

- (iii) (Ethiopia v. Union of South Africa; Liberia v. Union of South Africa): Order of 20 May 1961:  
I.C.J. Reports 1961, pp. 13 to 15.
- (iv) (Ethiopia v. Union of South Africa; Liberia v. Union of South Africa): Order of 5 December 1961:  
I.C.J. Reports 1961, pp. 61 to 62.
- (v) (Ethiopia v. Union of South Africa ; Liberia v. Union of South Africa): Judgment of 21 Dec. 1962:  
I.C.J. Reports 1962, pp. 319 to 662.
- (vi) Order of 5th February 1963:  
I.C.J. Reports 1963, pp. 6 to 8.
- (vii) Order of 18th September 1962:  
I.C.J. Reports 1963, pp. 12 to 13.
- (viii) Order of 20th January 1964:  
I.C.J. Reports 1964, pp. 3 to 4.
- (ix) Order of 20th October 1964:  
I.C.J. Reports 1964, pp. 171 to 172.

( VIII )

## U.N. GENERAL ASSEMBLY RESOLUTION 2145 (XXI) OF 27 OCTOBER 1966

### The General Assembly:

*Reaffirming* the inalienable right of the people of South West Africa to freedom and independence in accordance with the Charter of the United Nations General Assembly resolution 1514 (XV) of 14 December 1960 and earlier Assembly resolutions concerning the Mandated Territory of South West Africa,

*Recalling* the advisory opinion of the International Court of Justice of 11 July 1950<sup>1</sup>, which was accepted by the General Assembly in its resolution 449A (V) of 13 December 1950, and the advisory opinions of 7 June 1955<sup>2</sup> and 1 June 1956<sup>3</sup> as well as the judgment of 21 December, 1962,<sup>4</sup> which have established the fact that South Africa continues to have obligations under the Mandate which were entrusted to it on 17 December 1920 and that the United Nations as the successor to the League of Nations has supervisory powers in respect of South West Africa,

<sup>1</sup> International Status of South West Africa, Advisory Opinion: *I. C. J. Reports*, 1950, p. 128.

<sup>2</sup> South West Africa—Voting Procedure, Advisory Opinion of June 7th, 1955: *I. C. J. Reports* 1955, p. 67.

<sup>3</sup> Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion of the June 1st, 1956, *I.C.J. Reports* 1956, p. 23.

<sup>4</sup> South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962. *I. C. J. Reports* 1962, p. 319.

*Gravely concerned* at the situation in the Mandated Territory, which has seriously deteriorated following the judgment of the International Court of Justice of 18 July, 1966,

*Having studied* the reports of the various committees which had been established to exercise the supervisory functions of the United Nations over the administration of the Mandated Territory of South West Africa,

*Convinced* that the administration of the Mandated territory by South Africa has been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights,

*Reaffirming* its resolution 2074 (XX) of 17 December 1965, in particular paragraph 4 thereof which condemned the policies of apartheid and racial discrimination practised by the Government of South Africa in South West Africa as constituting a crime against humanity,

*Emphasizing* that the problem of South West Africa is an issue falling within the terms of resolution 1514 (XV),

*Considering* that all the efforts of the United Nations to induce the Government of South Africa to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the well-being and security of the indigenous inhabitants have been of no avail,

*Mindful* of the obligations of the United Nations towards the people of South West Africa,

*Noting with deep concern* the explosive situation which exists in the southern region of Africa,

<sup>5</sup> South West Africa, Second Phase, Judgment, *I. C. J. Reports* 1966, p. 6.

*Affirming* its right to take appropriate action in the matter, including the right to revert to itself the administration of the Mandated Territory,

1. *Reaffirms* that the provisions of General Assembly resolution 1514 (XV) are fully applicable to the people of the Mandated Territory of South West Africa and that, therefore, the people of South West Africa have the inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations;

2. *Reaffirms further* that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence;

3. *Declares* that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa, and has, in fact, disavowed the Mandate;

4. *Decides* that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations;

5. *Resolves* that in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa;

*Establishes an Ad Hoc* Committee for South West Africa composed of fourteen Member States to be designated by the President of the General Assembly—to recommend practical means by which South West Africa

should be administered, so as to enable the people of the Territory to exercise the right of self-determination and to achieve independence, and to report to the General Assembly at a special session as soon as possible and in any event not later than April, 1967;

