UNIVERSITY OF NAIROBI

AFRICA BEFORE THE WORLD COURT

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by Judge Taslim Olawale Elias, Q.C.,

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Judge Taslim Olawale Elias, QC.

JUDGE T.O. ELIAS

Born in November 1914 in Nigeria, Judge Taslim Olawale Elias had his University education at the University of London, where he graduated with BA, LLB, LLM, PhD and LLD between 1944 and 1962.

After holding a series of Research Fellowships at the Universities of Manchester and Oxford and visiting Professorship in India, he did some legal advising and court work.

His eminence in this area led to his being appointed as Constitutional and Legal Adviser to various political parties that were seeking independence from Britain in the late 50's and 60's such as British West Indies in 1959; National Convention of Nigeria's Citizen's Delegation in 1958; Somaliland Delegation to Lancaster House in 1960 and Dr. Hastings Banda's Malawi Congress Party Delegation in July 1960.

All these naturally served as a pointer that he should become the first Attorney-General and Minister of Justice when Nigeria became independent in 1960. Later he became the Chief Justice of the Federal Republic of Nigeria (1972-75). This was of course after serving as Professor and Dean of the Faculty of Law at the University of Lagos (1966-1972).

Still climbing on the ladder of fame, in July 1975, he was elected President of the World Association of Judges in succession to Earl Warren, the late Chief Justice of the United States—a position he is still holding up to the moment. The same year also saw his being elected to serve as a Judge of the International Court of Justice at The Hague, where he later rose again by election, to become Vice-President of the same Court in 1979—and is now its Acting President.

Apart from these, he has served on numerous Committees and Commissions; he is a member of innumerable learned Associations and Societies.

As an academic and a scholar, he has published not less than 16 books, and over 35 articles in learned journals.

Judge Elias's eminence transcends the boundaries of his native country, Nigeria, where two of the highest national honours of Commander of the Federal Republic of Nigeria (CFR), and Nigeria National Merit Award (NNMA) were conferred on him in 1963 and 1979 respectively.

Outside Nigeria, because of his outstanding contribution in the field of law, he was appointed a Queen's Counsel (QC) in 1961, besides being appointed to serve on numerous Commonwealth and UN legal Commissions and Committees. This eminence is also testified by the fact that he is a recipient of honorary degrees from nine Universities in four continents of the world!

In the field of public lectures such as this one, Judge Elias is no stranger. He has given The Hague Lectures at The Hague, Netherlands; the Aggrey-Fraser-Guggisberg Memorial Lectures at the University of Ghana; Trinidad Tobago lectures in Trinidad; public lectures at Yaunde in Cameroon and at the University of Iowa in U.S.A. More recently in 1980, he gave the Buckingham Lectures at the University College of Buckingham in Britain.

1st December 1981

AFRICA BEFORE THE WORLD COURT

Introduction

It is not inappropriate, I think, that these series of lectures should be devoted to a consideration of judicial settlement of disputes between nations in the World Court in the Palace of Peace, where a statuette of Mahatma Gandhi adorns one of its main corridors.[1]

The three lectures may be classified into three main groups. The first lecture will deal roughly with cases before the Court during the Era of Protectorates, Colonies and Capitulations. The second lecture will concern itself mainly with the Era of Decolonization. The third lecture will be devoted to getting rid of the Mandate and Trusteeship systems. Thus the three lectures have to consider almost all the known forms of dependent political status for countries in customary international law during the period 1923 to the present day, or the entire life-span of the World Court since its establishment some 58 years ago in 1922. Indeed, Africa has in one aspect or another been before the Court since the days of the League of Nations, though unfortunately more often as the object rather than as the subject of international law. Nevertheless, as the cases will indicate as we go along, the issues in dispute touch on some of the most fundamental questions of general international law.

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[1] It will be recalled that Mahatma K. Gandhi was himself a lawyer who qualified at an English Inn of Court and who soon after saw practice in South Africa in the tumultuous early days of *apartheid*. As he noted in the companion volume to his well-known autobiography, "Satyagraha in South Africa": "Readers of *My Experiments with Truth* cannot afford to miss these chapters on Satyagraha, if they would follow in all its details the working out of the search for truth". (See Revised Second Edition, the Foreword). See also "Reminiscences of Gandhi", ed—by C. Shukla, March 1951, Bombay, especially pp. 80-86. But the most telling of Gandhi's teachings about peaceful coexistence and non-violent solution of racial problems will be found in his memorable "All men are Brothers" Unesco, Orient Longmans Private Ltd., 1959, especially Chapter 6 entitled International Peace, pp. 118-123.

LECTURE I

The Era of Protectorates, Colonies and Capitulations

In the *Nationality Decrees in Tunis and Morocco*[1], there was a dispute between France and Great Britain regarding the Nationality Decrees issued in Tunis and the French zone of Morocco on 8 November 1921, and their application to British subjects, the French Government having refused to submit the legal questions involved to arbitration. The case was referred to the Permanent Court of International Justice for its advisory opinion on the question whether the dispute in question was or was not by international law solely a matter of domestic jurisdiction under Article 15, paragraph 8, of the League Covenant. The Council noted that the two Governments had agreed that, if the opinion of the Court was that the question was not solely a matter of domestic jurisdiction, the whole dispute would be referred to arbitration or jurisdiction under conditions to be agreed between the two Governments.

The British Government pointed out that the whole dispute was not at that stage submitted to settlement by the Court, but only the preliminary question whether the dispute was by international law solely a matter of domestic jurisdiction of France: also that each Government relied partly on questions of the existence or abrogation of treaties and of the contracts of the terms of these treaties; it observed that questions of treaty application are by international law necessarily outside the exclusive domestic jurisdiction of any one State. Accordingly, the British Government prayed that the answer to the first question referred to the Court should be in the negative.

The Decree in question had then been promulgated by the Bey in Tunis on 8 November 1921 and another Decree on the same subject was promulgated by the President of the French Republic, and both were put in the Tunisian *Journal Officiel* on the same day. Similar legislation was introduced at the same time in the French zone of Morocco whose ruler, His Shereefian Majesty, issued a dahir on 8 November, while the President of the French Republic promulgated his own Decree on the same date. The dahir was published on 6

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[1] 1923, *P.C.I.J., Series No.* 4.

December in the *Bulletin Officiel* of the French zone of Morocco while a copy of the Presidential Decree was adapted to it. The British Ambassador in Paris drew the attention of the British Government to both Decrees and addressed two letters of protest to the President of the Council of Ministers and Foreign Minister of France, the first note being against the application to British subjects of the Decrees promulgated in Tunis, whilst the second declared that the British Government was unable in any way to recognize that the Decree put into force in the French zone of Morocco was applicable to persons entitled to British nationality. As a result of the failure between the British and the French Representatives to agree on this subject, the British suggested that the dispute should be referred to the Permanent Court of International Justice, adding that the intended application of these Decrees to British subjects would be withdrawn and instructions given to the French Representatives to that effect; it further stated that unless the French Government was willing to do this, the British Government could only reiterate its demand that the question should be referred to arbitration. The French Representative replied that he was unable to adopt the views of the British Government and drew special attention to the point that the Arbitration Covenant of 14 October 1903 was not applicable because the interests of a third Party, Tunis, were affected and also because questions of nationality were too intimately connected with the actual constitution of a State to make it possible to consider them as questions of an exclusively juridical character.

In the same manner, the French Representative argued that, with regard to the Decrees relating to Morocco, the French Government had, conjointly with the Sultan, the sovereign right to legislate upon the nationality of the descendants of foreigners, in virtue of the birth within the territory, directly the foreign Powers which claim them had, by accepting the Protectorate, renounced all right to the continuance of their juridical privileges and affirmed that no application of this sovereign right could be submitted to arbitration.

The British Government said that, in the event of the French Government's refusal, it had no alternative but to place the whole question before the Council of the League of Nations in accordance with the terms of the Covenant of the League. The French Representative observed that, if the question in dispute was not one which could be submitted to the International Court of Justice, neither did it appear better suited for submission to the Council of the League of

Nations, for it did not fall within the list of disputes mentioned in the Covenant. It was in these circumstances that the dispute was brought by the British Government before the Council of the League under Article 15 of the Covenant, and the French Government preferred to base its stand upon the provisions of paragraph 8 of the same Article before the Council. The question put to the Court was as follows:

> "Whether the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French zone) on November 8 1921, and their application to British subjects, is or is not, by international law, solely a matter of domestic jurisdiction"[1].

There was a slight discrepancy between the French version and the English version, but the Court held that the meaning was roughly the same, namely the question before the Court was whether the dispute mentioned in the Council's resolution related to a matter which, by international law, was solely within the domestic jurisdiction of France. In replying to the question put to it, therefore, the Court had to give an opinion upon the *nature* and not upon the *merits* of the dispute, which, under the terms of the second resolution referred to the Court, might in certain circumstances, form the subject of a subsequent decision.

The Court observed that whether a certain matter was or was not solely within the jurisdiction of a State was an essentially relative question; it depended upon the development of international relations; and that, in the present state of international law, questions of nationality were, in the opinion of the Court, in principle within this reserved domain. For the purpose of the present case, it was enough to observe that it might well happen that for a matter such as that of nationality which was not, in principle, regulated by international law, the right of a State to use its discretion was nevertheless restricted by obligations which it might have undertaken towards other States. In such a case jurisdiction which, in principle, belongs solely to the State, was limited by rules of international law. Article 15, paragraph 8, then ceased to comply as regards those States which are entitled to invoke such rules and a dispute as to the question whether a State had or had not the right to take certain measures became in these circumstances a dispute of an international character and fell outside the scope of

[1] Article 15, paragraph 8, of the Covenant.

the exception contained in that paragraph. The Court further observed that, to hold that a State had no exclusive jurisdiction, did not in any way prejudice the final decision as to whether that State had a right to adopt such measures. The Court felt that Article 15 in effect established the fundamental principle that any dispute likely to lead to a rupture which was not submitted to arbitration in accordance with Article 13 should be laid before the League Council. The reservations generally made in arbitration treaties were not to be found in this Article.

The Court pointed out, however, that it must not be forgotten that the provision contained in paragraph 8 of Article 15, in accordance with which the Council in certain circumstances was to confine itself to reporting that a question was, by international law, solely within the domestic jurisdiction of one Party, was an exception to the principles affirmed in the preceding paragraphs and does not, therefore, lend itself to an extensive interpretation. For these and other reasons the Court held, contrary to the arguments of the French Government, that it was only called upon to consider the arguments and legal grounds advanced by the interested Governments, insofar as it was necessary to form an opinion of the nature of the dispute. It pointed out that, while it was obvious that these legal grounds and arguments could not extend either the terms of the requests submitted to Court by the Council or the competence of the Court by the Council's resolution, it was equally clear that the Court must consider them in order to form an opinion as to the nature of the dispute referred to it in the State resolution, with regard to which the Court's opinion had been requested.

