of acquisition of territory, but it can prevent the acquisition of territory. In the *Preah Vihear Temple (Camb. v. Thai.)* case, estoppel (called recognition and acceptance) was invoked to prevent Thailand from denying that the boundary was that as shown on a map¹⁹⁵ — this was a delimitation of a boundary case, not an acquisition of territory case, the Court finding that the boundary that was established was the map boundary, not the treaty boundary. In the *Legal Status of Eastern Greenland (Den. v. Nor.)* case, estoppel (called recognition) was invoked to prevent Norway from denying its own recognition of Danish sovereignty over the disputed territory¹⁹⁶ — here estoppel was used to prevent the acquisition of territory. In the *Right of Passage Over Indian Territory (Port. v. Ind.)* case, estoppel (called recognition) was invoked to prevent India from denying Portugal's effective occupation of Portuguese enclaves in Indian territory.¹⁹⁷ In the *Arbitral Award of the King of Spain (Hon. v. Nic.)* case, estoppel (called recognition) was invoked to prevent Nicaragua from denying that the boundary fixed by the King of Spain in prior arbitration and accepted by Nicaragua was in fact

191. *Preah Vihear Temple (Camb. v. Thai.)*, 1962 I.C.J. 6, 63-64, 33 I.L.R. 48, 91-93 (Sep. Op. J. Fitzmaurice). The opinion of the Court spoke only of acceptance and recognition. *Id.* at 32-33, 33 I.L.R. at 70-71.

192. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 68-69, 3 WORLD CT. R. 148, 189.

193. *Preah Vihear Temple (Camb. v. Thai.)*, 1962 I.C.J. 6, 63-64, 33 I.L.R. 48, 91-93 (Sep. Op. J. Fitzmaurice); *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 68-69, 3 WORLD CT. R. at 189; *Right of Passage Over Indian Territory (Port. v. Ind.)*, 1960 I.C.J. 6, 39, 31 I.L.R. 23, 51-52; *Arbitral Award Made By the King of Spain (Hon. v. Nic.)*, 1960 I.C.J. 192, 213, 30 I.L.R. 457, 473-74; *Honduras Borders (Guat. v. Hon.)*, 2 U.N.R.I.A.A. 1307, 1327-29, 1360-61 (1933).

194. *Miniquiers and Ecrehos (Fr. v. U.K.)*, 1953 I.C.J. 47, 71, 20 I.L.R. 94, 114-15; *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, 138-39, 18 I.L.R. 86, 101-02.

195. 1962 I.C.J. 6, 63-64, 33 I.L.R. 48, 91-93 (Sep. Op. J. Fitzmaurice). It is important to distinguish in boundary delimitation situations between boundaries fixed upon readily identifiable geographical features, such as the center of a river, and boundaries fixed upon non-readily identifiable features, such as lines of longitude and latitude or the watershed in *Preah Vihear Temple, id.* In the latter situation, the boundary remains inchoate until it is marked upon the ground or upon a map of such a scale that one using the map can readily determine where on the ground (or water) the boundary is. There is the further question, in a boundary determination case, of whether the final decision fixing the boundary amounts to a mere delimitation of the boundary or is an allocation of territory. The Supreme Court of India in *Patel and Others v. Union of India*, 1969 A.I.R.(S.C.) 783, opted for the former viewpoint in interpreting Rann of Kutch (*Ind. v. Pak.*), 17 U.N.R.I.A.A. 1, 50 I.L.R. 2, (1968).

196. 1933 P.C.I.J. (ser. A/B) No. 53, at 68-69, 3 WORLD CT. R. 148, 189.

197. 1960 I.C.J. 6, 39, 31 I.L.R. 23, 51-52.

its boundary¹⁹⁸ — another delimitation of a boundary case. In *The Minquier and Ecrehos (Fr. v. U.K.)* case, estoppel (by admission, i.e., recognition) was invoked to prevent France from denying that the boundary between France and the Channel Islands was where France had previously said it was¹⁹⁹ — still another delimitation of a boundary case, but here estoppel acted to prevent France from acquiring territory. In the *Fisheries Case (U.K. v. Nor.)*, estoppel (called acquiescence) was invoked to prevent the United Kingdom from claiming that the fishing zone boundary set by Norway had not been set according to a valid principle of international law²⁰⁰ — yet another delimitation of a boundary case. And in the *Honduras Borders (Guat. v. Hon.)* case, estoppel (called acquiescence and recognition) was invoked to (1) bar Honduras from denying Guatemala's sovereignty over territory over which there had been a continued and long unopposed assertion of Guatemalan authority which should have invited opposition,²⁰¹ and (2) bar Guatemala from denying that another part of its border with Honduras was where Guatemala had placed it on one of its official maps²⁰² — yet another delimitation of a boundary case where estoppel acted to prevent the acquisition of territory by both parties. There is just no authority in the international law cases that estoppel may act to *effect* the transfer of territory from one state to another.

Turning to the prerequisites of estoppel, one writer, after noting that estoppel in international law is procedural, sets out the following essential elements of international estoppel:

- (1) the right was apparently actionable;
- (2) the party actually seised of the right ought to have been aware that it was actionable;
- (3) that party ought to have been aware that his silence might be construed by others as a communication of assent to their behavior, arguably contrary to the right;
- (4) that party ought to have communicated, unequivocally in all processes available to him, that he did not accede to such behavior and that he reserved his right to action;
- (5) under the circumstances, others could not have been expected to be informed of such intentions or to consider them serious or *prima facie* valid;
- (6) others did not, manifestly or tacitly, attempt to defer or prevent authoritative resolution of the conflicting claims;
- (7) subsequent action on the initial right will be prejudicial to the interests of either the community or to its individual members.²⁰³

198. 1960 I.C.J. 192, 213, 30 I.L.R. 457, 473-74.

199. 1953 I.C.J. 47, 71, 20 I.L.R. 94, 114-15.

200. 1951 I.C.J. 116, 138-39, 18 I.L.R. 86, 101-02.

201. 2 U.N.R.I.A.A. 1307, 1327-29 (1933).

202. *Id.* at 1360-61.

203. W. M. REISMAN, NULLITY AND REVISION 385-86 (1971). Note, *Namibia*, *supra* note 2, at 904, purports to rely on Reisman for its estoppel argument, but it fails to note the procedural aspect of estoppel and recasts Reisman's elements eliminating some of them without explanation. For a discussion of estoppel in international law, see MacGibbon,

Putting aside any difficulties²⁰⁴ other than applying these criteria to the status of Walvis Bay, we find that these criteria cannot be met.

(1) *the right was apparently actionable*: South Africa's right to keep Walvis Bay as a part of the Cape Province cannot be said to have been actionable. By the terms of the Mandate, South Africa had the right to administer South West Africa as an integral part of the Union.²⁰⁵ Including Walvis Bay in the administration of South West Africa is within the confines of the Mandate and was acquiesced to by the League of Nations, the only body that would have any right to bring an action.²⁰⁶

(2) *the party actually seized of the right ought to have been aware that it was actionable*: The right not being actionable, this element has no application.

(3) *that party ought to have been aware that his silence might be construed by others as a communication of assent to their behavior, arguably contrary to the right*: The right not being actionable, this element has no application. Here, South Africa was not silent as it repeatedly asserted that the administration of Walvis Bay had been transferred to the Mandated Territory only for administrative purposes and that it remained part of the Province of the Cape of Good Hope.

(4) *that party ought to have communicated, unequivocally in all processes available to him, that he did not accede to such behavior and that he reserved his right to action*: By expressly stating that Walvis Bay remained part of the Province of the Cape of Good Hope, by only treating it "as if" it were part of South West Africa, and by never petitioning the Council of the League of Nations to include Walvis Bay in the Mandated Territory, South Africa adequately preserved its sovereignty over Walvis Bay.

(5) *under the circumstances, others could not have been expected to be informed of such intentions or to consider them serious or prima facie valid*: As South Africa, in effect, informed the entire world that Walvis Bay remained under South African sovereignty, a position acquiesced to by the League of Nations and unchallenged by the United Nations until 1977, this element has no application.

(6) *others did not, manifestly or tacitly, attempt to defer or prevent authoritative resolution of the conflicting claims*: As there were no conflicting claims to be resolved until 1977, this element has no application.

supra note 97; Bowett, *supra* note 98; Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1, 16-23 (1977).

204. As previously noted, South Africa was forbidden to unilaterally alter the terms of the Mandate, see sources cited *supra* note 124. In addition, there is no recognized basis or mode of acquisition whereby Namibia would have a claim to Walvis Bay.

205. In 1960, South African legal scholars considered that "... while not a portion of the Union as such, the territory, whose exact juridical status is a mystery, is so closely connected with the Union as to be practically a fifth province." HAHLO & KAHN, *supra* note 22. See also AFRICA SOUTH OF THE SAHARA 1986, at 693-94 (15th ed.1985).

206. See sources cited *supra* notes 123-24.

(7) subsequent action on the initial right will be prejudicial to the interests of either the community or to its individual members: Here is the only element where one can present an argument against South Africa retaining Walvis Bay. South African retention of Walvis Bay could adversely affect the economy of Namibia. However, is this effect any different for any landlocked country that must depend upon its neighbors for seaborne trade? In other words, is this the kind of prejudice which counts, especially when Walvis Bay is just as dependent economically as Namibia is on Namibia's continued use of the port.

Even if the last element is conceded, this is insufficient for the application of estoppel in international law to the question of South African sovereignty over Walvis Bay.²⁰⁷

Turning to the Penguin Islands, there is no basis whatever to apply estoppel. The Penguin Islands were never administered as part of the Mandated Territory, and there is nothing to link them to Namibia other than their geographical proximity.²⁰⁸

207. It should be noted in passing that the proponents of estoppel against South Africa over Walvis Bay assume that sovereignty is the only issue. Little thought has been given to the application of estoppel to the way South Africa will administer Walvis Bay after Namibian independence. Likewise, there is the issue of whether South Africa's obligations under the Mandate might continue after Namibian independence insofar as Walvis Bay is vital to the economic survival of Namibia. An argument can certainly be made that South Africa, having created this situation of dependence, is bound by a residual duty under the Mandate to maintain Walvis Bay for the benefit of the people of Namibia. These issues of estoppel and residual duty under the Mandate are beyond the scope of this article. The only conduct of South Africa relevant to the issue of sovereignty over Walvis Bay relates to the maps produced by South Africa which failed to show an international boundary between Walvis Bay and South West Africa, *see* maps cited *supra* notes 148-154. This is hardly sufficient to invoke estoppel against South Africa. In view of South Africa's administration of the Mandate, it is questionable whether these maps were intended to ascertain sovereign rights.