7. *Calls upon* the Government of South Africa forthwith to refrain and desist from any action, constitutional, administrative, political or otherwise, which will in any manner whatsoever alter or tend to alter the present international status of South West Africa;

8. *Calls the attention* of the Security Council to the present resolution;

9. *Requests* all States to extend their whole-hearted co-operation and to render assistance in the implementation of the present resolution;

10. *Requests* the Secretary-General to provide all assistance necessary to implement the present resolution and to enable the *ad hoc* Committee for South West Africa to perform its duties.

( IX )

U.N. GENERAL ASSEMBLY RESOLUTION  
2248 (S-V) OF 19 MAY 1967

The General Assembly

*Having considered* the report of the *Ad hoc* Committee for South West Africa<sup>1</sup>,

*Reaffirming* its resolution 1514 (XV) of 14 December 1960 containing the Declaration on the granting of independence to colonial countries and peoples,

*Reaffirming* its resolution 2145 (XXI) of 27 October 1966 by which it terminated the Mandate conferred upon His Britannic Majesty to be exercised on His behalf by the Government of the Union of South Africa and decided that South Africa had no other right to administer the territory of South West Africa,

*Having assumed* direct responsibility for the territory of South West Africa in accordance with resolution 2145 (XXI),

*Recognizing* that it has thereupon become incumbent upon the United Nations to give effect to its obligations by taking practical steps to transfer power to the people of South West Africa,

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*Reaffirming* the territorial integrity of South West Africa and the inalienable right of its people to freedom and independence, in accordance with the Charter of the United Nations,

1. A/6640.

General Assembly resolutions 1514 (XV) and all other resolutions concerning South West Africa;

## II

1. *Decides* to establish a United Nations Council for South West Africa (hereinafter referred to as the Council) comprising eleven Member States to be elected during the present session and to entrust to it the following powers and functions, to be discharged in the Territory:

- (a) To administer South West Africa until independence with the maximum possible participation of the people of the Territory;
- (b) To promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage;
- (c) To take as an immediate task all the necessary measures, in consultation with the people of the Territory, for the establishment of a constituent assembly to draw up a Constitution on the basis of which elections will be held for the establishment of a legislative assembly and a responsible government;
- (d) To take all the necessary measures for the maintenance of law and order in the territory;
- (e) To transfer all powers to the people of the Territory upon the declaration of independence;

2. *Decides* that in the exercise of its powers and in the discharge of its functions the Council shall be responsible to the General Assembly;

3. *Decides* that the Council shall entrust such executive and administrative tasks as it deems necessary to a United

Nations Commissioner for South West Africa (hereinafter referred to as the Commissioner), who shall be appointed during the present session by the General Assembly on the nomination of the Secretary-General;

4. *Decides* that in the performance of his tasks the Commissioner shall be responsible to the Council.

## III

1. *Decides* that:

- (a) The administration of South West Africa under the United Nations shall be financed from the revenues collected in the Territory;
- (b) Expenses directly related to the operation of the Council and the office of the Commissioner—the travel and subsistence expenses of members of the Council, the remuneration of the Commissioner and his staff and the cost of ancillary facilities—shall be met from the regular budget of the United Nations;

2. *Requests* the specialized agencies and appropriate organs of the United Nations to render to South West Africa technical and financial assistance through a co-ordinated emergency programme to meet the exigencies of the situation.

## IV

1. *Decides* that the Council shall be based in South West Africa;

2. *Requests* the Council to enter immediately into contact with the authorities of South Africa in order to lay down procedures, in accordance with General Assembly resolution 2145 (XXI) and the present resolution, for the transfer of the administration of the Territory with the least possible upheaval;

3. *Further requests* the Council to proceed to South West Africa with a view to:

- (a) Taking over the administration of the Territory;
- (b) Ensuring the withdrawal of South African police and military forces;
- (c) Ensuring the withdrawal of South African personnel and their replacement by personnel operating under the authority of the Council;
- (d) Ensuring that in the utilization and recruitment of personnel preference be given to the indigenous people;

4. *Calls upon* the Government of South Africa to comply without delay with the terms of resolution 2145 (XXI) and the present resolution and to facilitate the transfer of the administration of the Territory of South West Africa to the Council;

5. *Requests* the Security Council to take all appropriate measures to enable the United Nations Council for South West Africa to discharge the functions and responsibilities entrusted to it by the General Assembly;

6. *Requests* all States to extend their whole-hearted cooperation and to render assistance to the Council in implementation of its task.