The facts of the case may be briefly summarized as follows. The French Decrees related to persons born, not upon the territory of France itself, but upon the territory of the French protectorate of Tunis and of the French zone of Morocco. If it is competent for a State to enact such legislation within its national territory, the question remains to be considered whether the same competence existed as regards a protected territory. The extent of the power of a protecting State in the territory of a protected State depends first upon the treaties between the protecting State and the protected State, especially the protectorate, and second, upon the conditions under which the protectorate had been recognized by third powers as against whom there was an intention to rely on the protection of these treaties. The Court was of the opinion that, despite common features possessed by protectorates under international law, they have individual legal

characteristics resulting from the special conditions under which they were created and the stage of their development. In the present case, the position was governed with regard to Tunis by the treaty of 1881 between France and Tunis, another treaty between the same Powers of 1883 and also the correspondence between France and Great Britain between 1881 and 1883. With regard to Morocco, there was a treaty between France and Morocco of 1912, the Anglo-French Declaration regarding Egypt and Morocco of 1904 and correspondence between France and Britain as well as Germany. All these documents must be examined in order to determine the extent of the power, if any, possessed by France in regard to Tunis and Morocco on this subject. The French Government contended that the public powers exercised by itself, taken in conjunction with the legal sovereignty of the protected State, constituted full sovereignty upon that on which international relations were based and that accordingly, the protecting State and the protected State might, by virtue of an agreement between them, exercise and divide between them within the protected territory the whole extent of the powers which international law recognized as enjoyed by sovereign States within the limits of their national territory. This contention was disputed by the British Government, which denied that the Decrees of 8 November 1921 were applicable to British subjects, and relied upon the treaties concluded by it with the two States which were subsequently placed under the French protectorate. By virtue of these treaties of 1856 and 1875, persons claimed as British subjects would enjoy a measure of extraterritoriality, incompatible with the position of another national as a result of the French protectorate. On the other hand, the French contended that these treaties which were entered into in perpetuity, had lapsed by virtue of the principle known as the *clausula rebus sic stantibus*, because the establishment of a legal and juridical régime in conformity with French legislation had created a new situation which deprived the capitulary régime of its *raison d'être*. Since the duration of the validity of the treaties had been raised, it is only by reference to international law that the question whether the issue was one within the domestic jurisdiction of France alone must be raised.

In the case of Tunis especially, France contended that, following upon negotiations between the French and the British Governments, Great Britain had formally renounced its rights of jurisdiction in the Regency, and that by the Franco-British Arrangement of 1897 she accepted a new basis for the relations between France and itself in

Tunis. The differing views held by the two Governments were a matter of interpretation by international law. Having regard to the position in Morocco, it was clear that Great Britain still exercised there its consular jurisdiction at the time of the present dispute. France argued that Britain, by consenting to the Franco-German Convention of 1911 with regard to Morocco, agreed to renounce its capitular rights as soon as the new judicial system completed by the Convention had been introduced. The British Government, however, contended that its adhesion to the Convention of 1911 was clearly conditional upon an internationalization of the town and district of Tangiers, a condition which had not yet been fulfilled; Britain maintained that it was not an agreement for the suppression of the capitulation régime, and that the relations between the two Governments were still governed by the Anglo-French Declaration of 1904.

In the cases of both Tunis and Morocco, therefore, there was a difference with regard to the interpretation of the relevant international engagements. Apart from all constructions relating to the protectorate and to the capitulations in Tunis, Britain also relied upon the most favoured nation clause and other relevant documents in the Anglo-French Arrangement of 1897 and the notes of 1919 exchanged between the two Governments on the subject of that arrangement. France denied that the most favoured nation clause relied upon by Britain was that applicable in the present case of the exclusively economic bearing of clause and because of the synallagmatic character of the Franco-Italian Convention. The French argued that the Arrangement of 1897 should be interpreted as a formal recognition by Britain of the contention by France to legislate with regard to the persons in Tunis, and more particularly with regard to their nationality, under the same conditions as in France. This argument was, however, disputed by the British Government. This is because, even if we assume the French contention to be correct, the question whether France possesses such competence in this respect would still depend, as regards Great Britain, on the construction to be placed upon the most favoured nation clause referred to by Britain, and this is a matter of interpretation in accordance with international law.

In view of the foregoing summary of the facts contended by both sides, the Court came to the conclusion that the dispute between Great Britain and France was not, by international law, solely a matter of domestic jurisdiction of France within the meaning of Article 15,

paragraph 8, of the League Covenant[1].

It must be regretted, however, that the Court was not called upon to enter into the merits of the dispute, which raised important questions relating to the issue of division of sovereignty between a protecting and a protected State, especially in respect of the making of laws affecting the people resident within the protected territory of different nationalities from those of the protecting and the protected States.

A similar situation in the *Oscar Chinn* case[2] arose out of a dispute between Great Britain and Belgium over a complaint by a Mr. Chinn, a British subject trading in the Belgian Congo. The question arose from certain trade privileges which the Belgian Congo Colony Government granted to UNATRA, a Belgian company in which the Belgian Government held more than half of the total shares and which was plying the Congo River for traffic of passengers and of goods, including large-scale shipping. During the economic depression of 1930 and 1931, which was world-wide, the UNATRA, like all other companies in the same trade on the Congo River, appealed to the Colony Government for financial assistance in the form of reduction of rates and the granting of subsidies as a result of heavy losses from the keen competition from other traders. The Belgian Government granted this request by means of fiscal measures adopted by the Belgian Colony Govern-

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[1] On the whole subject of matters within the domestic jurisdiction of States, see the following summary of the findings of the Permanent Court of International Justice by Schwarzenberger in Vol. 3 of his *International Law*, at p. 230:

1 The purpose of the exemption clause of Article 15 (8) is to give preference at the point defined in this clause to the principle of sovereignty over that of collective action.

2 The term "a matter which in international law is solely within the jurisdiction of that party" is not synonymous with sovereignty. It is intended to indicate matters which though they closely concern the interests of more than one State, are not, in principle, regulated by international law.

3 Whether a matter is solely within the jurisdiction of a State is a relative question. It depends on the state of the evolution of international law, relation and organisation.

4 In the League system, the reservation of domestic jurisdiction under Article 15 (8) is the exception to the rule of the submission to the jurisdiction of the League of disputes which are not submitted to arbitration. Thus, this clause is not to be extensively interpreted.

Compare these propositions with the provisions of Article 2, paragraph 7 of the United Nations Charter.

[2] 1934 *P.C.I.J. Series A/B No.* 63 p. 65.

ment, which had the effect of virtually driving out of business all those engaged in trade, whether Belgian or foreign-owned enterprises, so that UNATRA achieved in effect a *de facto* trade monopoly. In consequence, six enterprises that had been adversely affected by those fiscal measures in favour of UNATRA decided to take the matter to Court, and one of them was that of Mr. Chinn. The Court of first instance in Leopoldville gave judgment in favour of UNATRA. On appeal to the Court of Appeal in Leopoldville, the judgment was confirmed, but the other five enterprises abided by the decision. Mr. Chinn then appealed to the British Government for help and protection. The case thus became one between Great Britain and Belgium by virtue of the Treaty of St. Germain-en-Laye of 1919 and under general principles of international law. The British Government took the view that the effect of the decision of June 1931 was to ruin Mr. Chinn by forcing him to suspend entirely both his transport business as well as his shipbuilding and repairing business. The Belgian Government contended that this was not so.

The Court pointed out that the pecuniary importance of fluvial transport for the whole economic organization of the colony must be noted. The Congo River, owing to the majority and existence of its waterways, constituted the chief highway of the Belgian Colony. Penetrating, by means of its numerous tributaries to the remotest confines of the territory, it made it possible to expound and turn to account the local source of wealth of every part of the colony so that, from the point of view of the evacuation of produce to be exported, it constituted an essential factor of the commercial activities of the colony. As for the special character of the UNATRA Company, it was in fact reconstituted in 1925 as a private company, but it operated as an organized public service agency, involving special obligations and responsibilities for satisfying the general requirements of the colony. The governing legislation had not, of course, constituted a bar to the enterprises of other concerns who were desirous of engaging in fluvial transport on their own account or even for the account of others. But these concerns, carrying on business freely and having pecuniary profits as their main and legitimate object, had no claim to any guarantees on their profits from the State. They could only claim the freedom and equity guaranteed by treaty on the Congo. The Belgian Government pointed out that the determining course of the measure which it took was the general economic depression and the necessity of assisting trade, which was suffering grievously from the fall in prices of colonial

products, and of warding off the danger which tended to involve the whole colony in a common disaster. The Belgian Government claimed that it was the sole judge of this critical situation and of the remedies that it called for, subject, of course, to its duty of respecting its international obligations. The Convention of St. Germain was the successor of the General Act of Berlin of 1885 and of the Act and Declaration of Brussels of 1890. Both Parties had relied on the Convention of St. Germain as the immediate source of their respective contractual rights and obligations. The Court then observed that no-one, so far as it was aware, had ever challenged the validity of this Convention. The Convention in Article 5 guaranteed the principle of freedom of trade in regard to the very question of fluvial navigation with which the Court was concerned. The situation, as regulated by the Berlin Treaty of 1885, remained unaffected with regard to freedom of navigation over the Congo River.

The British alleged, however, that the Belgian Government, by enjoying a reduction of tariffs with the UNATRA Company in return for a promise of customer pecuniary connections, made it impossible for the other fluvial transporters, including Mr. Chinn, to retain their customers and in consequence to carry on their business; thus it enabled the UNATRA Company to exercise a *de facto* monopoly which, in the view of the British Government, was incompatible with the Belgian Government's obligation to maintain commercial freedom and equity and also with the obligation arising out of Article 5 of the Convention of St. Germain, which applied those principles to fluvial navigation. The British Government, in the alternative, alleged that the Belgian Government, by creating for the advantage of the Belgian company UNATRA a régime in the benefits of which Mr. Chinn, a British subject, was not entitled to share, was practising a discrimination contrary to the equality of treatment stipulated in the Convention of St. Germain. Great Britain then submitted that, in the event of the Court not finding that the measures taken by the Belgian Government constituted a breach of the State Convention by making it commercially impossible for Mr. Chinn, a British subject, to carry on his business, the measures taken by the Belgian Government constituted a violation of vested rights protected by the general principles of international law.

