

## (I) INTRODUCTORY NOTE

The Committee on the motion of the Delegation of Ghana present at the Eighth Session decided to take up for discussion the judgment of the International Court of Justice on the South-West Africa Cases under Article 3 (c) of the Committee's Statutes and to consider certain questions arising therefrom. The matter was generally discussed at that Session and the Delegations of Ceylon, Ghana, India, Indonesia, Iraq, Japan, Pakistan and Thailand made statements. The Committee decided to give first priority to the subject at its Ninth Session and directed the Secretariat to study the questions raised in the course of discussions at that Session and to prepare a detailed brief for consideration of the Committee at its Ninth Session.

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(II.) STATEMENTS OF THE DELEGATES  
ON THE JUDGMENT OF THE  
INTERNATIONAL COURT OF JUSTICE  
ON SOUTH WEST AFRICA CASES

Dated the 18th July- 1966.

(Ethiopia v. Union of South Africa  
Liberia v. Union of South Africa)

**Ghana :** Mr. President, Distinguished Delegates—I am quite sure that members here today are all aware of the reaction of my Government and indeed of the entire African Group of the United Nations, expressed in a short and concise press release on the 19th July, 1966 towards the rather interesting but startling decision of the International Court of Justice in the proceedings instituted by Ethiopia and Liberia, the African member states, parties to the Covenant of the League of Nations, against the Union of South Africa on the issue of South-West Africa.

In this statement, it was pointed out : “Laws do not develop in a vacuum and must be interpreted within the prevailing attitudes of the International Community”.

In the General Assembly of the United Nations and in other international forums, the voice of the twentieth century has always proclaimed with animated articulation and clarity, the principles of sovereign equality, of world peace and security, of the right to self-determination and of freedom and justice for all irrespective of their different political, economic and social systems or forms of government.

Here in Bangkok, we members of the Asian-African Legal Consultative Committee, enthused by the common desire to achieve these very ends have once more met to canvass and formulate legal principles which we firmly believe will guide

mankind towards peace and security through the observance of the Rule of Law. In a way, therefore, we must all feel disappointed that the general march of events has tended again and again to demonstrate the ever widening gap between these lofty principles and actual practice.

All too often great measures hatched in the United Nations or in its Specialised Agencies or other international organisations have been wrecked by the dead hand of the *Veto* or by the sterility of outmoded legal technicalities.

This decision of the International Court of Justice which, in effect, has given legal sanctity and blessing to the claims of South Africa, a government that has been persistently condemned by all peace loving nations of the world for her *apartheid* and other inhuman excesses, must constitute a serious affront to the legal conscience of the world community and shake the very basis of decency in international life. It is the unspeakable irony of our time that an institution of the order of the International Court of Justice, forged out of contemporary norms and principles, should be used to frustrate and stultify the implementation and furtherance of these ideals.

It is the consideration of these matters that has prompted my Delegation to raise the question of South West Africa at this stage of our deliberations.

We, in Africa, have joined hands of friendship, greater cooperation and understanding with you in Asia. We have together nearly always spoken with one voice in the deliberations at many international gatherings. What therefore affects Africa immediately will at least have immediate repercussions on Asia.

Accordingly, it is the ardent hope of my Delegation that the Asian-African Legal Consultative Committee will do its utmost in concert with other international legal organisations to conduct a thorough search for the legal wisdom that will bring principles and practice as close together as possible.



To this end, my delegation would suggest that the Committee consider this matter and request the Secretariat to make available detailed material on the subject to facilitate a discussion at the next Session of the Committee.

It may be useful, in this exercise, for the Secretariat to give due consideration, *inter alia*, to :—

- (a) Equitable geographical distribution of seats on the International Court of Justice,
- (b) Termination of the Mandate creating the international status of South West Africa and assumption of direct responsibility by the United Nations.

It is the strong conviction of my Delegation that by taking these steps the Asian-African Legal Consultative Committee would be contributing immensely and in a positive manner towards the achievement of the high legal ideals on which we all so much set our hearts. Thank you.