## V

*Requests* the Council to report to the General Assembly at intervals not exceeding three months on its administration of the Territory, and to submit a special report to the Assembly at its twenty-second session concerning the implementation of the present resolution.

## VI

*Decides* that South West Africa shall become independent on a date to be fixed in accordance with the wishes of the

people and that the Council shall do all in its power to enable independence to be attained by June 1968.

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On 13 June 1967, in pursuance of paragraph 1 of section II of the above resolution, the General Assembly elected Chile, Columbia, Guyana, India, Indonesia, Nigeria, Pakistan, Turkey, U.A.R., Yugoslavia and Zambia as the members of the U.N. Council for South West Africa. On the same date, in pursuance of paragraph 3 of section II of the above resolution, the General Assembly, on the nomination of the Secretary-General (A/6656), appointed Constantin A. Stavropoulos, the Legal Counsel of the United Nations as Acting U.N. Commissioner for South West Africa.

IV STATEMENTS MADE BY HON. MR.  
JUSTICE M. HIDAYATULLAH\*,  
SPECIAL INVITEE AND THE  
DELEGATES AT THE  
NINTH SESSION

Mr. JUSTICE HIDAYATULLAH

Mr. Chairman and distinguished delegates, I feel greatly honoured and, if I may say so, overwhelmed, by the invitation which has been issued to me by your Consultative Committee to address you on the subject of 'South West Africa Cases'. It is not that I have made a very detailed study of the subject because in my capacity as a Judge, I find very little spare time to make detailed studies of anything but the cases before me, but I have taken an interest which may be described as a little more than detailed in the subject of South West Africa and have therefore placed on paper certain thoughts which have been also placed with an amount of restraint due from a Judge who is sitting writing about Courts such as the International Court of Justice. In these cases, there has been a lot done about advancement of international law theory, but I have purposely not touched upon them because that is a matter which will be considered by scholars of greater merit than I can claim. I feel that addressing such a distinguished gathering and in the presence of so many experts on the subject, I should speak again with a certain amount of restraint and, if I may add, modesty, because it would be most unbecoming on my part if I ventured into theories or offered advice beyond what would be

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\* Mr. Justice M. Hidayatullah, now Chief Justice of the Supreme Court of India, was invited to attend the Ninth Session and to assist in the deliberations of the Committee on the subject of *South West Africa Cases*, under Rule 7(5) of the Statutory Rules of the Committee.

the function of a person who, so to speak, sets the field for the match. We have before us a problem which may be described as a problem of great magnitude.

I was surprised yesterday when your elected Chairman referred to South West Africa case as a half-dead issue. I hope he was only pulling my leg and did not mean it. I know that the South West Africa case requires all the legal acumen and political subtlety that man is capable of to solve, but I cannot describe it as even half-dead or fully-dead because I think if faith and energy and determination to do something have any meaning, the South West Africa case is not dead, but it is very much alive, and we are here to find the means how to attain independence for a section of humanity which under the circumstances today is finding it difficult to attain it. We know that most of the countries have had a colonial history, but they have been able to shake off the colonial yoke except certain old colonies of Portugal to which our Prime Minister referred yesterday and South West Africa which, though not a colony, started as a mandate but is about to become integrated into South Africa, if it has not already been *de facto* so integrated.