The Belgian Government, on the other hand, claimed that the measures adopted by it became necessary in order to safeguard the interests of the community as a basis of the position of colonial pro-

ducts in the markets of the world; it never formed part of the intentions of the Belgian Government to create a monopoly of any kind for UNATRA in order to drive embarrassing competitors out of business. It claimed that the measures which it took were lawful from the standpoint of international law, whether conventional or customary. It further maintained that a distinction must be drawn between the sphere of navigation and that of the management of national shipping since, in the former case, the riparian State is forbidden to encroach upon freedom of navigation; its freedom of action in the latter case was not subject to any restriction. The final submission of the Belgian Government was that no injury had been caused to already existing vested rights, although it was possible that injury might have been caused to private interests, which was a different matter. It must be pointed out, however, that the main argument by the British Government was the alleged inconsistency between the measures taken by the Belgian Government and the principles of equity and freedom of trade as well as freedom of navigation. It was universally accepted that the freedom of navigation mentioned in the Convention of 1919 comprised freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers. The Court pointed out, however, that, while freedom of navigation implied, as far as the business side of maritime or fluvial transport was concerned, also freedom of commerce, it did not follow that in all other respects freedom of navigation entailed a presupposed freedom of commerce.

Accordingly, the Court, by a majority of six votes to five, decided that the measures taken and applied by the Belgian Government in connection with the UNATRA, a limited liability company, and in relation to fluvial transport on the waterway of the Belgian Congo were not, having regard to all the circumstances of the case, in conflict with the international convention between the Governments of Belgium and Great Britain. Thus it was that the Court, by a narrow majority, came to the conclusion that the overriding economic interests of the colony of the Belgian Congo should be held to supersede the private interests of companies similarly engaged in the fluvial transport and shipping business over the Belgian Congo River.

In the *Phosphates in Morocco* case[1], the Italian Government instituted proceedings before the Court against the French Government

[1] 1938, *P.C.I.J., Series A/B, No.* 74, p. 10.

concerning the prospecting and exploitation of phosphates in Morocco, in which an Italian national and an Italian company had been involved. The application was brought under the provisions of the General Act of Algeciras of 1906 and of the Franco-German Treaty of 1911. Certain licences to prospect for phosphates in reserved areas had been issued by the Mines Department of Morocco to two French nationals, and some of these licences had been later transferred to an Italian national and later still to an Italian company. The relevant mining regulations had been promulgated in Morocco. In accordance with the provisions of the two treaties of 1906 and 1911 there were obligations to respect the general principle of economic liberty without inequality (open door), and it was also based upon the system of concessions " to be guided by the laws governing this matter in foreign countries". The regulations also stipulated that the concession for the working of phosphates might only be disposed of by public award on tender offering a royalty based upon the amount of prospecting. It was also laid down that the prospectors holding prospecting licences for a reserved area who had discovered new phosphate deposits within their area and had shown that they could be worked, should be entitled, during a period of 15 years reckoned from the date of the decision recognizing them as discoverers, to one-fifth of the royalties payable on every ton by the successful tenderers. Later it appeared that in certain areas phosphates of exceptional value were discovered in an area in respect of which the Moroccan Mines Department invited tenders and made awards. The Italian company later submitted a case to the Moroccan authorities claiming to be discoverers of certain sections of the phosphates in question. After protracted negotiations and correspondence between the parties, the Moroccan authorities rejected the Italian company's claim, and the company asserted that all its efforts to appeal to the French Resident General in Morocco had failed because he was not able to get the latter to take any action to protect its interests. The Italian Government thereafter took up the case of its national before the Court. The Italian Government claimed that they were not seeking damages but respect for vested rights, and that this entailed in any case, as a condition precedent to the annulment of the decision of the Mines Department, a measure not within the jurisdiction of the civil courts of Morocco. The Ministry for Foreign Affairs of France maintained its standpoint, refusing any satisfaction. Italy insisted that its action, being inspired by the same purpose and designed to achieve the same object, constituted a continuing and

permanent unlawful act involving the international responsibility of France in different ways: the establishment of the phosphate monopoly by a Moroccan Decree was in effect inconsistent with the international obligation of Morocco and of France; that economic freedom in Morocco should be respected without inequality; that the mining regulations should be based on the system of concessions in accordance with French law; and that the Moroccan monopolies should be confined to opium, kif and tobacco. It also claimed that the decision of the Mines Department was *ultra vires* and constituted a misuse of power, since it conflicted with the official announcement of 1919 and "under the cloak, of meeting the exigencies, aimed at getting rid of the dreaded foreign holding and even avoiding the payment of compensation for expropriation in disregard of vested rights which was regarded by international conventions".

The Italian Government asserted that the obstacles placed in the way of a petition to the French Resident General and the allegation that the decision of the Mines Department had finally settled the question despite the terms of the relevant Decree for the juridical organization of the protectorate constituted a veritable denial of justice. The denial of justice had been confirmed and aggravated by the refusal to submit the dispute to a competent tribunal capable of redressing the wrong suffered by the Italian company, and of restoring the position in accordance with municipal law and international law. The Italian Government further pointed out that the proposal that recourse should be had to the civil courts of Morocco with a view to obtaining damages for the wrong suffered was not calculated to give them the satisfaction which was due, but was designed rather to ensure that the Italian subjects who had been expropriated should receive compensation if they remained despoiled of their property. It was pointed out also that the dispute could not be the subject of a special representation agreement owing to the evasive attitude of the French Government and was therefore submitted to the Court by a unilateral application on the part of Italy. The Italian Government held that France had incurred international responsibility of two kinds, namely, indirect responsibility as a State protecting Morocco, and personal and direct responsibility resulting from action taken by the French authorities, or with their co-operation, purely for the sake of French interests.

The Italian Government therefore demanded that, as regards the Moroccan phosphates, the economic freedom, which was sacrificed in the interest of unlawful monopoly, should be restored or

that, at the least, the rights acquired in virtue of the regulations should be acknowledged and respected; these rights were those relating to the convention by the Italian company holding the prospecting licences of the status of discoverer and to the disposal by public tender of the deposits covered by the licences. It argued that if the Court should hold that the vested rights only extended to compensation for expropriation, the amount of that compensation must be assessed with due regard to two essential circumstances:

(*a*) that the revenues of the Moroccan Phosphates Office up to date had exceeded one million as shown by the official publications, and

(*b*) that if the rights had been disposed of by public tender, the Italian company, being able to get the benefit of the one-fifth share of the royalties accruing to it as the recognized discoverer, would have to bid against any other competitor and would, therefore, have inviolably been a tenderer.

It finally claimed that compensation was necessary for damages of another kind, represented by the considerable expense to which the interested parties had been put during this long period owing to the protracted negotiations in which they had had to engage with the authorities of the protectorate as well as with the French authorities.

The French Government pointed out that, on the the basis of the various documents submitted by the other two Governments to the Court, there was extreme doubt as to the legal character of the Italian nationality on which the application to the Court had been based. It pointed out that no satisfactory explanation had been given by the Italian Government as to the transfer of the rights of the Italian company to an American company. The French Government also pointed out that the Italian Government had not sufficiently explained that it had exhausted local remedies available to it in accordance with general principles of international law. It was also pointed out that the dispute submitted by the Italian Government to the Court had arisen in regard to a situation prior to September 1931 and accordingly fell outside the scope of the Court's compulsory jurisdiction as determined between France and Italy by the declarations on the subject made by the two Governments.

After examining the various contentions of both sides, the Court declared itself unable to entertain the Italian Government's application since it found that the dispute, whether regarded in its general aspect, represented by the alleged monopolization of the Moroccan phos-

phates, or in its more limited aspect, represented by the claim of the Italian nationals, did not arise with regard to situations or facts subsequent to the ratification of the acceptance by France of any compulsory jurisdiction, and that in consequence it had no jurisdiction to adjudicate on this dispute.

The case concerning the *Protection of French Nationals and Protected Persons in Egypt*[1] occurred in this way. When the Egyptian Government took certain measures affecting some French nationals on its territory in 1949, the French Government, relying upon the Convention of Montreux of 1937, regarding the abrogation of the capitulation in Egypt, instituted proceedings against Egypt in the case concerning the *Protection of French Nationals and Protected Persons in Egypt*.[2] On 23 February 1950, however, the agent of the French Government wrote to the Court to the effect that the measures taken by the Egyptian Government against the persons, property, rights and interests of French nationals and protected persons had been withdrawn by the latter Government, and that therefore the dispute was virtually at an end. Consequently, the French Government had decided not to go on

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1 *I.C.J. Reports* 1950, p. 59.

2 By a capitulatory régime was meant a system resulting from special arrangements by treaty whereby foreigners, mainly from Western European countries, who were resident in certain Asian and African countries, enjoyed immunity from the local jurisdiction within the territory of the State in civil and criminal matters, and were subject only to the jurisdiction of the Consular Courts of their home State and subject to its municipal law. In the case of Egypt, until 1937 civil and criminal matters and some police offences were subject to the jurisdiction of international courts called Mixed Courts, although in other criminal matters these foreigners were subject to the jurisdiction of their own courts. As a result of the Conference held in Montreux in April 1937, Great Britain, the United States and a number of other Powers agreed to the abolition of the capitulations, while providing for a transitional period of 12 years during which certain cases involving foreigners were to be tried by Mixed Courts composed of Egyptian and other foreign nationals. Another Convention was signed between Great Britain and France for the abolition of British capitulatory rights in the French zone of Morocco and also in Zanzibar. It may be noted also that capitulatory régimes in certain Asian and African countries were gradually abolished, for instance, in Japan in 1899, in Turkey in 1914 and 1923, and in China only on 11 January 1943 when Great Britain and the United States signed treaties with China relinquishing extraterritorial rights in that country. The régime of capitulations was abolished in Ethiopia only in 1936. Finally, capitulatory régimes are now a thing of the past. See Lauterpacht's *International Law*, vol. I, 8th edition, London, pp. 682-686.

with the proceedings and requested that the case be removed from the general list of the Court. The Court accordingly granted the request for discontinuance by the French Government.

In the case concerning the *Rights of Nationals of the United States of America in Morocco*[1], an action was instituted by the United States of America against France, and the Court considered it necessary in October 1951 to request the agent for the Government of France to clarify the capacity in which she was proceeding in that case and, in particular, to specify whether it was appearing on both its own account and as protecting power in Morocco. France replied giving an assurance that, in order to dispel the doubts remaining in the minds of the Government of the United States of America, it supplemented its observations and submissions in regard to the United States' objection by specifying that France was proceeding in the case both on its own account and as protecting power in Morocco, and that the judgment of the Court would be regarded as binding by both France and Morocco.