208. In its annual Reports to the Council of the League of Nations Concerning the Administration of South West Africa which were submitted from 1920 until 1939, there was a section in each Report (except for the first three or four years) entitled "Mining" which contained statistics and other data on guano production in the Mandated Territory. Not once did this section ever include any data on the Penguin islands. The Penguin Islands (also known as the Northern or Ichaboe Group of the Government Guano Islands) were under the administration of the Departments of Agriculture of the Cape or Union Governments from 1895 until 1951 when the administration was transferred to the Department of Commerce and Industry of the Union Government. *See The Guano Islands of South Africa*, in Official Yearbook of the Union and of Basutoland, Bechuanaland Protectorate and Swaziland, No. 9, 1926-1927, at 41-43 (1928), and *id.* at No. 29, 1956-1957, at 668 (1958). There are other islands like the Penguin islands which lie in or near the territorial waters of another state, but are an integral part of the nation to which they belong; *e.g.*, the French Department of St. Pierre and Miquelon off the south coast of Newfoundland, Canada; the numerous Greek islands in the Aegean Sea adjacent to Turkey; and the Vietnamese island of Phu Quoc off the coast of Kampuchea.

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

It has been argued that, if Walvis Bay is not part of the Mandated Territory of South West Africa and thus not subject to the trust imposed on South Africa by the Mandate, it is a non-self-governing territory within the meaning of Article 73 of the United Nations Charter which imposes a duty on South Africa to administer Walvis Bay as a "sacred trust".²⁰⁹ If Article 73 applies to Walvis Bay, then the principle of self-determination also applies and South Africa has the duty to abide by the desires of the inhabitants²¹⁰ as to whether they wish to be part of South Africa or part of Namibia.²¹¹

This argument has been predicated upon two United Nations General Assembly Resolutions by which the following criteria were established for determining if 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.²¹² Applying these criteria, Walvis Bay does not qualify as a non-self-governing territory.

The first of the three criteria is established by virtue of Walvis Bay's geographical separation from the rest of South Africa. However, it must be noted that such a situation is not unique in Africa. Three other similar coastal enclaves forming integral parts of their respective nations exist on

209. Note, *Namibia*, *supra* note 2, at 916-20; Asmal, *supra* note 2, at 6-12. Note that this principle can have no application to the Penguin Islands because they are uninhabited.

210. What these desires would be has never been determined, but a majority of the population of Walvis Bay is non-white and thus may wish to be incorporated into an independent Namibia. The 1980 population of Walvis Bay was 18,735 of which there were 5,772 whites, 4,751 "Coloureds" (persons of mixed race), and 8,212 Africans. See *MOORSOM*, *supra* note 2, at 8.

211. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion), 1971 I.C.J. 16, 31, 49 I.L.R. 3, 21.

212. Note, *Namibia*, *supra* note 2, at 916, and Asmal, *supra* note 2, at 33, citing to G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960); 1960 U.N. Y.B. 49; G.A. Res. 1541, 15 U.N. GAOR Supp. (No.16) at 29, U.N. Doc. A/4684 (1960); 1960 U.N. Y.B. 509. G.A. Res. 1514 is a declaration of the right to self-determination for non-self-governing territories. It sets out no criteria for determining what is a non-self-governing territory. Paragraph 6 of G.A. Res. 1514 provides that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." This paragraph can be utilized by both sides in the Walvis Bay dispute to support their respective positions. It is the Annex to G.A. Res. 1541, entitled *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73e of the Charter of the United Nations*, which set out the criteria. G.A. Res. 1541, *supra* Annex at Principles IV, V. The question naturally arises as to whether this "guide" can be said to state positive international law because General Assembly Resolutions are nonbinding recommendations only. U.N. CHARTER arts. 10-11, 13-14. But note that the General Assembly had the power to terminate South Africa's Mandate over South West Africa. See *supra* note 124.

the continent — the Angolan enclave of Cabinda and the Spanish Mediterranean enclaves of Ceuta and Melilla.²¹³ This criterion is not particularly helpful here.

Turning to the second, this is somewhat difficult to apply. As to the majority white and "coloured" populations of Walvis Bay, there clearly is ethnic and cultural identity with the same population groups in South Africa.²¹⁴ As to the minority black African population, what is the ethnic and cultural test and how can it be applied on a continent where national boundaries as a matter of practice ignore ethnic and cultural identity?²¹⁵ This problem of the cultural or ethnic arbitrariness of African boundaries has been addressed by the independent nations of Africa on two occasions — the first in 1964 when the member states of the Organisation of African Unity by resolution pledged themselves to respect their frontiers which existed at their independence,²¹⁶ and the second in 1969 in the Manifesto on Southern Africa (the Lusaka Declaration) approved by the Conference of East African and Central African States and adopted by the Heads of State and Government of the Organisation of African Unity in which it was stated that "the present boundaries of the states of Southern Africa are the boundaries of what will be free and independent African states."²¹⁷ Quite clearly, the African nations themselves have taken the position that colonial boundaries override ethnic or cultural distinctions, and specifically so in southern Africa. To apply this criterion to Walvis Bay and not to the rest of Africa would be wholly arbitrary.²¹⁸

It is with the third of these criteria that this argument truly fails. Apart from the problem of determining exactly what is meant by "arbi-

213. On the Arabian Peninsula, there is the Omani enclave on the Musandam Peninsula separated from the rest of Oman by the United Arab Emirates. In Europe, there is the German enclave of Büsingen am Hochrhein, surrounded entirely by Switzerland, and the Belgian enclave of Baerle-Duc, surrounded entirely by the Netherlands. As to the latter, the International Court of Justice ruled in favor of Belgium in its dispute with the Netherlands over the question of sovereignty over this enclave thereby implicitly rejecting the principle of contiguity as a rule of positive international law which grants contiguous states paramount claims to enclaves and adjacent territories (the argument of contiguity not having been raised). *Case Concerning Sovereignty Over Certain Frontier Land (Belg. v. Neth.)*, 1959 I.C.J. 209, 27 I.L.R. 62. *See also* *Island of Palmas (Neth. v. U.S.)*, 2 U.N.R.I.A.A. 829, 854-55, 869, 22 AM. J. INT'L L. 867, 893-94, 910 (1928); BROWNLIE, *supra* note 82, at 153; AKEHURST, *supra* note 85, at 153. For some more enclaves, past and present, *see* F. E. KRENZ, *INTERNATIONAL ENCLAVES AND RIGHTS OF PASSAGE* (1961).

214. Whites and "Coloureds" (persons of mixed race) constituted 56.2% of the population of Walvis Bay in 1980. *See* MOORSOM, *supra* note 2, at 8.

215. Note *Namibia*, *supra* note 2, at 917 n.83, solves this dilemma by deciding that the relevant ethnic and cultural group in Walvis Bay is the entire population while that of South Africa is only the white population. Such an arbitrary choice defies logic.

216. BASIC DOCUMENTS ON AFRICAN AFFAIRS 360, para. 2 (I. Brownlie ed. 1971).

217. 1 BASIC DOCUMENTS OF AFRICAN REGIONAL ORGANIZATIONS 141, para. 11 (L.B. Sohn ed. 1971).

218. This criterion is sound in the context of a colonial power located far from the African continent. It is when it is applied to a wholly African context that it has little validity.

trarily subordinate", the status of Walvis Bay is not in any significant manner any more subordinate than any other part of South Africa. Here, it is irrelevant to look at the status of Walvis Bay prior to the establishment of the United Nations in 1945 because the concept of non-self-governing territory did not exist prior to that time, at least as used in the modern context here. This concept, along with the corresponding concept of self-determination, is the product of a gradual evolutionary development which manifested itself in Article 73 of the United Nations Charter and has continued to develop and mature since.²¹⁹

With the granting of parliamentary representation to South West Africa in 1949,²²⁰ the Government of South Africa gave the people of South West Africa and Walvis Bay rights virtually identical to those of the people of the four provinces of South Africa; in effect, South West Africa had become a *de facto* fifth province.²²¹ Considering the political framework of the unitary state predicated upon parliamentary supremacy which South Africa has been since the formation of the Union in 1910,²²² it is difficult to see how South Africa's administration of Walvis Bay through Windhoek from 1922 until 1977 instead of through Cape Town provides the basis for arguing that the status of Walvis Bay was or is "arbitrarily subordinate". And since 1977, with the transfer of administration back to that of the Province of the Cape of Good Hope, the argument for the third criterion collapses completely.²²³

Finally, the argument that South Africa's imposition of apartheid in Walvis Bay provides a basis under Article 73 for depriving South Africa of Walvis Bay, a position predicated on the proposition that apartheid deprives the South African government of any internal legitimacy at all,²²⁴ is a fallacious argument. One could easily use this argument to justify dismembering not only the rest of South Africa, but a number of other countries in the world with oppressed minorities. Governmental legitimacy and territorial sovereignty are not the same thing, and there is no basis for applying the criteria of the former to that of the latter.²²⁵

In the final analysis, the degree of subjectivity here should make the international lawyer hesitate. How can one validly argue that Walvis Bay

219. Asmal, *supra* note 2, at 10-12; G.A. Res. 1541, Principle II, Annex, 15 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/4684 (1960); 1960 U.N. Y.B. 509.

220. South Africa never *de jure* incorporated South West Africa as it was permitted to do. *Mandate for German South West Africa*, art. 2. See Appendix "C".

221. *Honduras Borders* (Guat. v. Hon.), 2 U.N.R.I.A.A. 1307, 1327-29 (1933).

222. The author accepts that if Walvis Bay was a non-self-governing territory in 1977, South Africa's action in transferring the administration of Walvis Bay back to that of the Cape of Good Hope would have no effect on that status. It is submitted that the argument in favor of such status was hopelessly weak in 1977, and that the 1977 transfer and subsequent internal developments as to Walvis Bay have destroyed this argument completely.

223. Asmal, *supra* note 2, at 16-22.

224. *Id.*

225. 1 OPPENHEIM, *supra* note 85, at 131 *et seq.* (recognition of governments) and *id.* at 451-52 (territorial sovereignty).

is a non-self-governing territory subject to the right of self-determination in terms of these United Nations General Assembly Resolutions when the United Nations General Assembly refuses to accord such status to Gibraltar and the Falkland Islands, colonies which would so obviously qualify but for their neighbors' questionable claims to sovereignty?²²⁶ In the context of Walvis Bay, the arguments premised on Article 73 are not legally valid.²²⁷ They form no basis for taking Walvis Bay from South Africa under any claim predicated on rules of international law.

V. Conclusion

From the foregoing, it is difficult to draw any conclusion based on law other than that South Africa's claims to sovereignty over Walvis Bay and the Penguin Islands²²⁸ are valid. Since annexation in the last century, sovereignty over both Walvis Bay and the Penguin Islands by the British Empire and its successor, South Africa, has been continuous, effective, and internationally recognized. No action by South Africa has altered this state of affairs. While the United Nations General Assembly²²⁹ has condemned South Africa for its 1977 transfer of the administration of Walvis Bay from that of South West Africa/Namibia to that of the Province of the Cape of Good Hope, calling it an "annexation", this characterization is legally erroneous. Annexation of territory is a method of acquiring territorial sovereignty.²³⁰ As sovereignty over Walvis Bay has been vested in South Africa (or its predecessor, the British Empire) for more than a century, the 1977 transfer of administration had no effect on that sovereignty which continued to be vested in South Africa. For better or worse, as to

226. R. PERL, *THE FALKLAND ISLANDS DISPUTE IN INTERNATIONAL LAW AND POLITICS* 36-40 (1983). The argument against self-determination for Gibraltar is predicated on the doctrine of "colonial enclaves" which holds that territory detached by a colonial power from the surrounding territory should be returned to the surrounding state. It could be argued that Walvis Bay is a "colonial enclave" although South Africa is not a colonial power in the traditional sense. See Shaw, *supra* note 78, at 134-40. Note, however, that this doctrine is inconsistent with self-determination. The difficulty here is that the status of Walvis Bay is no different than that of the Angolan enclave of Cabinda or the Spanish African enclaves of Ceuta and Melilla.