Ceylon : Mr. President—Anything I say on the matter of the recent judgment of the International Court of Justice must be prefaced by a statement that I suffer from the disadvantage that at the time of leaving my country and up to this moment I have not had access to the full text of the judgment which is said to be voluminous. Nor must anything I can now say be taken as in any way critical of the good faith of the judges who participated in the decision which has come as a disappointment to the vast mass of the human race, if one is to judge by the comments which have found expression in the newspapers of so many widely dispersed parts of the world.

You will recall, Mr. President, that on the opening day of this Session I myself made some reference to this judgment as having shrouded the role of international law in the settlement of international disputes. At a time when the world, particularly

the developing and newly independent countries thereof, are hopefully looking forward to the dawn of an acceptable legal order, this judgment has introduced a disturbing element of uncertainty into international adjudication. If what I may call, without meaning offence to any one, the newer nations have hitherto shown a disinclination to use the Court on the ground that its composition is heavily weighted against them, this judgment certainly contributes nothing to remove that fear. That Court is essential in the interests of peace among the nations cannot be gainsaid ; but it appears to us to be vital that there should be a more determined wish among the nations not only to abide by the Rule of Law, but also to free themselves from the apronstrings of technicality and move forward with the purpose of fashioning that Rule dynamically in the direction of legitimation of a just moral order. Only then can the Rule of Law have positive basis in the will and acquiescence of man.

Mr. President, that the Government of South Africa accepted a mandate is not doubted, and I apprehend it is not doubted by South Africa itself. If Ethiopia and Liberia, who were members of the League of Nations, have not a sufficient legal right in seeing that the conditions of the mandate are observed by the mandatory, is it not doubtful whether all former members of the League have likewise no such legal right ? If that be so, then do we not reach a result that the Court in no circumstances now give a binding judgment on a mandatory's obligations ?

Changes in procedure and amplification of the powers of the Court in certain directions appear to be called for in the light of the present predicament. To some of us who have been brought up in the tradition whereby a stage is reached when certain issues, once adjudicated upon, are considered binding upon the parties to a suit, the doctrine of *res judicata* has meaning. Much of the work of courts, and the International Court of Justice is no exception, will be interminable if that doctrine is not respected and maintained. Yet the recent



decision appears to me to be in breach of this doctrine. Did not the applicant-nations have a right to believe that by the 1962 decision the question of jurisdiction had come to be settled as between them and South Africa? The "antecedent" point that found favour with the majority (and that too by the invocation of a casting vote) appears to amount to nothing less than a reversal of the 1962 judgment. Then, is not reversal an accident of the composition of the Bench, and does not that emphasise the element of uncertainty and impermanence in the decisions of the Court? Does it not help somewhat to erode the confidence of men in the validity of even the incipient international order which we are hopefully trying to foster and promote in the face of and despite the deep cleavages of our period?

Although the African nations are immediately concerned by this decision, is it seriously to be suggested that the other nations of the world are any less concerned? Certainly the nations in Asia have an abiding interest in the peoples of Africa taking their rightful places in the world community.

Can technicality be over-refined in disputes affecting the right of human beings to live in the way human beings have a right to live? Must law in the last result be governed inevitably by technicality? Will not this judgment come to be considered by posterity as the enthronement of technicality? Can international law today hope to grow unless it seeks to found its very basis in the emerging world community of nations, and in the process consciously and deliberately repudiating the past that had made possible nation states and colonies to cohere together as if they were not basic and irreconcilable contradictions?

In this age of dynamism there can only be one answer to this question. Must not world legal opinion relegate technicality to its proper place? The point I have just thought of mentioning here and many other questions which need not be mentioned in what is essentially a short statement deserve

anxious and serious consideration by this Committee. I, therefore, propose that we request the Secretariat to make a study of the full text including the opinions of the dissenting judges in this controversial judgment and report to the Committee before its next Session.

**India :** Mr. President, Distinguished Delegates and Observers :—

On behalf of my Delegation, I share the concern expressed by the distinguished Delegate of Ghana day before yesterday over the recent Judgment of the International Court of Justice in the case of South West Africa, as also his interest in the Committee expressing an opinion thereon after adequate study of the relevant documentation. Mr. President, may I say at the outset that although South West Africa is an African country, the concern and interest in the promotion of well-being of the people of that country and their right to full self-government and independence are fully shared by all Asian States.