The facts of the case may be briefly summarized as follows. By a Decree dated 30 December 1948, the French authorities in the protectorate of Morocco imposed a system of licence control in respect of imports not involving an official allocation of currency, and limited these imports to a number of products indispensable to the economy of the French zone of Morocco. The United States Government, however, maintained that this measure affected its rights under treaties with Morocco and contended that, in accordance with these treaties and with the General Act of Algeciras of 1906, it was not lawful for any Moroccan law or regulations made under it to apply to its nationals in that zone unless such a law had previously received the United States consent. The Court considered the various submissions of both sides, and held that the import controls imposed by France were contrary to the treaty between the United States and Morocco of 1836 and also contrary to the General Act of Algeciras, since both involved discrimination in favour of France against the United States. After considering the claim of the United States to consular jurisdiction in the French zone of Morocco, the Court took the view that the United States was entitled to exercise such jurisdiction in all disputes, civil as well as criminal, between United States citizens or persons under

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[1] *I.C.J. Reports* 1951, p. 109 and *I.C.J. Reports* 1952, p. 176.

the protection of the United States. The Court also held that the United States was entitled to exercise such consular jurisdiction to the extent required by the relevant provisions of the General Act of Algeciras. The United States submitted, *inter alia*, that the most favoured nation clause in treaties with countries like Morocco was not intended to create equal territory or dependence rights, but was intended to incorporate permanently these rights and render them independent of the treaties in which they were originally accorded. Consequently, it commented that a right to fiscal immunity of 1856 and the Spanish treaty of 1861 was incorporated in the treaties which guaranteed to the United States most favoured nation treatment, with the result that this right would continue even if the rights and provisions granted in the two treaties should come to an end. This contention was unacceptable to the Court, since it had not been established that the most favoured nation clause in treaties with Morocco had a meaningful effect other than such clauses in other treaties or were governed by rules of law. Accordingly, the Court rejected the United States contention that this jurisdiction included cases in which only the defendant was a citizen or a protégé of the United States. It similarly rejected the United States claim that the application to United States citizens of laws and regulations in the French zone of Morocco required the assent of the United States Government before having effect. The Court pointed out that while it was true that an assent was required, it was only necessary as far as intervention of the consular courts of the United States was required for the effective enforcement of such laws and regulations as applied against United States citizens. For similar reasons, the Court rejected a counter-claim by the United States that its nationals in the French zone of Morocco were entitled to immunity from taxation in respect of goods for consumption and services. It also went on to consider the question of the valuation of imports by the Customs authorities of Morocco, and came to the conclusion that the value of merchandise in the country of origin and the value in the local Moroccan market were both elements in the appraisal of its cash wholesale value delivered at the customs house.

LECTURE II

The Era of Decolonization

In the first lecture we dealt with cases which were largely concerned with the problems of international law regarding Protectorates, colonies and capitulations—the main types of dependent territories and territorial jurisdictions known to public international law up to the end of the Second World War. The United Nations inaugurated the new era of decolonization, advocating the new principles of the right of self-determination and political independence for all peoples. In the wake of the new era, the United Nations grew from some 51 States to well over 155 States at the present time, and until recently the process has been attended by tension, civil war and wars of national liberation.

One of the first dependent territories to achieve independence was the Belgian Congo, which gained its freedom from the Belgian Government in June 1960. This was followed immediately by civil war and internal strife, and a good deal of bloodshed and chaos resulted. The Government of the newly-independent Republic of the Congo invited the United Nations Organization in New York to come to the aid of the country in re-establishing law and order and achieving political stability.

In the *Certain Expenses of the United Nations, Article 17, paragraph 2 of the Charter*,[1] the matter came to a head. The United Nations, through its Security Council and the General Assembly, adopted a series of resolutions enabling the assumption of measures and initiatives in efforts to meet the challenges of the situation in the Congo. In the course of these various operations mounted in the Congo, the United Nations inevitably ran up huge expenditures in support of which most of the Members of the United Nations met their financial obligations, but a small number refused to pay. The States refusing to pay, including the Soviet Union and France, argued that the expenses undertaken by the UNOC (United Nations Organization for the Congo), the Organization set up for the United Nations local administration, were not properly incurred in the service of the Congo, in accordance with the provisions of the United Nations Charter, and therefore refused to pay their own dues. The vast majority of the

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[1] *Advisory Opinion, I.C.J. Reports* 1962, p. 151.

Members of the United Nations, which had duly paid their own contributions, took a different view, pointing out that Article 17, paragraph 2, of the Charter of the United Nations provided that "the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly". Following a series of debates between the two groups of Member States, the General Assembly, on 20 December 1961, adopted a resolution which asked for an Advisory Opinion from the International Court of Justice as to whether the expenditures authorized by the General Assembly concerning the United Nations operations in the Congo as well as the operations of the United Nations Emergency Force in the Middle East, constituted "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter of the United Nations.

In its Advisory Opinion of 20 July 1962, the Court gave an affirmative answer to the question asked of it, holding that all the authorized expenditures that had been incurred in the service of the United Nations administration in the Congo were "expenses of the United Nations" as envisaged in the Charter. In the Court's view, the expression "the expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter, are certainly the amounts paid out to defray the costs of carrying out the purposes assigned to the Organization under the Charter, namely, the maintenance of peace and security in the world. The Court made a reasonably detailed examination of the resolutions which authorized the expenditures in question, and came to the conclusion that they were lawfully incurred in strict accordance with the relevant provisions of the Charter. In the course of its examination of these resolutions, the Court also considered all the main arguments which those States that refused to pay had advanced against the incurring of the expenditures, and refuted firmly each of those arguments. The Court was of the view that the attempt to make the maintenance of peace and security of the world a monopoly of the Security Council which it alone could authorize, was a misunderstanding of the fundamental principles and purposes of the Charter in regard to today's world.

The Court took the position that both the Security Council as the executive organ and the General Assembly as the deliberative body have a concurrent responsibility for the overall peace efforts of the Organization. There could, therefore, be no question of denying the authority of the enabling resolutions on the basis of which the various expenses had been incurred. No doubt, the Charter gave primacy to the Security

Council in ensuring the maintenance of world peace and security, but there is also full appreciation of the equally significant responsibility accorded to the General Assembly in the Charter, enabling it to act in circumstances where the Security Council would not or did not act promptly.[1] The overwhelming majorities that supported all the relevant resolutions of the General Assembly showed that the incurring of the expenditures in question was vital and even inevitable for the execution of the task which the United Nations as an Organization had undertaken in the Congo and without which the course of peace would have been seriously endangered.

The Court considered that such expenditures of the Organization had to be tested by their relationships to the purposes enshrined in the Charter and that if an expenditure were made for a purpose other than those of the United Nations, such an expenditure could not be considered as "expenses of the Organization". In this connection, the Court observed as follows:

> "The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes would be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. As soon as

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[1] The United Nations Charter emphasizes the secondary role of the General Assembly in four different connections as follows:

(*a*) Under Article 12(1) and 12(2), the General Assembly shall not make any recommendation regarding a dispute or situation assigned to the Security Council regarding the maintenance of peace unless the Council specifically requests it to do so.

(*b*) As provided also in Article 12(1), the reservation in favour of the Security Council precludes the exercise by the General Assembly of its general powers of discussion under Article 10 as well as its powers of making recommendation under Article 14.

(*c*) Under Article 11 and 15, only the individual Member-States, the Security Council and non-member States are entitled to invoke the jurisdiction of the General Assembly.

(*d*) Otherwise, the General Assembly can exercise its special powers in the field of peace-keeping and may make recommendations concerning any question, including any dispute or situation, relating to the maintenance of international peace and security, to the State or States concerned, the Security Council or to both. Where, however, enforcement action is necessary, the General Assembly must refer the matter to the Security Council either before or after discussion (Article 11(2)).

> they have entrusted the Organization with the attainment of those common aims, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization."

The Court was of the opinion that once it is agreed that the action in question is within the scope of the functions of the Organization, and it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. The Court said further:

> "If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent".

The reasoning of the Court was not limited to the relationship between the General Assembly and the Security Council; it extended to the Secretary-General as an organ of the United Nations carrying out certain functions within its competence. The Secretary-General could himself take certain actions in furtherance of the purpose of the Organization; and if so, expenditures incurred for the security of such ends would certainly be proper .The Court observed that:

> "If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute expenses of the Organization."

This is certainly the case where, in several resolutions, the Security Council itself renewed the authority given to the Secretary-General to "continue the activities in the Congo". The Court also considered that it was unnecessary to express an opinion as to which article or articles of the Charter of the United Nations were the basis for the resolutions of the Security Council authorizing UNOC to carry out its functions in the Congo.

In the case concerning the *Northern Cameroons* and the United Kingdom,[1] the Court was faced with a different type of problem, this time concerning the Mandate or Trusteeship System. The background of the case brought by the Republic of Cameroon in 1961 against the Government of the United Kingdom was that the rights and duties which Germany renounced under Article 119 of the Treaty of Versailles of 1919 were placed under the Mandates System of the League of Nations. Under the terms of the Peace Conference, Great Britain and France made a recommendation, which was accepted, that the territory which had been known as the German territory of Kamerun should be divided into two mandates, one to be administered by Britain and the other by France. The two mandates were accordingly established in 1922.

Upon the creation of the United Nations, the British and French Governments proposed to place the two mandates under the International Trusteeship System in accordance with Article 76 of the Charter. The Trusteeship Agreements for the territory of the Cameroons under British administration and for the territory of the Cameroons under French administration were approved by the General Assembly and came into force in December 1946. Great Britain as an Administering Authority maintained in the trust territory of the Cameroons the same administrative arrangements which it had first instituted in 1922. Under these arrangements, the territory was divided into a northern region and a southern region. The Northern Cameroons was itself not a geographical whole but was in two sections, separated by a narrow strip of the territory of what was then the British Protectorate of Nigeria, which bordered the entire western side of the Mandate. It was administered as part of the two northern provinces of Nigeria, Bornu and Adamawa. The Southern Cameroons was administered until 1939 as a separate Cameroons province of Southern Nigeria. Thereafter, the Southern Cameroons was joined for administrative purposes to the eastern provinces of Nigeria, as a separate province.

The Trust Territory of the Cameroons under French administration, which formed the entire eastern and most of the northern frontier of the Trust Territory of the Cameroons under British administration, attained independence as the Republic of Cameroon in January 1960, and joined the United Nations as a Member. As a result of a plebiscite conducted under the auspices of the United Nations in October 1961,

[1] *Judgment, I.C.J. Reports* 1963, p. 15.

the Southern Cameroons joined the Republic of Cameroon, within which it then became incorporated.

As for the Northern Cameroons, a plebiscite also conducted by the United Nations in 1961 resulted in the territory joining the Federation of Nigeria, which had become independent on 1 October 1960 and which had been admitted as a member of the United Nations six days later. The Northern Cameroons became and remained a separate province of the northern region of Nigeria.

It is thus clear that the affairs of this region of West Africa had been constantly before the United Nations General Assembly, which had conducted the two plebiscites and which had, by a resolution, approved the result in each case. The plebiscites had been carried out in pursuance of resolutions asking the people in each area to decide whether to join Nigeria or to join the French section, and the plebiscites had been accepted by the General Assembly of the United Nations.