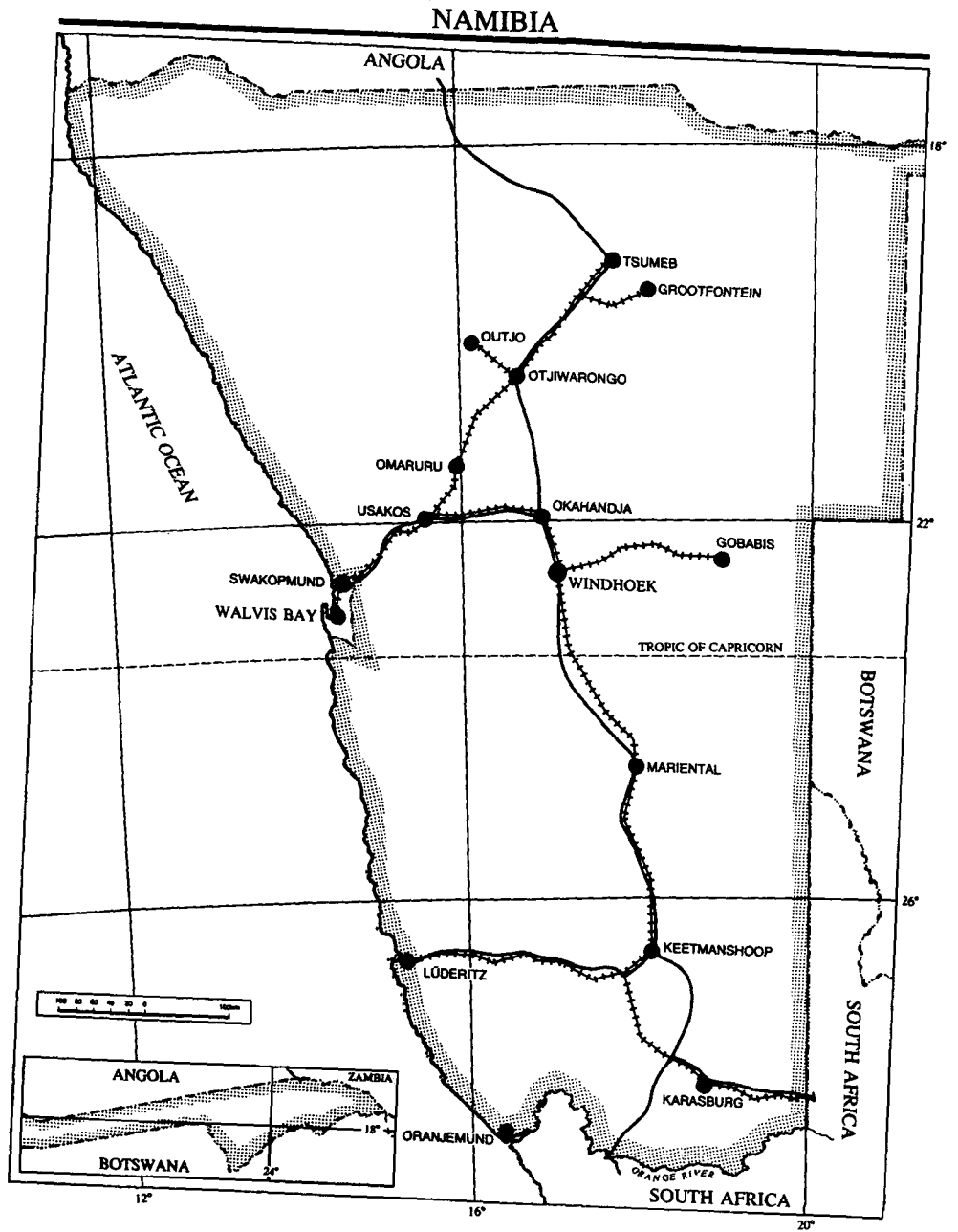
227. Other nonlegal reasons have been advanced for giving Walvis Bay to Namibia such as economic and military necessity, but these reasons have little or no legal basis and are in fact political reasons; and thus they are beyond the scope of this article. For a discussion of these other considerations, see MOORSOM, *supra* note 2, at 58-66; Note, *Namibia, supra* note 2, at 920-22; Dore, *Self-Determination of Namibia and the United Nations: Paradigm of a Paradox*, 27 HARV. INT'L L.J. 159, 173-76 (1986); Munkman, *supra* note 93, at 99-100.

228. Any problem over there being one island too many (a Roast Beef Island separate from Sinclair Island) has been eliminated because South Africa is not claiming Roast Beef Island. The problem of how many islands constitute Long Island should be only a question of evidence.

229. G.A. Res. 32/9D, U.N. Doc. A/32/2.7 paras. 6-8 (1977) and *id.* at Add. 1-3 (1977); 1977 U.N. Y.B. 918. The Security Council Resolution only called for the "reintegration" of Walvis Bay into Namibia. S.C. Res. 432, U.N. Doc. S/RES/432 (1978).

230. J. G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 160 (9th ed. 1984); 1 O'CONNELL, *supra* note 82, at 432-33.

both Walvis Bay and the Penguin Islands, this time South Africa stands in the legal right.



THE PENGUIN ISLANDS

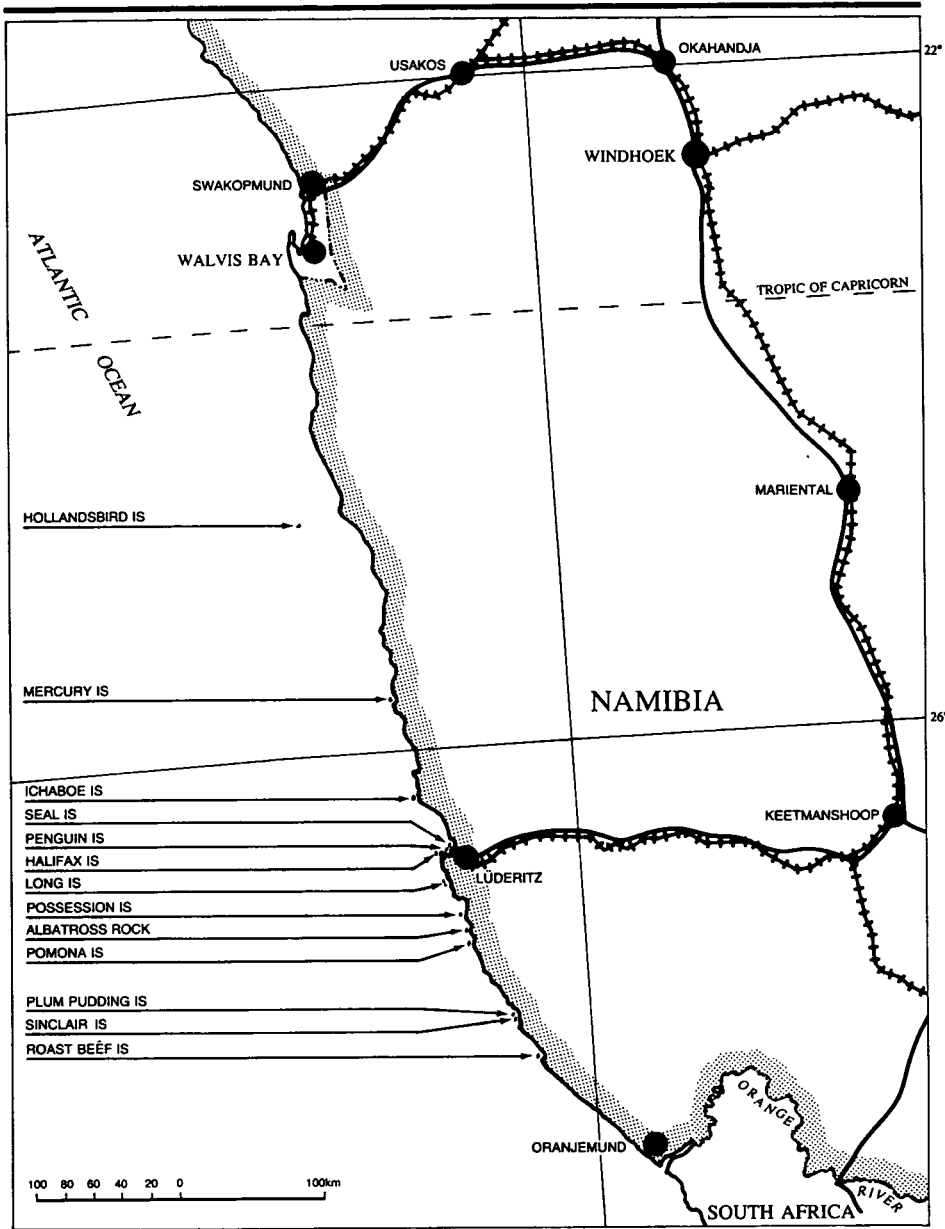


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APPENDIX "A"

1. **BRITISH PROCLAMATION**, taking possession of the Port or Settlement of Walfisch Bay. — Walfisch Bay, Mar. 12, 1878. [69 B.F.S.P. 1177]

PROCLAMATION by Richard Cossantine Dyer, Esquire, Staff-Commander in command of Her Majesty's ship *Industry*, at present lying at anchor off the Port or Settlement of Walfisch Bay.

WHEREAS it is expedient that the Port or Settlement of Walfisch Bay, together with a certain portion of the territory surrounding the same, shall be taken possession of on behalf of Her Britannic Majesty Queen Victoria, and, subject to the pleasure of Her Majesty in that behalf, be declared a dependency of the United Kingdom of Great Britain and Ireland: Now, therefore, I, Richard Cossantine Dyer, the officer in command of Her Majesty's ship *Industry*, at present lying at anchor off the said settlement, do, in the name of Her said Britannic Majesty, Queen Victoria, take possession of the said port or settlement of Walfisch Bay, together with the territory hereinafter described and defined, in token whereof I have this day hoisted the British flag over the said port, settlement, and territory, and I do proclaim, declare, and make known that the sovereignty and dominion of Her said Britannic Majesty shall be and the same are hereby declared over the said port, settlement, and territory of Walfisch Bay; and I do further proclaim, declare, and make known that the said territory of Walfisch Bay so taken possession of by me as aforesaid shall be bounded as follows: that is to say, on the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppmansdorf; on the east by a line from Scheppmansdorf to the Rooibank, including the Plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the last 10 miles of the course of the said Swakop River.