Mr. President, it is not necessary to go over the entire background of the question of South West Africa. The matter has been before the General Assembly of the United Nations since 1946. The World Court has given three advisory opinions in this connection, the first on the 11th July 1950, the second on the 7th June 1955 and the third on the 1st June 1956, and made pronouncements regarding the international status of South West Africa, the obligations of the administering power, the powers of supervision of the General Assembly, and the procedures to be followed by its Committees and in the plenary in examining reports from the administering country and hearing petitions and petitioners. When the Union of South Africa did not cooperate with the United Nations notwithstanding these opinions, the General Assembly had no option but to encourage States which were Members of the League of Nations to agitate their rights and interest in the proper enforcement of



the international obligations of South Africa in the World Court. Accordingly, Ethiopia and Liberia initiated contentious proceedings against the Union of South Africa on the 4th November 1960. In the proceedings before the Court, South Africa raised four preliminary objections to the Court's jurisdiction, which were ruled out by the Court in its judgment of the 21st December 1962. The Court then proceeded to deal with the merits. It is a matter of great regret, Mr. President, that after a further lapse of about four years, the Court should have dismissed the applications on a preliminary point, namely, that the parties had no legal right or interest in the subject-matter of the dispute, a matter which, it appears to us *prima facie*, has already been disposed of by its judgment of the 21st December 1962. The judgment of the Court delivered on the 18th July 1966 was 7:7, and the President cast his second vote in favour of those holding that the parties (applicants) had no interest. The result was that the Court did not proceed to the merits, and after expending so much effort, energy and expense, the Asian and African nations are thus faced with the position that the crucial questions whether the Union of South Africa was bound by the obligations imposed upon it by the mandate agreement and the League Covenant, whether by pursuing a policy of *apartheid* and taking other arbitrary and discriminatory measures South Africa had violated its obligations, and whether it had fulfilled its obligations towards the United Nations remain unresolved.

Mr. President, my Government has expressed surprise at the outcome of this case and at this unfortunate judgment. The Indian Foreign Minister stated in Parliament on the 2nd August 1966: "The judgment is not likely to inspire confidence in the International Court or in the establishment of the Rule of Law in international affairs".

We, therefore, fully endorse the views expressed by the distinguished Delegate of Ghana that this judgment need to be examined by our Committee both with regard to its basis in

international law and with regard to its consequences. We feel that the Secretariat of the Committee should be requested to—

- (1) prepare a background note on the question of South West Africa ;
- (2) assemble the background materials relating to the case of South West Africa before the World Court,
- (3) examine the question whether it will be competent for the General Assembly of the United Nations to terminate the mandate over South West Africa and bring the territory within its direct supervision ; and
- (4) prepare a note on the representation of the main forum of civilisation and of the principal legal systems of the world in the Court.

The matter may thereafter be discussed at the Ninth Session of the Committee. Thank you, Mr. President.

**Indonesia :** The judgment of the International Court of Justice, which we are discussing now, is a lengthy document of learned words. But the result of that lengthy document is not satisfactory. That judgment does not answer any of the questions, for instance, the question whether South Africa is responsible to the United Nations and also to the underlying explosive questions of *apartheid* in particular and the independence movement in general. Frankly speaking, Mr. President, the document is for me also *inter partes*, but because of the outcome, I am concerned that there is something wrong in it. To find out what is wrong in the logic of the judgment and to find a righteous solution based on the Rule of Law is the duty of this Committee. We can find comfort in the fact that the votes in the case were equally divided and that the negative decision was the result of the casting vote of the Australian President. The decision is a difficult one. We, therefore, should refrain



from rash action, and we support the proposal of the distinguished Delegate from Ghana to put the question on the agenda of the next Session.

**Iraq :** Mr. President, I shall be brief on this question because I can speak in concert with the views of other Delegates who have expressed their views. The Government of Iraq has issued a declaration in this matter. The declaration analyses this decision of the Court and condemns the judgment. I can't give you the exact text of this declaration because it is not with me. But I can give you some idea about it. It says in the declaration that this decision does not establish the Rule of Law and does not give confidence for a State in this organization. This decision is against freedom, justice and peace. This is the summary of the contents of this declaration, and we think that it is time to ask for amendment of the Statute of the International Court to have more members from the Asian and African countries to be able to defend our interests and our rights. Thank you.