One of the major complaints of the Republic of Cameroon against the United Kingdom as an administering authority was that the latter had failed to carry out a previous recommendation for the separation of the administration of Northern Cameroons from Nigeria before the plebiscite and before the General Assembly's approval of the results of the plebiscite. The Republic of Cameroon also argued that the trusteeship could not be terminated without its consent "in its capacity as a side directly concerned". The Cameroons did not, however, say that the United Kingdom was responsible for the termination of the trusteeship, which event, it argued, was the work of the General Assembly itself. Further, as the plebiscite was carried out with the full knowledge of all Members of the United Nations, and as the Cameroons raised certain objections which were replied to by Great Britain at that time, it was clear that if the Cameroons had any ground for complaint at all, it must be laid at the door of the General Assembly. In its claim that the United Kingdom had violated the Trusteeship Agreement for the Territory of the Cameroons under British administration by creating "such conditions that the trusteeship had led to the eventual attachment of the Northern Cameroons to Nigeria instead of to the Republic of Cameroon", the Cameroons had no case.

The Court therefore, came to the conclusion that, as the Republic of Cameroon had itself recognized, its Judgment on the merits of the case could not affect the decision of the General Assembly by which the attachment of the Northern Cameroons to Nigeria was concluded, in accordance with the results of the plebiscites under the supervision

of the United Nations itself. To proceed to adjudicate on the merits as demanded by the Republic of Cameroon would be devoid of purpose. The Court, therefore, decided that it could not adjudicate upon the merits of the Republic of Cameroon's Application. The Court concluded its reasoning in these words:

> "If the Court were to decide that it can deal with the case on the merits, and if thereafter, following argument on the merits, the Court decided, *inter alia*, that the establishment and the maintenance of the administrative union between the Northern Cameroons and Nigeria was a violation of the Trusteeship Agreement, it would still remain true that the General Assembly, acting within its acknowledged competence, was not persuaded that either the administrative union, or other alleged factors, invalidated the plebiscite as a free expression of the will of the people."[1]

So far, the cases we have been considering have disclosed four main types of dependent territories or territorial jurisdictions known to public international law: protectorates, colonies, capitulations and mandates or trust territories. These are to be found in nearly all parts of the Third World; but hardly anywhere else in the former dependencies in such profusion as in Africa.

Nevertheless, a fifth type of territory of semi-sovereign status would seem to have been disclosed in the recent case of *Western Sahara*[2], in which three sovereign States—Spain, Morocco and Mauritania—made claims to the Western Sahara. Spain asserted territorial sovereignty over the territory dating back tenuously to the sixteenth century, but definitively from 1884; then Morocco claimed to be the sovereign Lord from time immemorial; while the Mauritanian known claim dates back to its own independence from France in 1960.

The controversy arose during the proceedings of the General Assembly in relation to matters with which it was then dealing. It did

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[1] Compare the separate opinion of Judge Wellington Koo with that of Judge Sir Gerald Fitzmaurice on the question as to whether Cameroon was or was not entitled to raise the issue with the British Government as the Administering Authority under Article 19 irrespective of the date of the facts giving rise to the dispute in question. The latter would seem to have the better of the argument.

[2] *Advisory Opinion, I.C.J. Reports 1975*, p.12

not arise independently in bilateral relations. The Spanish Government, in a communication addressed on 10 November 1958 to the Secretary-General of the United Nations, said:

> "Spain possesses no non-self-governing territories, since the territories subject to its sovereignty in Africa are, in accordance with the legislation now in force, considered to be and classified as provinces of Spain."

The Government of Spain, on 20 November 1958, quickly reiterated in a communication to the Secretary-General that it "claimed certain African territories at present under Spanish control as an integral part of the Moroccan national territory". Spain had, in 1961, agreed to transmit information on the territories in question, but Morocco formulated the "strongest reservations" regarding any such information, since "those seats and regions formed an integral part of Morocco and the Statutes at present governing them were contrary to international law and incompatible with the territorial sovereignty and integrity of Morocco". Spain replied by drawing attention to "the historic presence of Spanish citizens on the west coast of Africa, not subject to the sovereignty of any other country, and devoting themselves largely to fishing, goes back a very long way and has been confirmed by international law... The rules of Morocco have recognized on repeated occasions that their sovereignty does not extend to the coasts of the present Spanish provinces of the Sahara." This controversy remained latent from 1966 to 1974, a period in which Morocco, without abandoning its legal position, accepted the application of the principle of self-determination. The controversy was, however, revived by Morocco in a communication of September 1974 addressed to Spain, in which it staked legal claim to the territory without having the effect of detaching the dispute from the decolonization proceedings of the United Nations. The submission of the issue to the Court was explicitly proposed by Morocco "in order to guide the United Nations towards a final solution of the problem of Western Sahara". In the case of Mauritania, it made its claim when it became a Member of the United Nations in 1960, that Western Sahara was a part of its national territory. It was, however, prepared to acquiesce in the will of the population and did not confront Spain with a direct legal claim parallel to that of Morocco.

During the General Assembly debates on the subject, the claims of Morocco and Mauritania to legal ties appeared, in many respects, as conflicting, while in the oral proceedings before the Court they were

described as overlapping in certain areas rather than as conflicting. The General Assembly in December 1974 requested an advisory opinion on the following questions:

"I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no-one (*terra nullius*)?

If the answer to the first question is in the negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?"

It must be pointed out that the terms of the request contain also a proviso concerning the application of General Assembly resolution 1514 (XV) relating to the right of self-determination for non-self-governing territories.

The object of the request was to obtain from the Court an opinion which the General Assembly deemed to be of assistance to itself for the proper exercise of its functions concerning the decolonization of the territory. The original scope of the dispute as thus outlined is relevant to a point raised by Spain that the request should not have been submitted to the Court without Spain's consent as the Administering Power in charge of the territory. The dispute between Morocco and Spain regarding Western Sahara was not one as to the legal status of the territory today, but one as to the rights of Morocco over it at the time of colonization. Two basic principles involved in the whole controversy were that of self-determination and that of the national unity and territorial integrity of countries. Algeria, as one of the parties appearing before the Court in this case, stated that self-determination of peoples is the fundamental principle governing decolonization, and pointed out that through successive resolutions which recommended that the population should be consulted as to its own future, the General Assembly had recognized the right of the people of Western Sahara to exercise free and genuine self-determination; and it added that the application of self-determination in the framework of such consultation had been accepted by the Administering Power and supported by regional institutions and international conferences, as well as endorsed by the countries of the area. Algeria was of the view that the Court should not disregard the fact that the General Assembly had itself confirmed its will to apply its resolution 1514 (XV), a system of decolonization based on the self-determination of the people of Western Sahara.

The Court observed as follows:

"The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV). In this resolution the General Assembly proclaims "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations." To this end the resolution provides *inter alia:*

"... 2. All peoples have the right to self-determination: by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development....

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations."

It was, therefore, clear that the General Assembly resolution 1514 (XV) provided the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations. The General Assembly resolution 1514 (XV) has complemented this earlier resolution by contemplating for non-self-governing territories at least the following three possibilities:

"(a) emergence as a sovereign independent State;
(b) free association with an independent State; or
(c) integration with an independent State."

It further declares:

"'Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes."

It also pointed out that integration, if it should happen at all, should be the result of the freely expressed wishes of the peoples of the territory acting with full knowledge of the change in their status, their wishes

having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. It added that the United Nations could, whenever it deemed it necessary, supervise these processes.

The Court also recalled resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations", which reiterated the basic need to take account of the wishes of the people concerned:

> "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status *freely determined by a people* constitute modes of implementing the right of self-determination by that people."

The Court recalled that:

> "In 1966, in the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Spain expressed itself in favour of the decolonization of the Western Sahara through the exercise by the population of the territory of their right to self-determination. At that time this suggestion received the support of Mauritania and the assent of Morocco."

The General Assembly has, in subsequent years, reiterated this same principle of the right of the peoples of Western Sahara to self-determination. But it is fair to point out that in all these resolutions affirming the rights of the peoples of Western Sahara to self-determination, Morocco and Mauritania continued to remind the General Assembly of their respective claims that Western Sahara constituted integral parts of their territories. Both sides, at the same time, assented to the holding of a referendum to be held in satisfactory conditions and under the supervision of the United Nations. In the resolution regarding the request for an advisory opinion to the International Court of Justice, however, there was a significant change contained in a provision of the resolution, asking the Administering Power "to postpone the referendum it contemplated holding in Western Sahara". But the General Assembly took special care to insert provisions making it clear that such a postponement did not prejudice or affect the right of the people of Western Sahara to self-determination in accordance with resolution 1514 (XV). Thus, the reference of the matter to the International Court of Justice for an advisory opinion did not, or was not intended

to, affect the right of the population of Western Sahara to determine their future political status by their own freely expressed will, which principle was universally reaffirmed in the resolution referring the case to the Court. The right of that population to self-determination constitutes, therefore, a basic assumption of the questions put to the Court.

The Court emphasized:

> "An advisory opinion of the Court on the legal status of the territory at the time of Spanish colonization and on the nature of any ties then existing with Morocco and with the Mauritanian entity may assist the General Assembly in the future decisions which it is called upon to take."

In considering the detailed documents, the Court observed as follows:

> "Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers."

The Court pointed out, on the basis of the information put before it, that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them: and that Spain did not proceed on the basis that it was at the time of colonization establishing a sovereignty over *terrae nullius:* instead it recognized the existence of organized groups under chieftains. The Court declined to express an opinion on the differing views presented before it concerning the nature and legal value of agreements between a State and local chiefs, as it was not asked to determine that question. The Court said:

> "Accordingly, the Court does not find it necessary first to pronounce upon the correctness or otherwise of Morocco's view that the territory was not *terra nullius* at that time because the local tribes, so it maintains, were then subject to the sovereignty of the Sultan of Morocco; nor upon Mauritania's corresponding proposition that the territory was not *terra nullius* because the

local tribes, in its view, then formed part of 'Bilad Shinguitti' of Mauritanian entity."

The Court pointed out that any conclusion that it might reach with respect to either of these points of view could not change the legal position that the territory was not *terra nullius* during all the relevant periods.

The Court finally took the view that the information and materials put before it showed the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. In the case of Mauritania, it held that the information and materials equally showed the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. The Mauritanian entity consisted of a conglomeration of territories acknowledging an overlord sufficiently to enable it to claim to be a State entitled to membership of the United Nations. The Court was, however, not convinced that the information and materials placed before it established any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. The Court was, therefore, of the opinion that there were no legal ties of a kind that could affect the principle of decolonization contained in resolution 1514 (XV) in respect of Western Sahara which must be deemed to remain entitled to exercise that right through the free and genuine expression of the will of the people of the territory.