This Proclamation of Her Majesty's sovereignty and dominion shall take effect forthwith, but shall be subject to Her Majesty's gracious confirmation and disallowance.

God save the Queen!

Given under my hand and seal at Walfisch Bay, this 12th day of March, 1878.

RICHARD C. DYER, Staff-Commander in command.

2. **BRITISH LETTERS PATENT**, for the Annexation to the Colony of the Cape of Good Hope of the Port or Settlement of Walfisch Bay, on the West Coast of South Africa, and of certain Territory surrounding the same. — Westminster, Dec. 14, 1878. [70 B.F.S.P. 495]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India: To all to whom these presents shall come, greeting:

WHEREAS the port of settlement of Walfisch Bay, situated on the West Coast of South Africa to the north of the Tropic of Capricorn, together with certain territory surrounding the same, and bounded as follows, viz.: — On the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppmansdorf; on the east by a line from Scheppmansdorf to the Rooibank, including the plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the last 10 miles of the course of the said Swakop River, and on the west by the Atlantic Ocean; was, on the 12th day of March, 1878, by Proclamation duly taken possession of for us and on our behalf:

And whereas it is expedient to provide that the said port, settlement, and territory may be annexed to and form part of our Colony of the Cape of Good Hope:

Now we do, by these our Letters Patent, under the Great Seal of Our United Kingdom of Great Britain and Ireland, ratify and confirm the aforesaid Proclamation of the 12th day of March, 1878. And we do further authorize our Governor for the time being of our said Colony of the Cape of Good Hope, by Proclamation under his hand and the public seal of the said Colony, to declare that, from and after a day to be therein mentioned, the said port, settlement, and territory shall be annexed to and form part of our said Colony. Provided always that our said Governor issues no such Proclamation as aforesaid until the Legislature of our said Colony of the Cape of Good Hope shall have passed a law providing that the said port, settlement, and territory shall, on the day aforesaid, become part of our said Colony, and subject to the laws in force therein. Provided also that the application of the said laws to the said port, settlement, and territory may be modified either by such Proclamation as aforesaid, or by any law or laws to be from time to time passed by the Legislature of our said Colony for the government of the said port, settlement, and territory so annexed.

2. And we do hereby reserve to us, our heirs and successors, full power and authority, from time to time, to revoke, alter, or amend these our Letters Patent as to us or them shall seem meet; and we do hereby further reserve to us, our heirs and successors, full power and authority to erect by Letters Patent the said port, settlement, and territory into a separate Colony, with or without any adjacent territory, or to include the same in any adjacent British Colony or Colonies for the time being established in South Africa.

3. And we do further direct and enjoin that these our Letters Patent shall be read and proclaimed at such place or places as our said Governor shall think fit within our said Colony of the Cape of Good Hope.

In witness whereof we have caused these our letters to be made patent. Witness ourself at Westminster, the 14th day of December, in the 42nd year of our reign.

By warrant under the Queen's Sign Manual.

C. ROMILLY.

3. ACT of the Government of the Cape of Good Hope, to provide for the Annexation to that Colony of the Port or Settlement of Walfish Bay, on the West Coast of Africa, and of certain Territory surrounding the same, and of certain British Territories on the St. John's River, in South Africa. [Act 35 of 1884]

WHEREAS it is expedient that the Port or Settlement of Walfish Bay, situated on the west coast of South Africa, to the north of the Tropic of Capricorn, together with certain territory surrounding the same, and bounded as follows, viz.: on the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppmansdorp; [on the east by a line from Scheppmansdorp] to the Rooibank, including the plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the last 10 miles of the course of the said Swakop River, and on the west coast by the Atlantic Ocean, be annexed to this Colony; and whereas by Her Majesty's Letters Patent, bearing date at Westminster the 14th day of December, 1878, and passed under the Great Seal of the United Kingdom of Great Britain and Ireland, the Governor for the time being of this Colony was authorized by Proclamation under his hand and the public seal of this Colony to declare that, from and after a day to be herein mentioned, the said Port, Settlement, and territory, as in the said Letters Patent described, should be annexed to and form part of this Colony: And further whereas it is expedient that the port and tidal estuary of the St. John's River in South Africa, and certain lands on the banks of the said river forming part of Her Majesty's dominions be also annexed to this Colony; and whereas by Her Majesty's Letters Patent, bearing date at Westminster, 10th day of October, 1881, and passed under the Great Seal of the United Kingdom of Great Britain and Ireland, the Governor for the time being of this Colony was authorized by Proclamation under his hand and the public seal of this Colony to declare that, from and after the day to be therein mentioned, the said territories should be annexed to and form part of this Colony, and by Proclamation to signify the limits of the said territory so annexed, provided that in the case of either of the territories to be so annexed, no such proclamation should be issued until the Legislature of this Colony should have passed a law providing that the said territories shall, on the day aforesaid, become part of this Colony and subject to the laws in force therein: and provided also, that the application of the said laws to the said territories might be modified either by such Proclamation as aforesaid or by any law or laws to be from time to time passed by the Legislature of this Colony for the government of the said territories so annexed: And whereas it is expedient that a law should be enacted providing that the said respective territories shall, on the day to be mentioned in that behalf in a Proclamation or Proclamations of the Governor as aforesaid, become part of this Colony: Be it enacted by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council and House of Assembly thereof, as follows:

1. From and after such day as the Governor shall, pursuant to the powers in that behalf contained in the said Letters Patent, by Proclamation under his hand and the public seal of this Colony, fix in that behalf the Port or Settlement of Walfish Bay on the West Coast of Africa, and certain territory surrounding the same, the limits of which are defined in the Letters Patent of the 14th December, 1878, aforesaid, and the British territories on the St. John's River, with the limits and name in any such Proclamation signified, shall respectively become and be part of the Colony of the Cape of Good Hope, and subject to the laws in force therein, except as the application of the same to the said respective territories may be modified by any such Proclamation.

2. From and after the annexation of the said respective territories to this Colony as aforesaid, the laws which may be in force therein under and by virtue of the last preceding section may, until it shall be otherwise provided by Act or Parliament, be repealed, altered, amended, and modified, and new laws applicable to the said territories respectively may be made, and may be repealed, altered, amended, and modified by the Governor; and no Act hereafter passed by the Parliament of this Colony shall extend or be deemed to extend to the said territories or any or either of them unless such Act shall be extended thereto in express words either contained therein or in some other Act of Parliament, or unless the operation thereof shall be extended to any or either of such territories by the Governor, and no Proclamation published in the Gazette after any Proclamation or Proclamations as in the last preceding section mentioned shall be deemed to extend or apply to the said territories, or any or either of them, unless the same shall be declared in express words contained in such or some other Proclamation as aforesaid to extend or apply thereto.

3. The Court of the Eastern Districts shall have the jurisdiction concurrent with that of the Supreme Court in and over all causes arising, and persons residing and being, within the territory of St. John's River so to be annexed as aforesaid.

4. This Act may be cited as the "Walfish Bay and St. John's River Territories Annexation Act, 1884."

4. PROCLAMATION by the Governor of the Cape of Good Hope and High Commissioner for South Africa, annexing Walfish Bay to the Colony of the Cape of Good Hope. — Aug. 7, 1884. [75 B.F.S.P. 407]

PROCLAMATION by his Excellency the Right Honourable Sir Hercules George Robert Robinson, a Member of Her Majesty's Most Honourable Privy Council, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Governor and Commander-in-chief of Her Majesty's Colony of the Cape of Good Hope in South Africa, and the Territories and Dependencies thereof, and of Tembuland, Emigrant Tambookieland, Bomvanaland and Galekaland, and Her Majesty's High Commissioner, &c.

WHEREAS it is enacted by the Act No. 85 of 1884, intituled "An Act to provide for the annexation to the Colony of the Cape of Good Hope of the Port or Settlement of Walfish Bay on the West Coast of Africa, and certain territory surrounding the same, and of certain British territories in the St. John's River in South Africa," that from and after such day as the Governor shall, pursuant to the powers in that behalf contained in Her Majesty's Letters Patent, bearing date at Westminster the 14th day of December 1878, by Proclamation under his hand and the public seal of this Colony, fixed in that behalf, the Port or Settlement of Walfish Bay on the Port or Settlement of Walfish Bay on the West Coast of Africa, and certain territory surrounding the same, the limits of which are defined in the Letters Patent aforesaid, shall become and be part of the Colony of the Cape of Good Hope, and subject to the laws in force therein, except as the application of the same to the said Port or Settlement of Walfish Bay and certain territory surrounding the same may be modified by any such Proclamation;

Now, therefore, I, the Governor aforesaid, under and by virtue of the powers aforesaid, do hereby proclaim, declare, and make known, that I have fixed the date hereof as the day from and after which the said Port or Settlement of Walfish Bay and certain territory surrounding the same, and included under the following limits, that is to say: on the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppman's Dorp; on the east by a line from Scheppman's Dorp to the Rooibank, including the plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the last 10 miles of the course of the Swakop River, and on the west by the Atlantic Ocean, shall, under the name, designation, and title of Walfish Bay, become and be part of the Colony of the Cape of Good Hope, and subject to the laws in force therein.

2. I do further proclaim a Court of Resident Magistrate to be erected, constituted, and established for and within the said territory of Walfish Bay, and the said Court shall be holden by and before the Resident Magistrate for the territory aforesaid.

God Save the Queen!

Given under my hand and the public seal of the Colony of the Cape of Good Hope, this 7th day of August, 1884.

(L.S.) HERCULES ROBINSON, Governor.

By command of his Excellency the Governor in Council, THOMAS UPINGTON.

5. AGREEMENT between Germany and Great Britain Respecting Zanzibar, Heligoland and the Spheres of Influence of the Two Countries in Africa, signed at Berlin, 1 July 1890. [82 B.F.S.P. 35, 173 C.T.S. 271]

THE Undersigned,

Sir Edward Baldwin Malet, Her Britannic Majesty's, Ambassador

Extraordinary and Plenipotentiary;

Sir Henry Percy Anderson, Chief of the African Department of Her Majesty's Foreign Office;

The Chancellor of the German Empire, General von Caprivi;
The Privy Councillor in the Foreign Office, Dr. Krauel;

Have, after discussion of various questions affecting the Colonial interests of Germany and Great Britain, come to the following agreement on behalf of their respective Governments:

* * *

III. In South-west Africa the sphere in which the exercise of influence is reserved to Germany is bounded —

1. To the south by a line commencing at the mouth of the Orange River, and ascending the north bank of that river to the point of its intersection by the 20th degree of east longitude.

2. To the east by a line commencing at the above-named point, and following the 20th degree of east longitude to the point of its intersection by the 22nd parallel of south latitude, it runs eastward along that parallel to the point of its intersection by the 21st degree of east longitude; thence it follows that degree northward to the point of its intersection by the 18th parallel of south latitude; it runs eastward along that parallel till it reaches the River Chobe; and descends the centre of the main channel of that river to its junction with the Zambezi, where it terminates.