**Japan :** With due respect to the highest authority of the World Court, the utmost which I can say at this moment is that the judgment in question was a disappointment and a surprise.

I must read and study carefully the full text of the judgment before formulating any further comments. Nevertheless, I think, there are two aspects to consider in this question, that is, the merit of case on the one hand, and on the other hand, the constitution and function of the Court. On this second point, I cannot but recollect a personal experience. About forty years ago I visited *Palais de Justice de Dijon* in France. The guide, pointing at a tortoise in the garden, said :

*Voila le symbol de justice. Le marche lentement.*

(There the symbol of justice. It goes slowly.)

If justice goes fast, the social order will always be upset.

If justice goes slowly the society will always be disappointed.

The problem before us, it seems to me, is how to make the World Court go on keeping pace with the march of the world society—not too fast and not too slowly. Thank you.

**Pakistan :** Mr. Chairman, Fellow Delegates, Distinguished President of the International Law Commission and Observer Friends. Let me at the outset thank my learned colleague from Ghana for having provided an opportunity to the members of this Committee to express their views on the judgment of 18th July 1966 of the International Court of Justice. I was in my country when this judgment was reported to the papers and I must say that the people of Pakistan and my Government were thoroughly disappointed at the performance of that august body. I have not read the full text of judgment, but it is clear to all of us that the Court has dismissed the application of Ethiopia and Liberia on a preliminary point that the two applicant countries had failed to establish in them a legal right or interest in the administration of South West Africa. Is it not shocking to the world conscience that the application made for such a laudable purpose as ensuring the right of self-determination for fellow human beings has been dismissed on a technical ground and what makes it worse is that this very Court in the year 1962 held by majority that the applicants had such a right. The principle of *res judicata* which is of universal application, has also been conveniently ignored.

I feel ashamed to say that those seven judges who were in a minority at that time of the earlier pronouncement in 1962 took undue advantage of the absence of three judges. One of them Mr. Justice Badawi from U.A.R. having died, while Mr. Justice Bustamante from Peru could not participate due to his illness, and Mr. Justice Chaudhuri Zafrulla Khan from Pakistan was not allowed by the Chairman to sit on this bench on the ground that he at one time was nominated as an *ad hoc* Judge by the applicant countries, although he never worked as such. When Mr. Justice Chaudhuri Zafrulla



Khan pleaded that it was no disqualification, the Chairman told him that several Judges shared his view and that it was not proper for him to sit in this case. Placed in this awkward position he had no option left. The accusation made by the press in a country that Mr. Justice Chaudhuri Zafrulla Khan deliberately avoided to sit in this case is false and if I may say so, malicious. I am surprised as to how could such eminent judges as the Chairman and seven other Judges hold such a view that Mr. Justice Chaudhuri Zafrulla Khan was disqualified to sit on this bench. The Judges appointed by their Governments have always heard cases against those Governments and how could Mr. Justice Chaudhuri Zafrulla Khan be disqualified to hear this case only on account of having been nominated an *ad hoc* Judge by Ethiopia and Liberia which position he did not even occupy. The seven judges who were in a minority in 1962 became a majority with the casting vote of the Chairman. The result has been that for the time being the policy of *apartheid*, which has been universally condemned as contrary to law and humanity by all civilised nations, shall continue towards the people of South West Africa. May I say that this state of affairs is a challenge to all Governments who are dedicated to peace and respect of human rights. I, on behalf of my Government and the people of Pakistan, assure our brethren of South West Africa that we shall continue to give our whole-hearted support to their effort to end the system of oppression based on *apartheid* and to secure for them their inalienable human right of self-determination. It is time that the Security Council or the General Assembly of the United Nations ask an advisory opinion of this Court on the issues raised by the applicant countries in their application. In that event the Court will have to pronounce their opinion on the merits, and I have no doubt that the unanimous verdict of the Court on merits must go in favour of the people of South West Africa.