In view of this conclusion of the Court, it is passing strange to note that, when Spain decided to withdraw from Western Sahara, it handed over to Morocco and Mauritania the territory of Western Sahara, and that both States proceeded to share out the territories between them. We are thus faced with a situation in which Third World States, themselves the beneficiaries of resolution 1514 (XV) guaranteeing the principle of self-determination of all peoples, became modern colonizers of less fortunate peoples within their area. Both Morocco and Mauritania, which once affirmed these principles along with the other Members of the United Nations, now turned round to deny that very right to others. The Organization of African Unity has no doubt done its best to persuade both sovereign States to allow a referendum to be held so as to enable the people of Western Sahara to determine their own future, even if it resulted in their agreeing to merge or be integrated with one of the other of the two sovereign

States. It is worthy of note that Mauritania has recently surrendered all its claims to sovereignty over the portion of Western Sahara allocated to it when Spain left. The question remains as to what Morocco will eventually do with its own portion of the territories, or indeed with the portion surrendered by Mauritania.

We may recall that in the *Northern Cameroons* case just discussed, we had occasion to consider that a former Mandate or Trust Territory was partly integrated with Nigeria and partly integrated with the Republic of Cameroon after the express wishes of the peoples concerned had been ascertained by means of separate plebiscites supervised by the United Nations. In the next case we are about to consider, the *International Status of South West Africa*,[1] the issue was to determine *inter alia* the Government of South West Africa's claim that the territory had been an integral part of the Union of South Africa as a result of the alleged lapse of the Mandate by reason of the demise of the League of Nations in 1945.

Put succinctly, the matter in issue may be stated in the language of the questions asked of the Court by the General Assembly for an advisory opinion, in these words:

> "What is the international status of the Territory of South West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular:
>
> (*a*) Does the Union of South Africa continue to have international obligations under the Mandate for South West Africa and, if so, what are these obligations?
>
> (*b*) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South West Africa?
>
> (*c*) Has the Union of South Africa the competence to modify the international status of the Territory of South West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?"

The three particular questions submitted were considered together by the Court. The Territory of South West Africa was one of the German overseas possessions in respect of which Germany, by Article 119 of the Treaty of Versailles, renounced all her rights and titles in favour of the Principal Allied and Associated Powers; and, with

[1] *I.C.J. Reports 1950*, p. 128.

regard to their future, these possessions, having ceased to be under the sovereignty of the States which formerly governed them, were placed under a Mandates System by virtue of Article 22 of the Covenant of the League of Nations, thus creating a "tutelage" for the peoples therein which was to be entrusted to certain advanced nations and exercised by them "as Mandatories on behalf of the League". Two principles considered to be of paramount importance were (*a*) the principle of non-annexation, and (*b*) the principle that the well-being and development of such peoples formed a "sacred trust of civilization". It was also agreed that a Mandate for the Territory of South West Africa be conferred upon Great Britain, to be exercised on its behalf by the Government of the Union of South Africa. Britain agreed to accept the Mandate and undertook to exercise it on behalf of the League of Nations in accordance with certain proposed terms, which were that the Union of South Africa was to have full power of administration and legislation over the Territory as an integral portion of the Union, and could apply the laws of the Union to the Territory, subject to such local modifications as circumstances might require. It was further provided that the Mandatory Power was to observe a number of obligations and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled. Thus the terms of the Mandate and the principles embodied therein showed that the creation of this new international institution did not involve any cession of territory or transfer of sovereignty to the Union of South Africa.

The Union Government, in the proceedings in this case, then claimed that the Mandate had lapsed because the League of Nations had ceased to exist upon the creation of the United Nations. The Court pointed out that what had passed was not the League of Nations itself, but the machinery for the supervision of the Mandates. Under the United Nations system established in Article 76, the mandated territory did not pass under the United Nations automatically, but would come under it by a specific special agreement between the Mandatory and the United Nations Trusteeship Council. But the supervision required under the League of Nations and the machinery for setting it up were transferred to the Trusteeship Council so that the demise of the League did not automatically put an end to the Mandate system itself. The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations, including the Union of South Africa. The essentially inter-

national character of the functions which had been entrusted to the Union of South Africa appears, particularly from the fact that by Article 22 of the Covenant and Article 6 of the Mandate, the exercise of these functions was subjected to the supervision of the Council of the League of Nations and to the obligation to present annual reports today. It also appears from the fact that any Member of the League of Nations could, according to Article 7 of the Mandate, submit to the Permanent Court of International Justice any dispute with the Union Government relating to the interpretation of the application of the provisions of the Mandate. The international obligations thus assumed by the Union Government were of two kinds: one was directly related to the administration of the Territory and corresponded to the sacred trust of civilization, already referred to, in Article 22 of the Covenant; and the other obligation related to the machinery for implementation, and was closely linked to the supervision and control of the League mentioned in connection with the "securities for the performance of this trust".

The Court accordingly held that the dissolution of the League of Nations and the supervisory machinery had not entailed the lapse of the Mandate, and that the Mandatory Power was still under the obligation to give an account of its administration to the United Nations, which was legally qualified to discharge the supervisory functions formerly exercised by the League of Nations. The Court also held that the General Assembly should not, however, exceed the degree of *supervision which the League Council formerly exercised under the* Mandate System and should conform as far as possible to the procedure followed in that respect by the Council. The Court pointed out that the Mandatory Power was not under an obligation to place the Territory under Trusteeship although it might have certain political and moral duties in this connection. Finally, the Court was emphatic that the Union Government of South Africa had no competence to modify the international status of South West Africa unilaterally because of its international obligations in respect of the Territory which thereby enjoyed legal status.

LECTURE III

The Disappearance of the Mandate and Trusteeship Systems

We ended the second Lecture with an account of how the United Nations took over responsibility from the defunct League of Nations in respect of the Mandate over South West Africa. We discussed the decision of the Court declaring the international legal status of the Territory and outlining the obligations which that status imposed upon the Union Government of South Africa. One of these obligations is the duty for it to transmit from the inhabitants of the Territory the supervisory functions to be exercised by the United Nations, to which the annual reports and petitions were to be submitted. In the *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*[1], the General Assembly was of the opinion that, without United Nations' supervision, the inhabitants of the Territory would be deprived of the international supervision envisaged by the Covenant of the League. In an attempt to carry out the advisory opinion of the Court, the General Assembly adopted a special Rule F on the voting procedure which it should follow in taking decisions on questions related to reports and petitions concerning the Territory.

In order to elucidate the advisory opinion already given concerning the status of the Territory, the General Assembly put the following questions:

> "(*a*) Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950:
>
> 'Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations'?
>
> (*b*) If this interpretation of the advisory opinion of the Court is not correct, what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South West Africa?"

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1 *Advisory Opinion, I.C.J. Reports 1955*, p. 67.

The task of the Court was to establish the true meaning of this statement, and the question is whether it may properly be construed as including the system of voting to be followed by the General Assembly. The Court took the view that the function of supervision exercised by the General Assembly generally took the form of action based on the reports and observations of the Committee on South West Africa; and that the "degree of supervision" spoken of in the Advisory Opinion related to the extent of the substantive supervision thus exercised, and not to the manner in which the collective will of the General Assembly was expressed. It therefore followed that the words should not be interpreted as relating to procedural matters, but only as to measures and means of supervision.

The Court observed as follows:

> "The General Assembly was competent, under the Charter, to devise methods of supervision and to regulate, within prescribed limitations, the scope of their application. These were matters in which the obligations could be subjected to precise and objective determination, and it was necessary to indicate this in a clear and unequivocal manner. This was done when it was said in the previous Opinion that: 'The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System. . .'".
>
> It should be noted, however, that the Court said that it did not need to deal with the system of voting. In "recognizing that the competence of the General Assembly to exercise its supervisory functions was based on the Charter", said the Court, "the Court also recognized implicitly that decisions relating to the exercise of such functions must be taken in accordance with the relevant provisions of the Charter, that is, the provisions of Article 18. If the Court had intended that the limits to the degree of supervision should be understood to include the maintenance of the system of voting followed by the Council of the League of Nations, it would have been contradicting itself and running counter to the provisions of the Charter."

The Court therefore concluded that the statement must be interpreted as relating to substantive matters, and as not including or relating to the system of voting followed by the Council of the League of Nations.

The Union Government of South Africa argued that Rule F contained a provision which exceeded the supervisory power

enjoyed by the Council of the League of Nations, which observed the rule of unanimity in pronouncing on reports and petitions, whereas Rule F had substituted the two-thirds majority rule which would result in a degree of supervision exceeding that which applied under the Mandate System. In the view of the Court, the question of degree of supervision did not include or relate to the system of voting, and it was, therefore, unnecessary to go into the question any further.

The Court pointed out that while the statement regarding the degree of supervision related to substantive matters, the statement requiring conformity as far as possible with the procedure followed in the matter of supervision by the Council of the League of Nations related to the way in which supervision was to be exercised, a matter which was procedural in character. In this way, the Court concluded that "both substance and procedure are dealt with in the passage in question and both relate to the exercise of supervision. The word 'procedure' there used must be understood as referring to those procedural steps whereby supervision is to be effected".

In the view of the Court, it followed that the General Assembly, in adopting a method of reaching decisions in respect of the annual reports and petitions concerning the Territory, should base itself exclusively on the Charter, Article 18 of which authorized the General Assembly to decide whether decisions of this nature involve "important questions" or "other questions". The General Assembly had concluded that decisions by it on questions relating to reports and petitions concerning the Territory should be regarded as decisions on important questions to which the two-thirds majority rule should apply. In confirming this, the Court pointed out as follows:

> "It is from the Charter that the General Assembly derives its competence to exercise its supervisory functions; and it is within the framework of the Charter that the General Assembly must find the rules governing the making of its decisions in connection with those functions. It would be legally impossible for the General Assembly, on the one hand, to rely on the Charter in receiving and examining reports and petitions concerning South-West Africa, and, on the other hand, to reach decisions relating to these reports and petitions in accordance with a voting system entirely alien to that prescribed by the Charter."

The Court accordingly observed that, in the matter of determining how to take decisions relating to reports and petitions concerning

the Territory, there was but one course open to the General Assembly which had before it a text in Article 18 of the Charter prescribing the methods for taking decisions. The earlier Opinion of the Court left the General Assembly with that Article as a sole legal basis for the voting system applicable to decisions in connection with its supervisory functions. Rule F was adopted on that basis. The Court, therefore, concluded: "In adopting that Rule, the General Assembly acted within the bounds of legal possibility".