It is understood that under this arrangement Germany shall have free access from her Protectorate to the Zambezi by a strip of territory which shall at no point be less than 20 English miles in width.

The sphere in which the exercise of influence is reserved to Great Britain is bounded to the west and northwest by the above-mentioned line. It includes Lake Ngami.

The course of the above boundary is traced in general accordance with a Map officially prepared for the British Government in 1889.

The delimitation of the southern boundary of the British territory of Walvis Bay is reserved for arbitration, unless it shall be settled by the consent of the two Powers within two years from the date of the conclusion of this Agreement. The two Powers agree that, pending such settlement, the passage of the subjects and the transit of goods of both Powers through the territory now in dispute shall be free; and the treatment of their subjects in that territory shall be in all respects equal. No dues shall be levied on goods in transit. Until a settlement shall be effected, the territory shall be considered neutral.

6. ACT to make provision as to certain matters in respect of the relations between the Union and the Mandated Territory of South-West Africa. [Act 24 of 1922]

1. Administration of and legislation for Walvis Bay as if it were part

of the mandated territory. —

(1) From a date to be fixed by the Governor-General by proclamation in the *Gazette* (which date shall also further be notified by the Administrator of the mandated territory in the *Official Gazette* thereof) the port and settlement of Walvis Bay which forms part of the province of the Cape of Good Hope shall be administered as if it were part of the mandated territory and as if inhabitants of the said port and settlement were inhabitants of the mandated territory; and the powers conferred upon the Governor-General by Section 2 of Act No. 35 of 1884 of the Cape of Good Hope to repeal, alter, amend or modify any law in force in that port and settlement and to make new laws applicable thereto may be delegated by the Governor-General to the Administrator of the mandated territory to the intent that the said Administrator may, by the repeal, alteration, amendment or modification of laws and the making of new laws, bring the laws in force in that port or settlement into conformity with the laws of the mandated territory.

(2) Every proclamation by the said Administrator making such a law and every regulation made by him in respect of the said port and settlement shall be deemed to be sufficiently promulgated and published in the *Official Gazette* of the mandated territory.

* * *

(4) No Act of the Union Parliament passed after the date fixed as aforesaid shall apply to the said port and settlement unless by such Act it is specifically expressed so to apply or unless it is declared to apply by proclamation of the Governor-General in the *Gazette*.

(5) As from the date fixed as aforesaid the said port and settlement shall for all judicial purposes be regarded as forming part of the mandated territory and not as forming part of the province of the Cape of Good Hope.

* * *

(10) This Act may be cited for all purposes as "The South-West Africa Affairs Act, 1922."

7. Walvis Bay Administration. By His Royal Highness the Governor-General. [Proclamation 145 of 1922]

UNDER and by virtue of the authority vested in me by subsection (1) of Section 1 of the South-West Africa Affairs Act, 1922, I do hereby fix the First day of October, 1922, as the date from which the port and settlement of Walvis Bay, which forms part of the Province of the Cape of Good Hope, shall be administered as it were part of the mandated territory of South-West Africa and as if inhabitants of the said port and settlement were inhabitants of the said territory.

I do further, under and by virtue of the authority aforesaid, as from the said First day of October, 1922, delegate to the Administrator of the mandated territory of South-West Africa the powers conferred upon the Governor-General by Section 2 of Act No. 35 of 1884 of the Cape of Good

Hope, to repeal, alter, amend or modify any law in force in the port and settlement of Walvis Bay and to make new laws applicable to that port and settlement to the intent that the said Administrator may, by the repeal, alteration, amendment or modification of laws and the making of new laws bring the laws in force in the port and settlement of Walvis Bay into conformity with the laws of the mandated territory of South-West Africa.

GOD SAVE THE KING

Given under my Hand and the Great Seal of the Union of South Africa at Durban this 11th day of September, One Thousand Nine Hundred and Twenty-Two.

ARTHUR FREDERICK,
Governor-General.

By Command of His Royal Highness the Governor-General-in-Council.

J. C. SMUTS.

8. Walvis Bay Administration. [Proclamation 30 of 1922]

WHEREAS His Royal Highness the Governor-General of the Union of South Africa has under and by virtue of the authority vested in him by sub-section (1) of section one of the South-West Africa Affairs Act, 1922, been pleased to fix by Proclamation dated at Durban on the 11th day of September, 1922, and published in the Gazette of the Union dated 15th September, 1922, the First day of October, 1922, as the date from which the port and settlement of Walvis Bay, which forms part of the Province of the Cape of Good Hope of the Union, shall be administered as if it were part of the Mandated Territory of South-West Africa and as if its inhabitants were inhabitants of the said Territory;

AND WHEREAS under and by virtue of the authority aforesaid, His Royal Highness the Governor-General of the Union has been pleased as from the said First day of October, 1922, to delegate to me as Administrator of the Mandated Territory of South-West Africa, the powers conferred upon him by section two of Act No. 35 of 1884 of the Cape of Good Hope, to repeal, alter, amend or modify any law in force in the port and settlement of Walvis Bay and to make new laws applicable to that port and settlement to the intent that I may, by the repeal, alteration, amendment or modification of laws and the making of new laws bring the laws in force in the port and settlement of Walvis Bay into conformity with the laws of the Mandated Territory of South-West Africa;

NOW THEREFORE, I do hereby proclaim, declare and make known as follows: —

1. The said port and settlement of Walvis Bay shall be deemed to form portion of the District of Swakopmund created within this Territory under the provisions of section two of the Magistrates' Courts Act, 1917, of the Union Parliament as applied to this Territory by

section nine of the Administration of Justice Proclamation, 1919, and Proclamation No. 40 of 1920, dated the 2nd day of September, 1920, shall be and is hereby amended accordingly.

2. (1) From and after the First day of October, 1922, all laws now enforced within the said port and settlement of Walvis Bay shall be and are hereby repealed and from that date the law as existing and applied in the Mandated Territory of South-West Africa on that date shall be of force and effect within the said port and settlement.

(2) From and after the said First day of October, 1922, every enactment issued by the Administrator of the Territory of South-West Africa having the force of law within the said Territory shall be of force and effect within the said port and settlement unless the operation thereof within the said port and settlement is expressly excluded.

3. Every suit and proceeding civil or criminal pending in the Court of the Magistrate of Walvis Bay or in the Cape of Good Hope Provincial Division of the Supreme Court of South Africa at the date of the taking effect of this Proclamation shall be regarded as having by virtue of this Proclamation been removed into the Court of the Magistrate of the District of Swakopmund or the High Court of South-West Africa as the case may be and may be carried on, tried, heard and determined in such lastmentioned courts in like manner as nearly as may be as if they had been instituted or taken in those courts subsequent to the date of the taking effect of this Proclamation provided that —

(a) All suits and proceedings relating to rights, privileges, obligations or liabilities acquired, accrued or incurred prior to the First day of October, 1922, shall be determined according to the law in force in the said port and settlement at the time of acquisition, accrual or incurrence; and

(b) All offenses committed prior to the taking effect of this Proclamation shall be tried and determined according to the criminal law in force in the said port and settlement prior to the First day of October, 1922.

4. (1) Any license, permit or authority issued under the authority of any law in force in the said port and settlement before the First day of October, 1922, shall remain valid for the period for which it was issued and any duty, charge, fee or payment payable thereunder shall remain payable but no additional duty, charge, fee or payment shall become payable thereon by virtue of the provisions hereof.

(2) When any such licence, permit or authority is renewable or the issue of a similar licence, permit or authority is permissible under the law in force in the said port and settlement after the 30th day of September, 1922, but such renewal or issue cannot be immediately granted it shall be lawful for the person having lawful authority to grant such renewal or issue to grant a temporary licence, permit or authority for such period as may elapse before such renewal or issue is possible subject to such payment as the Administrator may direct.

5. All taxes, duties, dues and revenue of every kind and nature payable within the said port and settlement and due to or claimable by the Union Government or the Provincial Administration of the Province

of the Cape of Good Hope at the date of the taking effect of this Proclamation shall become, be and continue claimable by and payable to the Administration of South-West Africa and shall be collected and accounted for in the like manner as the taxes, dues and revenue according to the nature and kind thereof respectively are or ought to be collected in the Territory of South-West Africa.

6. This Proclamation may be cited for all purposes as the Walvis Bay Administration Proclamation, 1922, and shall commence and take effect on the First day of October, 1922.

GOD SAVE THE KING.

Given under my Hand and Seal at Pretoria this 2nd day of October, 1922.

GIJS. R. HOFMEYR,
Administrator.

9. ACT to amend the South-West Africa Affairs Act, 1922. [Act 24 of 1922]

1. Section *one* of the South-West Africa Affairs Act, 1922, is hereby amended by the substitution for sub-section (4) of the following sub-section:

(4) Any Act of Parliament or proclamation by the Governor General, passed or issued after the date fixed as aforesaid, which is in force or which may come into operation in the mandated territory, shall, as long as and to the extent to which it is in force also in the said port and settlement, unless the Act or proclamation otherwise provides.

2. This Act shall be called the South-West Africa Affairs Amendment Act, 1944.

10. NEW PROVISION for the Administration of Walvis Bay. [Proclamation R.202 of 1977]

Whereas from 7 August 1884 the port and settlement of Walvis Bay formed part of the Colony of the Cape of Good Hope and was administered and legislated for as such until 30 May 1910;

And whereas from 31 May 1910 the said port and settlement has formed part of the Province of the Cape of Good Hope and was administered and legislated for as such until 30 September 1922;

And whereas from 1 October 1922 and in terms of the South-West Africa Affairs Act, 1922 (Act 24 of 1922), the said port and settlement was for reasons of expediency administered and legislated for as if it were part of the Territory of South-West Africa and as if inhabitants thereof were inhabitants of the said Territory;

And whereas it is expedient and desirable again to administer and legislate for the said port and settlement as part of the Province of the Cape of Good Hope;

Now, therefore, under section 38 of the South-West Africa Constitution Act, 1968 (Act 39 of 1968), I make the laws set out in the Annexure.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria this Thirtieth day of August, One thousand Nine hundred and Seventy-seven.

N. DIEDERICHS: State President.

By Order of the State President-in-Council:

B. J. VORSTER.

ANNEXURE

Definitions

1. In this Proclamation, unless the context otherwise indicates —

* * *

(iii) "province" means the Province of the Cape of Good Hope; (v)

* * *

(v) "territory" means the Territory of South-West Africa;(ii)

(vi) "Walvis Bay" means the port and settlement of Walfish Bay mentioned in the Walfish Bay and St. John's River Territories Annexation Act, 1884 (Act 35 of 1884 of the Cape of Good Hope), and includes the territory surrounding it and bounded as described in the said Act. (vi)

Administration of Walvis Bay, and application of laws in force therein and in the province

2.