Before I conclude I would like to say a few words about the paper issued by the Press Service Office of Public Infor-

mation, United Nations, which was supplied to us yesterday. This is based on a Statement issued from the Registry of the International Court of Justice. This gives support to the now majority view of the Court. The proper thing for the Registry would have been to also give a brief gist of the dissenting notes of the other seven Judges. I have no status to take exception to this one sided picture depicted by the Registry, but I must say that I, as an humble student of law, am unable to reconcile the view taken in 1962 with the view taken now. It has been remarked at page 6 that there was no contradiction between a decision that the Applicants had the capacity to invoke the jurisdictional clause and a decision that the Applicants had not established the legal basis of their claim on the merits in respect of the contention that the jurisdictional clause of the Mandate conferred a substantive right to claim from the Mandatory the carrying out of the conduct of the Mandate provisions. If this was the correct view of law, why were not the petitions dismissed in 1962 and kept pending for four years involving huge expenditure and waste of the precious time of the Court. Probably the Court had no better work to do. If the Applicants had the capacity to invoke the jurisdiction of the Court, the only course open to the Court was to decide the matter in dispute on merits and to give a finding whether the Applicants were able to establish against the Respondent-South Africa the various allegations of the contraventions of the Mandate for South West Africa. I will close by saying that the judgment as it stands falls much too short of the expectation of my country.

**Thailand :** Mr. President, Fellow Delegates. The Delegation of Thailand has followed with interest the South West Africa case. Although at this stage it has not yet have time to consider the details of the decision, it is sufficient to make a few preliminary observations. This country, Thailand, supports the independence of all nations, particularly, Asian and African nations. Thailand opposes and does not tolerate the practice of *apartheid* wherever it may be adopted. There-



fore, despite its respect for the International Court of Justice, it has learned with regret and dismay the substance of the decision which, in effect, as my colleague from Japan has pointed out, would delay the turning of the wheel of Justice in this particular instance. It is rather heartening to hear that criticisms of this decision have been forthcoming from all quarters, not only from the African and Asian countries but also from the Soviet Union, the United States of America and from eastern European countries, even from Poland whose judge has pronounced in favour of this decision. We, in Thailand, strictly observe in good faith our obligations under the Charter of the United Nations and we would respect their decisions. But this is not the first time that we have been disappointed or dismayed by the decision of the International Court of Justice. Now we are happier that there is a growing sense of dissatisfaction with the result of which it is a hope of my Delegation that there will be marked progress and improvement both in the standard of justice as well as to the speed with which justice can be expected, particularly in the international field. Thank you.

**Ghana :** Mr. President, Distinguished Delegates—Having heard the speeches of other Delegates, at least there is a hope that we in Africa and Asia and in fact all peace-loving countries have a consensus of mind on this subject. The various opinions expressed are in fact a confirmation of what is to be expected. One golden thread runs through the speeches of Honourable Delegates, and that is what affects Africa now gives serious consideration to the thoughts of Asia.

In our times, Mr. President, might counts and the weak has no effective voice in international politics. We cherish the independence of the International Court of Justice, but can we seriously say that the members on the panel are independent. It has often been said that the judges do not represent their countries. This becomes a fiction when one considers the mode of election. The national groups are constituted by individual

governments. Judges are human beings and perhaps in trying to perpetuate their positions will naturally be guided by national interest in making up their minds on a particular issue. The Statute and the rules of procedure of the Court also admit election of *ad hoc* judges to represent the interest of States parties to a dispute. For these reasons, Mr. President, my Delegation feels that a time has come to press for the revision of the distribution of the seats of the Court. The United Nations Charter itself talks about equality of States, peaceful co-existence and denunciation of colonialism and man's inhumanity to man. The plight of people in South West Africa is an unhappy one. We, in Ghana, have once been under colonial domain and we are aware of the pinch of colonialism. It is not a happy lot, let alone when mingled with barbarism.

My Delegation is happy to note that a serious consideration has been given to this matter and the next Session of the Committee will probably see concrete decisions being taken to improve our present position as far as the International Court of Justice is concerned.

I thank all the Delegates, Mr. President, for supporting this idea. Thank you very much.