Another related problem touching petitions from the inhabitants of the Territory arose in the *Admissibility of Hearings of Petitioners by the Committee on South West Africa*[1]. There, the United Nations Committee on South West Africa, which had been established by the General Assembly, asked the latter whether or not the oral hearing of petitioners on matters relating to the Territory was admissible before that Committee. The General Assembly instructed the Committee to examine petitions as far as possible in accordance with the procedure of the former Mandates System. Thereafter, the General Assembly put the following question to the Court for its advisory opinion:

> "Is it consistent with the advisory opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the Territory of South West Africa?"

The Court thought it necessary at the outset to indicate its understanding of the question submitted to it to mean petitioners who had already submitted written petitions to the Committee in conformity with its rules of procedure. The question then arose as to whether the request for the opinion of the Court related to the authority of the Committee on South West Africa to grant oral hearings in its own right or only under prior authorization of the General Assembly. The Committee on South West Africa's functions were analogous to those of the Permanent Mandates Commission established by the Council of the League of Nations.

It would seem that the background to the whole matter was that the Union Government of South Africa, as the Mandatory, had refused to assist in the implementation of the first advisory opinion of the Court and to co-operate with the United Nations concerning the

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1 *Advisory Opinion, I.C.J. Reports 1956*, p. 23.

submission of reports and the transmission of petitions in accordance with the procedure of the Mandates System. When the Mandatory continued in its refusal to co-operate, the Committee found itself handicapped in the examination of petitions. For instance, it lacked both the Mandatory's comments on the petitions and the supplementary information which the Mandatory might have been expected to supply to the Committee directly or through its accredited representative. It was in these circumstances that the Committee requested the General Assembly to decide whether or not the oral hearing of petitioners by the Committee would be admissible.

The obligations imposed upon the Mandatory continued unimpaired with the only difference that the supervisory functions exercised by the Council of the League of Nations were from 1946 to be exercised by the United Nations through the General Assembly, which has since been charged with the duty of effective and adequate supervision of the administration of the Territory.

The Court took the view that, having concluded that South West Africa is a territory under international Mandate and that the Mandatory continued to have the two obligations previously explained, as well as the obligation to transmit reports and petitions and to submit to the supervision of the General Assembly, it was clear that the obligations of the Mandatory were those which obtained under the Mandates System; these obligations could not be extended beyond those to which the Mandatory had been subject by virtue of the provisions of Article 22 of the League Covenant and of the Mandatory System. The Court, therefore, said that the degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates System. It observed that these considerations were particularly applicable to annual reports and petitions.

We may now consider briefly the way in which the question of the grant of oral hearings to petitioners was dealt with during the régime of the League of Nations. The Permanent Mandates Commission had under consideration at various meetings the question of the grant of oral hearings to petitioners, both at the request of petitioners and on its own initiative. The Commission thought that in certain cases oral hearings would be useful, if not indispensable, in determining whether petitions were well founded or not. In 1926, the Commission laid the matter before the Council which decided to refer the matter to the Mandatory Powers for their opinion before giving the Commission a reply. All the Mandatory Powers at that time were opposed to the

grant of oral hearings on various grounds, and so it happened that oral hearings were not granted to petitioners by the Permanent Mandates Commission at any time during the régime of the League of Nations.

In 1923 however, the right of petition was introduced into the Mandates System by the Council of the League of Nations and certain rules were prescribed in relation to the matter. This innovation was designed to render the supervisory functions of the Council more effective, and it is not easy to understand why the right was not at the same time granted to the Permanent Mandates Commission to grant oral hearings to petitioners.

It was pointed out at one stage of the proceedings that the Court intended to express the view that the Mandates System and the degree of supervision to be exercised by the General Assembly in respect of the Territory must be deemed to have been crystallized so that, though the General Assembly replaced the Council of the League as the supervisory organ, it could not in the exercise of its supervisory functions do anything which the Council had not actually done, even if it had authority to do it. In rejecting that argument, the Court held:

> "There is nothing in the Charter of the United Nations, the Covenant of the League, or the Resolution of the Assembly of the League of April 18th, 1946, relied upon by the Court in its Opinion of 1950, that can be construed as in any way restricting the authority of the General Assembly to less than that which was conferred upon the Council by the Covenant and the Mandate; nor does the Court find any justification for assuming that the taking over by the General Assembly of the supervisory authority formerly exercised by the Council of the League had the effect of crystallizing the Mandate System at the point which it had reached in 1946."

It followed that the General Assembly, in carrying out its supervisory functions, had the same authority as the Council, and the scope of that authority could not be narrowed by the fact that the Assembly had replaced the Council as the supervisory organ. It was also argued that the grant of oral hearings by the Committee on South West Africa to petitioners would involve an excess in the degree of supervision to be exercised by the General Assembly, and that the grant of oral hearings by the Committee would not be consistent with the Court's first Opinion of 1950. In this connection, the Court made observations on two salient points. The first was to refute the suggestion that the

grant of oral hearings to petitioners would in fact add to the obligations of the Mandatory, and thus lay upon it a heavier burden than it was subject to under the Mandates System. The Court also discounted the suggestion that the statement "the degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System" should be interpreted as intended to restrict the activity of the General Assembly to measures which had actually been applied by the League of Nations. The Court took note that, under the compilation of practical considerations arising out of the lack of co-operation by the Union Government as Mandatory, the Committee on South West Africa provided in its Rules of Procedure an alternative for the receipt and the treatment of petitions. This innovation became necessary because the Mandatory had refused to transmit to the General Assembly petitions by the inhabitants of the Territory, thus rendering inoperative provisions in the rules concerning petitions and directly affecting the ability of the General Assembly to exercise an effective supervision.

For all these reasons, the Court concluded that it would not be inconsistent with its Opinion of 1950 for the General Assembly to authorize a procedure for the grant of oral hearings by the Committee on South West Africa to petitioners who had already submitted written petitions, subject, however, to the proviso that the General Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the Territory of South West Africa.

We now reach the stage in our survey at which the Court had examined the international status of the Mandated Territory of South West Africa and held that the Union Government was under the international supervision of the United Nations in respect of the Territory. Secondly, the Court had thereafter held that the voting procedure as laid down by the General Assembly in receiving petitions and annual reports was legally in order, so far as it obliged the Union Government to carry out its obligations in accordance therewith. Thirdly, the Court ruled that the South African Government had no right to refuse to co-operate with the Committee on South West Africa to appear before it to submit oral hearings in respect of their petitions to the Committee. The South African Government had thus brought the whole machinery of the Mandates System to a standstill, in addition to its refusal to place the Territory under the Trusteeship System established for the purpose in accordance with the United Nations Charter.

It was at this crucial point in time that Ethiopia and Liberia separately instituted legal proceedings before the World Court in *South West Africa* (Ethiopia *v.* South Africa; Liberia *v.* South Africa), *Second Phase*[1]. The first phase was in *South West Africa, Preliminary Objections*[2]. For convenience we shall briefly discuss both phases of the case together[3].

The two African States, the oldest sovereign States on the continent, complained against the Union Government of South Africa concerning the continued existence of the Mandate over South West Africa and the lack of progress and dereliction of duty and performance of South Africa as the Mandatory Power. Early in the proceedings the Court made an Order joining the two suits brought by Ethiopia and Liberia, which were found to be in the same interest. Their common demands were that:

(i) The Court should declare that South West Africa had remained a Mandated Territory as laid down by the Court itself in its advisory opinion of 1950,

(ii) South Africa had continued to be in breach of the obligations imposed upon it under that Mandate in accordance with Article 22 of the League Covenant, and

(iii) The Mandate and hence the Mandatory Power continued to be under the international supervision of the United Nations, which has since replaced the League of Nations in this respect.

Since all these situations had been well defined in three previous advisory opinions of the Court, both States were asking for declaratory judgments in respect of the Territory of South West Africa.

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1 *I.C.J. Reports 1966*, p. 6.

2 *I.C.J. Reports 1962*, p. 319.

3 In its 1962 Judgment, the International Court of Justice delivered what has been termed "self—neutralising judgements" on the interpretation of the arbitration clause in the Mandate of South West Africa. Article 7 (2) of the Mandate provides that "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 ICJ has taken over the role of the PCIJ since 1946. Article 7 clearly relates to such disputes and its provision complements the political and administrative supervision formerly exercised by the Council of the League and subsequently the United Nations General Assembly.

Four preliminary objections to the Court's jurisdiction were filed by the South African Government:

"1. The Mandate for South West Africa has never been, or at any rate is, since the dissolution of the League of Nations, no longer a 'treaty or convention in force' within the meaning of Article 37 of the Statute of the Court, this submission being advanced

(*a*) with respect to the Mandate as a whole, including Article 7 thereof; and

(*b*) in any event, with respect to Article 7 itself;

2. Neither the Government of Ethiopia nor the Government of Liberia is 'another Member of the League of Nations', as required for *locus standi* by Article 7 of the Mandate for South West Africa;

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

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

The two Applicants, in order to found the jurisdiction of the Court in the proceedings they had instituted, relied on Article 7 of the Mandate for South West Africa and Article 37 of the Statute of the Court.

The Court considered that if no dispute within the purview of Article 7 of the Mandate and Articles 36 and 37 of the Statute of the Court existed in fact, it must conclude that it was incompetent or *fin de non-recevoir*. The Court recalled that in the *Mavrommatis Jerusalem Concessions*[1], the Permanent Court defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views of interests between two persons". It was, therefore, not sufficient for one party to a contentious case to assert that a dispute existed with the other party; a mere assertion was not sufficient to prove the existence of a dispute any more than a mere denial of the existence of a dispute proved its non-

[1] *P.C.I.J., Series A. No.* 2, p. 11.

existence. The Court held: "It must be shown that a claim of one party is positively opposed by the other". Tested by this criterion, there could be no doubt about the existence of a dispute between the parties before the Court, since it is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the respondent as Mandatory.

The Court pointed out that the Mandate in fact and in law was an international agreement having the character of a treaty or convention; the Mandate is a special type of institution, composite in nature and instituting a novel international régime. Next, the Court took the view that the Mandate was still in force, having regard to the fact that it was an international convention under Article 7 of the League Covenant. The South African Government's contention that the rights and obligations under the Mandate in relation to the administration of the Territory of South West Africa, being of an objective character, still existed, while those rights and obligations relating to administrative supervision by the League and submission to the Permanent Court of International Justice, being of a contractual character, had necessarily become extinct on the dissolution of the League of Nations, which involved, as a consequence, the ending of Membership of the League, leaving only one party to the contract and resulting in the total extinction of the contractual relationship. The Court recalled its earlier ruling in its 1950 Opinion that that issue had already been decided in favour of the view that the United Nations had replaced the Council of the League for all practical purposes of the Mandate. The Court recalled that it was unanimous on its finding that Article 7 of the Union of South Africa to submit to the compulsory jurisdiction of this Court was still "in force".