(1) Walvis Bay shall cease to be administered as if it were part of the territory and as if inhabitants thereof were inhabitants of the Territory and shall again be administered as part of the province.

(2) Any law in force in the said Walvis Bay on the date immediately prior to the date of coming into operation of this subparagraph shall, subject to the provisions of paragraph 4, continue to apply therein until repealed, or except in so far as it may be amended or modified, in terms of this Proclamation or any other law.

(3) Any law in force in the province and not already in operation in Walvis Bay or any law coming into force in the province shall, subject to the provisions of paragraph 3, also apply in the said Walvis Bay.

* * *

Electoral matters

5. Walvis Bay shall cease to be part of the Electoral Division of Omaruru for the election of members of the House of Assembly and be deemed not to have been part thereof at all relevant times, and shall become part of the Electoral Division of Namakwaland and be deemed to

have been part thereof at all relevant times.

* * *

Short title and commencement

8. This Proclamation shall be called the Walvis Bay Administration Proclamation and shall come into operation on 1 September 1977.

SCHEDULE
LAWS REPEALED OR AMENDED

No. and year of Law	Title	Extent of repeal or amendment
Act 24 of 1922	South-West Africa Affairs Act, 1922	The repeal of the whole.
Act 39 of 1968	South-West Africa Constitution Act, 1968	The repeal of section 36.

APPENDIX "B"

1. ORDINANCE for declaring certain Guano to be the Property of Her Majesty the Queen. [Ordinance 4 of 1845]

WHEREAS considerable quantities of the substance commonly called "guano" have been found in and upon certain islands or rocks in the sea within the limits of this Colony and its dependencies: And whereas it is possible that further quantities of the said substance may exist and be hereafter discovered at other places within the said limits: And whereas doubts exist whether the said substance being merely or mainly the dropping of unreclaimed birds of a base nature can in law, though a merchantable article, be deemed to be property or possessed of legal value: And whereas it is expedient that such doubts should be removed and that all of the said substance lying and being in and upon any place or territory within the limits aforesaid, and not granted or belonging to any private individual, should be declared to be the property of Her Majesty the Queen, and that provision should be made for preventing or punishing the unauthorized removal of the same: Be it therefore enacted and declared by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council thereof, that all of the said substance commonly called guano which may now or at any time hereafter be found lying and being in or upon any island, rock, or other place not being the property of any private person or persons and within the limits of this Colony and its dependencies, shall be deemed and taken to be property and to belong to and be in the lawful possession of Her Majesty the Queen, her heirs and successors.

* * *

6. And be it enacted that this Ordinance shall commence and take effect from and after the date of the promulgation thereof [Jan. 30, 1845].

2. PROCLAMATION by His Excellency Sir George Grey. [Proclamation 53 of 1861]

Knight Commander of the Most Honourable Order of the Bath, Governor and Commander-in-Chief of Her Majesty's Colony of the Cape of Good Hope in South Africa, and of the Territories and Dependencies thereof, and Vice-Admiral of the same, and Her Majesty's High Commissioner, &c., &c., &c., &c.

WHEREAS, the Island of Ichaboe was, on the 21st day of June last past, taken possession of for and in the name of Her Britannic Majesty Queen Victoria, and declared a dependency of the Cape of Good Hope: And whereas it is expedient that, subject to the pleasure of Her Majesty in that behalf, Her dominion [sic] shall also be declared over a cluster of small Islands or Rocks adjacent to the said Island of Ichaboe, now therefore, I do hereby proclaim, declare, and make known, that the sovereignty

and dominion of Her said Britannic Majesty, Queen Victoria, shall be, and the same are hereby declared over the following Islands or Rocks adjacent to Ichaboe, that is to say, Hollamsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession, Albatross Rock, Pomona, Plumpudding, and Roastbeef, or Sinclair's Island. This Proclamation of Her Majesty's sovereignty and dominion to take effect forthwith, but to be subject to Her Majesty's gracious confirmation and disallowance.

GOD SAVE THE QUEEN!

Given under the Public Seal of the Settlement of the Cape of Good Hope, this 12th day of August, 1861.

G. GREY, Governor.

By command of His Excellency the Governor,

RICHARD SOUTHEY,
Acting Colonial Secretary.

3. PROCLAMATION by His Excellency Sir Philip Edmond Wodehouse. [Proclamation 27 of 1864]

Knight Commander of the Most Honourable Order of the Bath, Governor and Commander in Chief of Her Majesty's Colony of the Cape of Good Hope in South Africa, and of the Territories and Dependencies thereof, and Vice-Admiral of the same, and Her Majesty's High Commissioner, &c., &c., &c.

WHEREAS, by a Proclamation bearing date the 12th day of August, 1861, it was proclaimed and declared that the Sovereignty of Her Britannic Majesty Queen VICTORIA should be, and the same was thereby, declared over certain Islands on the Coast of Africa, that is to say, Hollamsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession, Albatross Rock, Pomona, Plumpudding and Roastbeef, or Sinclair's Island, and that such Proclamation should be subject to Her Majesty's gracious confirmation and disallowance; and whereas such Proclamation has been recently brought to the knowledge of Her Majesty's Government:

Now, therefore, I do hereby proclaim and declare that Her Majesty has been pleased to disallow the said Proclamation, and that the several Islands, Islets, and Rocks referred to therein are not to be viewed as British Territory.

GOD SAVE THE QUEEN!

Given under the Public Seal of the Settlement of the Cape of Good Hope, this 9th day of May, 1864.

P. E. WODEHOUSE, Governor.

By command of His Excellency the Governor,

RAWSON W. RAWSON,
Colonial Secretary.

4. PROCLAMATION by His Excellency Sir Philip Edmond Wodehouse.
[Proclamation 66 Of 1866]

Knight Commander of the Most Honourable Order of the Bath, Governor and Commander-in-Chief of Her Majesty's Colony of the Cape of Good Hope, in South Africa, and of the Territories and Dependencies thereof, and Vice-Admiral of the same, and Her Majesty's High Commissioner, &c., &c., &c.

WHEREAS the Island of Ichaboe was, on the 21st day of June, 1861, taken possession of for and in the name of Her Britannic Majesty Queen Victoria, and declared a dependency of the Cape of Good Hope: And whereas by a Proclamation bearing date the 12th day of August in the same year, it was proclaimed and declared that the Sovereignty of Her said Majesty should be, and the same was thereby declared over certain Islands, Islets, or Rocks on the Coast of Africa, adjacent to the said Island of Ichaboe, that is to say: Hollamsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax Possession, Albatross Rock, Pomona, Plumpudding and Roastbeef, or Sinclair's Islands, and that such Proclamation should be subject to Her Majesty's gracious confirmation or disallowance: And whereas Her Majesty was pleased on such lastmentioned Proclamation being brought to her knowledge to disallow the same: And whereas by a Proclamation bearing date the 9th day of May, 1864, such disallowance was publicly notified, and it was thereby declared that the said several Islands, Islets, or Rocks in the said Proclamations of the 12th day of August, 1861, and the 9th day of May, 1864, respectively, should not be viewed as British territory: And whereas it has, since the date of the Proclamation lastly hereinbefore recited, seemed good to her said Majesty that the same Islands, Islets, or Rocks should be taken possession of for and on behalf of Her Majesty: And whereas it has also seemed and does seem to Her Majesty that it is expedient, and that it is for the interest as well of Her Majesty's dominions and subjects, especially of Her said Colony of the Cape of Good Hope and the inhabitants thereof, that the same Islands, Islets, or Rocks, and the said Island of Ichaboe, should be annexed to and become and form part of the Colony of the Cape of Good Hope: And whereas, pursuant to orders in that behalf received, CHARLES CODRINGTON FORSYTH, Esquire, Captain of Her Majesty's Steam Frigate *Valorous*, did on the 5th day of May last past proceed to Penguin Island aforesaid, being one of the said Islands, Islets, or Rocks, and did there, by Proclamation bearing date the 5th day of May, take possession of the same, in the name of all the said Islands, Islets, or Rocks hereinbefore and in the said Proclamations of the 12th day of August, 1861, and the 9th day of May, 1864, respectively mentioned, for and on behalf of Her Majesty, and did thereby declare the sovereignty and dominion of Her Majesty over all the same Islands, Islets, or Rocks: Now,

therefore, I do hereby proclaim and make known that the said Island of Ichaboe, and the said Islands, Islets, or Rocks adjacent thereto, that is to say: Hollamsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax Possession, Albatross Rock, Pomona, Plumpudding and Roastbeef, or Sinclair's Islands, shall be from the day of the date hereof, and the same are hereby annexed to and form part of the said Colony of the Cape of Good Hope.

GOD SAVE THE QUEEN!

Given under the Public Seal of the Settlement of the Cape of Good Hope, this 16th day of July, 1866.

P. E. WODEHOUSE, Governor.

By command of His Excellency the Governor,

R. SOUTHEY,
Colonial Secretary.

5. ACT to Confirm the Annexation to this Colony of the Islands, Islets, or Rocks, on the South-West Coast of South Africa, Called Ichaboe, Holland's Bird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession Island, Albatross Rock, Pomona, Plumpudding and Roast Beef or Sinclair's Island. [Act 1 of 1873]

WHEREAS the Island of Ichaboe on the southwest coast of South Africa was, on the twenty-first day of June, 1861, duly taken possession of for behoof of Her Britannic Majesty Queen Victoria, and on her behalf: And whereas on the fifth day of May, 1866, certain other islands, islets, and rocks on the said southwest coast of South Africa, that is to say: — Holland's Bird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession Island, Albatross Rock, Pomona, Plumpudding and Roast Beef or Sinclair's Island, hereinafter called the Penguin Islands, were also duly taken possession of for behoof of her said Majesty and on her behalf: And whereas by a proclamation dated the sixteenth day of July, 1866, by His Excellency Sir Philip Edmond Wodehouse, Knight Commander of the Most Honourable Order of the Bath, then the Governor of this Colony, the said island of Ichaboe and the said Penguin Islands were declared to be annexed to and form part of this Colony: And whereas it is expedient that the declarations in the said proclamation contained should be confirmed by the Parliament of this Colony by an Act thereof: Be it therefore enacted by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council and House of Assembly thereof, as follows:

I. The declarations contained in the said proclamation of the sixteenth day of July, 1866, shall be, and the same are hereby confirmed; and the said Island of Ichaboe and the said Penguin Islands shall be held to have been duly annexed to and have formed part of the Col-

ony from and after the date of the said proclamation.

II. Notwithstanding such annexation as in this Act is contained, the said Islands shall for the purposes of the laws relating to the Customs of this Colony be deemed to be foreign ports respectively, until the Parliament shall otherwise determine.

III. This Act may be cited for all purposes as the "Annexation of Ichaboe and Penguin Islands Act, 1873."

6. **BRITISH LETTERS PATENT** appointing the Governor of the Colony of the Cape of Good Hope to be Governor of the Island of Ichaboe and the Penguin Islands, and authorizing the Annexation of the aforesaid Islands to that Colony. — Westminster, February 27, 1867. [67 B.F.S.P. 554]

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to all to whom these presents shall come, greeting:

Whereas the Island of Ichaboe, on the southwest coast of South Africa, was on the 21st day of June, 1861, duly taken possession of for us and on our behalf;

And whereas on the 5th day of May, 1866, certain other islands, islets, and rocks on the said southwest coast of South Africa, that is to say, Hollandsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax Possession, Albatross Rock, Pomona, Plumpudding and Roast Beef or Sinclair's Island, which said islands, islets, and rocks are hereinafter called the Penguin Islands, were also duly taken possession of for us and on our behalf;

And whereas, by Proclamation, dated the 16th day of July, 1866, by his Excellency Sir Philip Edmund Wodehouse, Governor and Commander-in-chief of our Colony of the Cape of Good Hope and of the territories and dependencies thereon and Vice-Admiral of the same, the said Island of Ichaboe and the said Penguin Islands were declared to be annexed to, and to form part of, the said Colony of the Cape of Good Hope;

And whereas doubts are entertained touching the legality of the said annexation of the said Island of Ichaboe and the said Penguin Islands by Proclamation and it is expedient that such doubts should be removed;

And whereas it is further expedient that the said Island of Ichaboe and the said Penguin Islands should be annexed to, and form part of, the said Colony of the Cape of Good Hope, if the Legislative Council and House of Assembly thereof should desire such annexation;

And whereas it is expedient that, until such annexation, the affairs of the said Island of Ichaboe and of the said Penguin Islands should be administered by a Governor, to be for that purpose appointed by us;

Now know ye, that in consideration of the premises, we, of our special grace, mere motion, and certain knowledge, have thought fit to constitute and appoint, and by these presents do constitute and appoint, the

Governor and Commander-in-chief for the time being of our said Colony of the Cape of Good Hope to be the Governor of the said Island of Ichaboe and Penguin Islands, and we do hereby invest in him all the powers and authorities which by these presents are given and granted to the Governor for the time being of the said Island of Ichaboe and Penguin Islands.

And we do hereby further declare our pleasure to be, that in the event of the death or incapacity of the said Governor and Commander-in-chief of the said Colony of the Cape of Good Hope, or, in the event of his absenting himself from the said Colony otherwise than for the purpose of visiting the said Island of Ichaboe or the said Penguin Islands, then and in either of these cases the officer for the time being who may be administering the Government of the said Colony of the Cape of Good Hope shall be and he is hereby constituted and appointed Governor for the time being of the said Island of Ichaboe and Penguin Islands.

And we do hereby further authorize and empower the said Governor of the said Island of Ichaboe and the Penguin Islands to make all such rules and regulations as may lawfully be made by our authority for the order, peace, and good government of the said Island of Ichaboe and Penguin Islands, subject, nevertheless, to any instructions which may from time to time be hereafter given him under our sign manual and signet, or through one of our Principal Secretaries of State.

And we do hereby further authorize and empower the said Governor of the said Island of Ichaboe and Penguin Islands, so long as he shall be Governor thereof, by any instrument under his hand and seal, to make leases and other dispositions for a term or terms of years, of any of the said Islands of Ichaboe or Penguin Islands, as aforesaid, or any part or parts thereof, and to issue licenses authorizing the person or persons designated therein to take guano or other fertilising substances or produce from the said Islands of Ichaboe or Penguin Islands, or any of them, and to insert in such leases, dispositions, or licenses, as the case may be, all such reservations by way of rent, or royalty, or otherwise, and all such conditions, exceptions, and stipulations as may to him seem advisable: Provided always that, in the execution of the powers hereby conferred on him, he shall conform to such instructions as he may from time to time receive from us, under our sign manual and signet, or through one of our Principal Secretaries of State.

And we do hereby further authorize and empower the said Governor, as he may deem expedient, under his hand and seal, to confirm any grant, disposition, lease or license, which may have been made or issued before the date of these presents, to any person or persons in respect to the said Island of Ichaboe or the said Penguin Islands, or any of them, or any part thereof, by any Governor of the said Colony of the Cape of Good Hope, or to accept a surrender of any such grant, disposition, lease, or licence, and to make and issue any new disposition, lease, or licence to the persons surrendering the same, or their nominees, under the powers and in the manner hereinbefore declared.

And we do hereby further declare our pleasure to be that if any time hereafter the Legislative Council and House of Assembly of the said Colony of the Cape of Good Hope shall, by resolution or otherwise, request the said Governor of the said Island of Ichaboe and Penguin Islands to transfer the same to the said Colony of the Cape of Good Hope, for the purpose of their being annexed to and forming part of the said Colony, and shall by law provide that upon such transfer and annexation all laws which may be in force in the said Colony on the day on which the said Island of Ichaboe and Penguin Islands shall be annexed thereto shall immediately upon such annexation take effect and be in force in and upon the said islands so annexed, then the said Governor shall, and he is hereby authorized and empowered to transfer to the said Colony the said Island of Ichaboe and the said Penguin Islands, and from and after the date of such transfer the said islands so transferred shall be deemed and taken to be, and shall be, annexed to and form part of the said Colony of the Cape of Good Hope.

And we further declare our pleasure to be that the said Governor of the said Island of Ichaboe and Penguin Islands shall declare by Proclamation the said transfer, and from and after the date of such Proclamation these presents shall cease and be of none effect so far as relates to the appointment of a Governor of the said Islands of Ichaboe and Penguin Islands and his powers thereunder, but not further or otherwise, and not so as to affect any instruments, acts, matters, or things made or done by him while such Governor as aforesaid, in pursuance of the powers hereby conferred on him.

And we do hereby reserve to us, our heirs and successors, full power and authority from time and time to revoke, alter, or amend these our Letters Patent, as to us or them shall seem meet.

In witness whereof we have caused these our Letters to be made Patent. Witness ourself at Westminster, the 27th day of February, in the 30th year of our reign.

By warrant under the Queen's sign manual.

C. ROMILLY

7. ACT to repeal "The Annexation of Ichaboe and Penguin Islands Act, 1873," and to make other provisions in lieu thereof. [Act 4 of 1874]

WHEREAS the Island of Ichaboe, on the southwest coast of South Africa, was, on the 21st day of June, 1861, duly taken possession of for and on behalf of Her Majesty Queen Victoria: And whereas, on the 5th day of May, 1866, certain other islands, islets, and rocks on the said coast, viz., Hollandsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax Possession, Albatross Rock, Pomona, and Plumpudding and Roast Beef, or Sinclair's Island, hereinafter called the Penguin Islands, were also duly taken possession of for and on behalf of Her said Majesty: And whereas, by a Proclamation dated the 16th day of July, 1866, by his

Excellency Sir Philip Edmund Wodehouse, the then Governor of this Colony, the said Island of Ichaboe and the said Penguin Islands were declared to be annexed to and to form part of this Colony: And whereas doubts having been entertained touching the legality of the said annexation by the said Proclamation, Her said Majesty, by Her Letters Patent dated the 27th day of February, 1807, after reciting (amongst other things the said doubts) that it was expedient that the same should be removed, and that the said islands should be annexed to and form part of this Colony, if the Legislative Council and House of Assembly thereof should desire such annexation, and that until such annexation the affairs of the said islands should be administered by a Governor, to be for that purpose appointed by Her said Majesty, did constitute and appoint the Governor and Commander-in-chief for the time being of this Colony to be the Governor of the said islands, with certain powers therein mentioned, and did declare her pleasure to be that if at any time thereafter the said Legislative Council and House of Assembly should by resolution or otherwise request the said Governor of the said islands to transfer the same to this Colony for the purpose of their being annexed to and forming part thereof, and should by law provide that upon such transfer and annexation all laws which might be in force in this Colony on the day on which the said islands should be annexed thereto should immediately upon such annexation take effect and be in force in and upon the said islands so annexed, the said Governor should and was thereby authorized and empowered to transfer to this Colony the said islands, and from and after the date of such transfer the said islands so transferred should be deemed and taken to be, and should be, annexed to and form part of this Colony: And whereas it is expedient that the said islands shall be annexed to and form part of this Colony, and that, for the purpose of enabling the said annexation to be carried out according to the said Letters Patent, the said "Annexation of Ichaboe and Penguin Islands Act, 1873," which was passed in ignorance of the said doubts and of the said Letters Patent, should be repealed: Be it enacted by the Governor of the Cape of Good Hope, with the advice and consent of Legislative Council and House of Assembly thereof, as follows: —

1. "The Annexation of Ichaboe and Penguin Islands Act, 1873," is hereby repealed.
 2. Upon the transfer and annexation of the said Island of Ichaboe and the said Penguin Islands to this Colony, all laws which may then be in force in this Colony shall immediately upon such annexation take effect and be in force in and upon the said islands so annexed.
 3. This Act may for all purposes be cited as "The Ichaboe and Penguin Islands Act, 1874."
8. ACT to exempt temporarily the Island of Ichaboe and Penguin Islands from the operation of the Customs Laws of that Colony. [Act 5 of

1874]

WHEREAS in case of the annexation of the Island of Ichaboe and certain other islands, islets, and rocks following, and hereafter called the Penguin Islands, to wit: Hollandsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax Possession, Albatross Rock, Pomona, and Plumpudding and Roast Beef, or Sinclair's Island, it is expedient that the Customs Laws of this Colony should not at present be in force therein: Be it enacted by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council and House of Assembly thereof, as follows: —

1. Notwithstanding that the said Island of Ichaboe and the said Penguin Islands may be annexed to this Colony, the said islands shall, for the purposes of the laws relating to the Customs of this Colony, be deemed to be foreign ports respectively until the Parliament shall otherwise determine.

2. This Act may for all purposes be cited as "The Ichaboe and Penguin Islands Act, 1874."

9. PROCLAMATION by His Excellency Sir Henry Barkly. [Proclamation 45 of 1874]

Knight Grand Cross of the Most Distinguished Order of St. Michael and St. George, Knight Commander of the Most Honourable Order of the Bath, Governor and Commander-in-Chief of Her Majesty's Colony of the Cape of Good Hope in South Africa, and of the Territories and Dependencies thereof; and Her Majesty's High Commissioner, &c., &c., &c.