The second preliminary objection derived from the same source of confusion on the part of South West Africa as the first objection, since it centred on the term "another Member of the League of Nations" in Article 7. The argument was that since all Member States of the League necessarily lost their membership and its accompanying rights when the League itself ceased to exist on 19 April 1946, there could no longer be "another Member of the League of Nations" afterwards. South Africa further contended that, even assuming that Article 7 of the Mandate was still in force as a treaty or convention, no State had "*locus standi*" or was qualified to invoke the jurisdiction of this Court in any dispute with South Africa as Mandatory. The Court rejected this contention, as contrary to the whole concept of judicial protection

of the sacred trust in the Mandate as an essential feature of the system. It was the *raison d'être* of this essential provision in the Mandate. The Court concluded that the term "another Member of the League of Nations" must take into consideration all the relevant facts and circumstances relating to the act of dissolution of the League, in order to ascertain the true intent and purpose of the Members of the Assembly in adopting the final resolution on 18 April 1946.

As regards the third preliminary objection that the dispute brought before the Court by the two Applicant States was not a dispute as envisaged in Article 7 of the Mandate, more particularly because the said conflict or disagreement did not affect any material interest of the Applicant States or their nationals, a careful examination of the purpose and intention behind Article 7 of the Mandate indicated that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory Power of those obligations both towards the inhabitants of the Mandate Territory and towards the League of Nations and its Members, of which both Ethiopia and Liberia were Members. As regards the fourth preliminary objection it consisted of the proposition that, if it was a dispute within the meaning of Article 7, it was not one which could be settled by negotiation with the Applicant, and that there had been no such negotiations with a view to its settlement. To this the Applicants replied that repeated negotiations had taken place over a period of more than ten years between them and the other Members of the United Nations holding the same views as they and the South African Government in the General Assembly and in various organs of the United Nations, and that each time the negotiations reached a deadlock, due to the conditions and restrictions placed upon them by the South African Government. The Court, therefore, concluded that the four preliminary objections should be rejected as not well founded.

This first phase of the case ended in a December 1962 Judgment of the Court which, having rejected all the four preliminary objections of South Africa, upheld its own jurisdiction to entertain the suit. It should be observed that, up to this point, when the question was raised by the Union Government of South Africa concerning the issue of *locus standi* of the two African States, the Court would appear to assume that the two States had *locus standi*.

Having decided that it had jurisdiction to hear the two applicants' complaints, the Court ordered pleadings on the merits in order to hear oral arguments and testimony from 18 March to 29 November 1965.

We may summarize the two African States' principal submissions as follows:

1. South West Africa is a territory under the Mandates conferred upon the British to be exercised on its behalf by the Government of the Union of South Africa;

2. South Africa continued to have the international obligation stated in Article 22 of the Covenant of the League and in the Mandate for South West Africa, as well as the obligation to transmit petitions from the inhabitants of the Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions were to be submitted;

3. The Union Government of South Africa had practised *Apartheid*, i.e. had distinguished as to race, colour, national or tribal origin, in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations under the League Covenant and under the Mandate; and that the Union had duty forthwith to cease the practice of *Apartheid* in the Territory;

4. The Union Government, by virtue of the economic, political, social and educational policies applied within the Territory, had failed to promote to the utmost the material and moral wellbeing and social progress of the inhabitants of the Territory; that its failure to do so was in violation of the stated obligations; and that the Union had the duty forthwith to cease its violation as aforesaid, and to take all practicable action to fulfil its duties under the Mandate;

5. The Union, by word and by action, in the respect already explained in their Memorials, had treated the Territory in a manner inconsistent with the international status of the Territory and had thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment was in violation of the United Nations obligation as aforesaid; that the Union had the duty forthwith to cease the actions summarized above and to refrain from similar actions in the future; and that the Union had the duty to accord full faith and respect to the international status of the Territory;

6. The Union had established military bases within the Territory in violation of its obligation; that the Union had the duty forthwith to remove all such military bases from within the Territory; and that the Union had the duty to refrain from the establishment of military bases within the Territory;

7. The Union had failed to render to the General Assembly or the United Nations annual reports containing information with regard

to the Territory and indicating the measures it had taken to carry out its obligation under the Mandate; that such failure is a violation of its obligations as stated in the Mandate; and that the Union had the duty forthwith to render such annual reports to the General Assembly;

8. The Union had failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure was a violation of its obligation under the Mandate; and that the Union had the duty to transmit such petitions to the General Assembly; and

9. The Union had attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt was in violation of its duties under the Mandate; and that the consent of the United Nations was a necessary prerequisite and condition precedent to attempts on the part of the Union Government directly or indirectly to modify the terms of the Mandate.

After due consideration of the lengthy and often involved documents advanced by South Africa against all these charges, the Court gave a Judgment in this second phase of the case on 18 July 1966, by the casting vote of the President, the votes having been equally divided 7:7. The Court came to the conclusion that Ethiopia and Liberia could not be considered to have established any legal right or interest appertaining to them in the subject-matter of their claims which they accordingly decided to reject. Thus, on the ground of not having *locus standi*, the Court came to its regrettable conclusion, even although that very ground had been disregarded in the earlier phase of the case concerning the jurisdiction of the Court.[1]

This decision of the Court based on an 8:7 majority by the casting vote of the President of the Court, was very badly received by the United Nations General Assembly and in most of the legal community

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[1] On this question, due note should be taken of this observation of Schwarzenberger, *op cit*, at p. 312:
"In 1962, the International Court of Justice rejected a preliminary objection which had been based on the individual rights interpretation of Article 7. In 1966, The Court—with the President's casting vote—reopened the issue under the heading of a requisite individual legal interest as part of the merits of the case and decided to the opposite effect".

of the world.[1] It was regarded as too legalistic and based upon too narrow a ground, centred on the two African States being regarded as having no *locus standi*.[2]

Shortly afterwards, came the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*[3]. On 27 October 1966, the General Assembly adopted resolution 2145 (XXI) to the effect that the Mandate for South West Africa was definitively terminated, and that South Africa no longer had any right to administer the Territory under Mandate. Later, when South Africa had done nothing about that decision, the Security Council in 1969 called upon South Africa to withdraw its administration from the Territory. On 30 January 1970, by resolution 276, the Security Council declared that the continued presence of the Government of South Africa in the Territory was illegal, and that all acts taken by the South African Government on behalf of or concerning Namibia, which is the new name given to South West Africa, after the termination of the Mandate, were illegal and invalid. The Security Council also called upon all States to refrain from any dealings with the South African Government that were incompatible with that decision. Generally, the non-recognition of

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[1] In both the 1962 and 1966 Judgments, there was an abnormal growth in separate declarations, Separate Opinions, and Dissenting Opinions on the part of members of the Court. Individual Opinions even outnumbered the number of judges who sustained the reasonings of the Court without modifications or qualifications. It is little wonder that such a restrained member of the Court like Judge Jessup had been moved to describe the Court's Judgment as "completely unfounded in law".
In the 1962 Judgment, two members of the Court, Judges Sir Patrick Spender and Sir Gerald Fitzmaurice somewhat ironically voiced doubts as to whether, in cases having strong political overtones, "the issues arising on the merits are such as to be capable of objective legal determination". (See I.C.J. Reports, 1962, p. 466. In the light of the two judges' views in the 1966 Judgment, however, it is no longer possible to accept their idea of what is "objective" in the statement cited.

[2] An instructive discussion of this case will be found in Bin Cheng's "The 1966 South West Africa Judgment of the World Court" (1970) 20 *Current Legal Problems, pp.* 181 *et seq.* See also W. Friedmann's "The Jurisprudential Implications of The South West Africa Case", *6 Columbia Journal of Transnational Law*, 1967.

[3] *Advisory Opinion, I.C.J. Reports 1971*, p. 16.

South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantage derived from international co-operation. With regard to non-member States, although not bound by Articles 24 and 25 of the United Nations Charter, they had been called upon to give assistance in the action which had been taken by the United Nations with regard to Namibia.

The Court observed:

> "The Mandate having been terminated by decision of the international organization in which the supervisory authority over its administration was vested, and South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with those decisions."

The Court continued:

> "Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a Territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constituted a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."

The Court pointed out that member States are under an obligation to abstain from entering into committed relations with South Africa in all cases in which the Government of South Africa purported to act on behalf of or concerning Namibia; also member States were under an obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia and to withdraw any such agents already there; and the member States should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with it did not imply any recognition of its authority with regard to Namibia.

On 29 July 1970 the Security Council decided to request an Advisory Opinion from the Court on the legal consequences for States of the continued presence of South Africa in Namibia. After very careful and prolonged analysis of the situation as presented by the States that took part in the oral proceedings, the Court, in its Advisory Opinion

of 21 June 1971,[1] found that the continued presence of South Africa in Namibia was illegal and also that South Africa was under an obligation to withdraw its administration immediately. The Court also said that member States were under an obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, enjoining South Africa to refrain from any acts implying recognition of the illegality of, or lending support or assistance to, such presence and administration. Finally, the Court declared that it was "incumbent upon States which are not members of the United Nations to give assistance... to the action which has been taken by the United Nations with regard to Namibia".

It is, however, a sad reflection on the times that the South African Government is still in Namibia today and continues to administer the Territory after a fashion. All efforts of the United Nations to secure self-determination and independence for Namibia have so far been frustrated by South Africa.[2] It is gratifying to end on the encouraging note that the law has spoken, and it has done so in favour of the right of the Namibian people to self-determination and independence. The approach is certainly one of peace, even as Mahatma Gandhi would have wished.

1 It is significant that the ICJ's opinion was at long last favourable to Namibia, in which, for the first time Africa was legally represented by Nigeria through the Lecturer on behalf of the Organization of African Unity which, in the face of the United Nations Charter and the Statute of the Court, could not be directly represented by Counsel. The acceptable device employed was that at least Nigeria as a Member State of the United Nations should appear as a party to the case before the Court.

2 See, generally, S.M. Schwebel's *The Effectiveness of Intenational Decisions*, 1971: and R. Higgins "The Place of Law in the Settlement of Disputes by the Security Council" (1970) 64 AJIL.
The Charter of the UN provides in Article 92 that the Court is the principal judicial organ of the United Nations; and Article 94 enjoins all States parties before the Court to regard its judgment as binding upon them in respect of cases thus adjudicated upon. The Charter of the United Nations lays a clear duty upon the Security Council to take steps to execute all the judgments pronounced by the Court. The Council to the executive branch of the United Nations Organization is endowed with police powers and enforcement action. What is most disturbing about the whole issue is the right which the Charter gives to the five Permanent Members of the Security Council to veto any decision of the Council, even including a legally binding judgment pronounced by the International Court of Justice. This veto power in respect of the execution of a Judgment of the Court further weakens its authority as the principal judicial organ of the United Nations Organization. It unnecesarily hamstrings the World Court in its operation.