WHEREAS by Letters Patent of Her Majesty Queen Victoria bearing date the 27th day of February, 1867, after reciting, amongst other things, that the Island of Ichaboe, on the Southwest Coast of South Africa, had been duly taken possession of for her said Majesty and on her behalf, on the 26th day of June, 1861, and that on the 5th day of May, 1866, certain other Islands, Islets, and Rocks, on the said Southwest Coast of South Africa, that is to say, Hollandsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession, Albatross Rock, Pomona, and Plumpudding and Roastbeef, or Sinclair's Island (therein and hereinafter called the Penguin Islands), had also been duly taken possession of for her said Majesty and on her behalf; and that by a Proclamation dated the 16th day of July, 1866, by His Excellency Sir Philip Edmond Wodehouse, the then Governor and Commander-in-Chief of the Colony of the Cape of Good Hope, and of the Territories and Dependencies thereof, and Vice-Admiral of the same, the said Island of Ichaboe and the said Penguin Islands were declared to be annexed to and form part of the said Colony; and that doubts were entertained touching the legality of the said annexation of the said Islands by Proclamation, and that it was expedient that such doubts should be removed, and that the said Islands should be annexed to and form part of the said Colony, if the Legislative Council and House of Assembly thereof desire such annexation, and that

until such annexation it was expedient that the affairs of the said Island should be administered by a Governor to be for that purpose appointed by her said Majesty: her said Majesty did in and by the said Letters Patent constitute and appoint the Governor and Commander-in-Chief for the time being of the said Colony of the Cape of Good Hope to be the Governor of the said Island of Ichaboe and Penguin Islands, and did thereby vest in him all the powers and authorities which by the said Letters Patent were given and granted to the Governor for the time being of the said Island of Ichaboe and Penguin Islands, and did, (amongst other things), declare her pleasure to be that if at any time thereafter the Legislative Council and House of Assembly of the said Colony of the Cape of Good Hope should by resolution or otherwise request the Governor of the said Island of Ichaboe and Penguin Islands to transfer the same to the said Colony for the purpose of their being annexed to and forming part of the said Colony, and should by law provide that upon such transfer and annexation, all laws which might be in force in the said Colony on the day on which the said Island of Ichaboe and Penguin Islands should be annexed thereto, should immediately upon such annexation take effect and be in force in and upon the said Islands as annexed, then the said Governor should be and he was thereby authorized and empowered to transfer to the said Colony the said Island of Ichaboe and Penguin Islands, and from and after the date of such transfer the said Islands so transferred should be deemed and taken to be and should be annexed to and form part of the said Colony of the Cape of Good Hope: And whereas her said Majesty did by the said Letters Patent further declare her pleasure to be that the said Governor of the said Island of Ichaboe and Penguin Islands should declare by Proclamation the said transfer, and from and after the date of such Proclamation the said Letters Patent should cease and be of none effect, so far as related to the appointment of a Governor of the said Islands of Ichaboe and Penguin Islands and his powers thereunder, but not further or otherwise, and not so as to affect any instruments, acts, matters, or things, made or done by him while such Governor as aforesaid in pursuance of the powers thereby conferred on him.

And whereas the said Legislative Council and House of Assembly of the said Colony of the Cape of Good Hope have, by resolutions bearing date respectively the 16th and 11th days of June, 1874, requested me to transfer the said Island of Ichaboe and Penguin Islands to the said Cape of Good Hope for the purpose of their being annexed to and forming part of the said Colony, and have by law, to wit, by the "Ichaboe and Penguin Islands Act, 1874," provided that upon such transfer and annexation all laws which may then be in force in the said Colony shall immediately upon such annexation take effect and be in force in and upon the said islands so annexed.

I do hereby, pursuant to the said Letters Patent, proclaim, and make known, and declare, that I have, by an instrument bearing even date herewith, executed under and by virtue of the powers and authority vested in me by the said Letters Patent, transferred the said Island of

Ichaboe and the said Penguin Islands to the said Colony of the Cape of Good Hope, and that the said Islands shall henceforth be deemed, and taken to be, and shall be, annexed to and form part of the said Colony.

GOD SAVE THE QUEEN!

Given under my hand and the Public Seal of the Colony of the Cape of Good Hope, this 9th day of July, 1874.

By command of His Excellency the Governor in Council,

HENRY BARKLY, Governor.

J. C. MOLTENO,

Colonial Secretary.

10. GERMAN PROCLAMATION placing under the Protection of the German Emperor the Territory acquired by M. Luderitz on the South-west Coast of Africa. — Aug. 16, 1884. [75 B.F.S.P. 546]

(Translation.)

His Majesty the German Emperor William I, King of Prussia, has commanded me to proceed to Angra Pequena with His Majesty's two-decked corvette the *Elisabeth*, to place under the direct protection of His Majesty the territory belonging to M. A. Luderitz on the West Coast of Africa.

The territory of M. A. Luderitz will, according to official communication, be taken to extend from the north bank of the Orange River to the 26° south latitude, 20 geographical miles inland, including the islands belonging thereto by the law of nations.

In carrying out His Majesty's commands I herewith hoist the Imperial German flag, and thus place the abovementioned territory under the protection and sovereignty of His Majesty the Emperor William I, and call upon all present to give three cheers for His Majesty.

Long live his Majesty the Emperor William I. SCHERING,

Captain at Sea, and

Commandant of His Imperial Majesty's ship Elisabeth.

11. PROTOCOL between Germany and Great Britain for the Settlement of British Claims in Territories under German Protection in South-West Africa, signed at Berlin, 15 July 1886. [77 B.F.S.P. 1042, 168 C.T.S. 129]

The undersigned Commissioners, having met and discussed fully those British claims in the territories placed under German protection in South-West Africa, upon which Messrs. Bieber and Shippard, the Commissioners at Cape Town, had disagreed, agree to submit to their Governments the following recommendations: —

1. *Ebony Mines.*

That if Robert Lewis or his assigns desire to work this mine, he or they be at liberty to do so, and to convey the ore to the coast, until the 21st of September, 1898, without payment to, and without hindrance or interference by, the Colonial Company.

2. *Sandwich Harbour.*

That Mr. Anders Ohlson (trading as A. Ohlson and Co.) and Messrs. De Pass, Spence, and Co., respectively, be held to have acquired a full title in perpetuity for themselves and their assigns to the lands and buildings which they respectively have heretofore occupied in Sandwich Harbour for the purposes of the fishery, together with the right to each firm of taking at any time any other sites on the shore of this harbour, and of erecting buildings thereon, should the sand, as has happened before, shift so as to render useless the land which is now, or at any future time may be, occupied by the buildings; it being understood that any site so taken becomes the absolute property of Messrs. De Pass, Spence, and Co., or of Mr. Ohlson, or their respective assigns, as the case requires, and that they have no further claim to the land which they previously occupied; but that neither firm nor their assigns are entitled to take any site occupied by other persons, nor to take any site the occupation of which would interfere with other persons.

That it should be further recognized that the firms of A. Ohlson and De Pass, Spence, and Co. have the right of coast fishery in Sandwich Harbour, and along the coast between Sandwich Harbour and the point 23° 20' south latitude, 14° 31' east longitude, with the right of landing on and using for fishery purposes any part of the coast not in the private possession of third parties, subject always to the observance of any laws and regulations which may be issued by the competent authorities. The said firms shall not, however, have any right to hinder other persons from also fishing there, or from establishing themselves in Sandwich Harbour.

3. *Hottentot Bay.*

That Messrs. De Pass, Spence, and Co. have in like manner acquired a full title in perpetuity for themselves and their assigns to the guano deposits at Hottentot Bay, and to the land which they now occupy there for carrying on fishery or collecting of guano.

4. *Unnamed Islets and Rocks.*

That Messrs. De Pass, Spence, and Co., and their assigns, be free to make use, as they have hitherto done, of these islets and rocks, including Shark Island, without payment until the expiry of their lease, that is to say, until the 30th June, 1895; and if the British Government waive all claim to the sovereignty of these islands and rocks, and acknowledge the sovereignty of Germany over them, then that the latter Power should consent to confer no private rights over them to any persons other than the lessees for the time being of the 12 British islands named in the Letters Patent of the 27th February, 1867.

Upon this understanding the British Commissioner will recommend his Government to acknowledge forthwith the sovereignty of Germany in these islets and rocks.

5. *Mainland Claims.*

That Messrs. De Pass, Spence, and Co. should be held to have acquired for themselves and their assigns a full title in perpetuity to the Pomona mine, with 2 English miles of land round the mine on every side; and that they should have the right to use the lagoon for their vessels, and to make use of the land round the lagoon for all purposes as they have done hitherto, without payment and without hindrance or disturbance by the Colonial Company, and if irreconcilable disputes between the firm and the Company should arise as to the proper exercise of these rights on land, then that the chief officer of the German Government within the Protectorate shall allot to Messrs. De Pass, Spence, and Co., or their assigns, sufficient land for the purposes of their business, conveniently situated on the shore of the lagoon, and that the land so allotted shall become the absolute property in perpetuity of the persons to whom the same is allotted, but that such allotting of land shall in no way affect or lessen their right to use the lagoon for their vessels.

Berlin, July 15, 1886.

CHARLES S. SCOTT.

R. KRAUEL.

Sir E. Malet to Count Bismarck

M. LE SECRETAIRE d'ETAT,

Berlin, October 23, 1886.

Her Majesty's Government have had under their consideration the Protocol signed by Dr. Krauel and Mr. Scott, containing the joint recommendations of the Imperial and British Commissioners for a settlement of certain outstanding British claims in the Imperial Protectorate of South-west Africa, in regard to which the Commissioners at Cape Town failed to arrive at an agreement. I have now the honour to inform your Excellency, by direction of Her Majesty's Principal Secretary of State for Foreign Affairs, that the arrangements embodied in the Protocol in question are approved and accepted by Her Majesty's Government. In acquainting your Excellency with this decision, I am directed to add that Her Majesty's Government would be glad to be informed whether the Imperial Government in like manner approve and accept the arrangement in question.

I have, &c.,

Count Bismarck.

EDWARD B. MALET.

Count Hatzfeldt to the Earl of Iddesleigh.

(Translation.)

MY LORD,

German Embassy, London, November 13, 1886.

In a note of the 23rd ultimo the British Ambassador in Berlin in-

formed the Imperial Government that his Government agreed to the proposals contained in the Protocol, the German version of which is herewith inclosed, respecting the rights of British subjects in the South-West African territories under German protection, which Protocol was signed on the 15th July last by Mr. Scott, the First Secretary of the English Embassy in Berlin, and Dr. Krauel, Privy Councillor of Legation.

Sir Edward Malet stated at the same time that the British Government wished to be informed whether the Imperial Government also agreed to the proposals in question.

In reply, I am instructed to express the concurrence of my Government in the proposals made in the inclosed Protocol.

The Imperial Government is prepared to take the necessary steps to communicate the provisions of the Protocol to those interested, and as far as necessary to superintend the execution of those provisions through the Imperial officials in the protected territory.

I have, &c.,

The Earl of Iddesleigh.

v. HATZFELDT.

APPENDIX "C"

Mandate for German South West Africa

The Council of the League of Nations:

Whereas by Article 119 of the Treaty of Peace with Germany signed at Versailles on June 28th, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions, including therein German South-West Africa; and

Whereas the Principal Allied and Associated Powers agreed that, in accordance with Article 22, Part I (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory aforementioned, and have proposed that the Mandate should be formulated in the following terms; and

Whereas His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

Whereas, by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:

Confirming the said Mandate, defines its terms as follows:

Article 1

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

Article 2

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.

Article 3

The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on September 10th, 1919, or in any convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

Article 4

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

Article 5

Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

Article 6

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.

Article 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.

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 the 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.

The present Declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany.

Made at Geneva the 17th day of December, 1920.