Now what is the question that arises about it and let us now get down to the problem. Before I do so, let me take you back a little into the history of South West Africa, which is as well known to you as to me. I need not therefore dwell upon it for any length of time. You know that South West Africa was formerly a part of the German Colonies. It was seized by Germany before Britain could seize it, and therefore it became a part of the German Colonies. After the First World War, Germany gave up South West Africa under Article 118 of the Treaty of Versailles, and then it passed under the Mandate of South Africa on behalf of His Britannic Majesty. It is a curious thing that this mandate was created as a 'C' class mandate and not by any treaty or convention but by a resolution and therein lies the real difficulty of the problem, because the resolution was not complete in itself. It only

mentioned certain things which the Mandatory was required to do. All 'C' class mandates were of that character, and this particular mandate was to be administered by South Africa as an integral part of its own territories. There was no provision under which the responsibility of South Africa could be questioned. Of course, the Mandates Commission was to look into the matter and there were to be the usual reports to that Commission by South Africa on its own administration of the territory. There was, however, a trust created, namely, that South West Africa will be administered in a way so as to reach independence or rather self-government in due course of time.

South Africa started on this venture and naturally took a great interest in the affairs of South West Africa. It, from the very beginning, started to integrate South West Africa in its own territories. Nominally, it was a mandate, but actually it was being administered as if it was a part of South Africa. When this went on and the investment of capital from South Africa took place, the interest of South Africa in South West Africa grew, and naturally, I do not say it is very wrong for anybody to think that way, the South Africans think in terms of their investments and what they have done in that territory. South Africans began to think of South West Africa as a part of their own territory, but actually it never was a part of their territory. It was a mandate and as a mandate it was likely to be taken over by the comity of nations which had created the mandate. Now when the League of Nations died a natural death just before the beginning of the Second World War, South West Africa remained a mandated territory. When the Second World War ended and the trusteeship system came into existence, it was expected that South Africa would make South West Africa a part of the same scheme, but it did not. It was invited to do so, but declined. Thereafter, the question arose: What is to be done to this Mandate? And you are well aware that the United Nations General Assembly passed

Resolutions after Resolutions almost at every one of its sittings, reiterating the need for getting South West Africa into the trusteeship scheme and also bringing to the notice of the world that certain policies of *apartheid* which South Africa had been following in its own territories had also been extended to South West Africa. Meanwhile, there grew a great deal of desire on the part of South West African people to attain independence as some of the colonies had been attaining independence. Simultaneously, there was the other question whether South Africa was not to report to the United Nations about its administration and whether the United Nations was entitled to receive petitions and complaints from South West Africa. I shall cut short the whole of the proceedings which took place in the United Nations so as to be able to reach the real point about which we are concerned. At the end of it all the question arose whether the mandate itself survived, and the first reference was made to the International Court of Justice to determine whether the Mandate itself continued, or not. That was the first reference which was made, and if I may tell you what was the point decided, you will see that the mandate was held to continue and there was succession of the United Nations in place of the League of Nations. This was the decision which the 1950 Advisory Opinion of the International Court of Justice gave. South West Africa continues to be a territory under an international mandate. South Africa cannot by unilateral action alter this status. South Africa can alter this status of South West Africa with the consent of the United Nations, and the trusteeship system is available to South West Africa in the sense that it provides the means by which the territory may be brought under the system. Some of the decisions were unanimous, the others were not so, but it is to be noticed that Sir Arnold McNair, now Lord McNair, and Judge Read, when they gave their dissent also agreed that there would be a right of any member of the former League of Nations to bring an action and to get its interest recognised by having a suit or a contested action before the International Court of Justice. That is implicit in the decisions of all the Judges, including the two

dissentient Judges, Sir Arnold McNair and Judge Read. It is on the basis of this that the United Nations was encouraged to bring two contested suits or actions at the instance of Ethiopia and Liberia, and these actions were filed with the consent of the other nations. These matters went before the International Court of Justice and it gave two judgments. The first was a preliminary judgment in 1960, and the other, was the second judgment by which the suits were thrown out in 1966. In 1960 the problem had arisen as to whether there was jurisdiction in the Court to try these actions at all and at that time, by a majority of 8 to 7, it was held that the Court had jurisdiction. In 1966 when on 18th July the Court rendered its second judgment, it was held that the two countries which had brought the action had no legal standing to bring these actions. This was because it was said that the provisions of the agreement did not permit any country to bring an action which had no legal interest of its own. There are two provisions in that agreement: one is the ordinary provision for creating a trust on behalf of humanity for proper administration, and the second is a special compromisory clause in which it is said that the countries, signatories to the United Nations Charter will be entitled to send their missionaries and to compel their being looked after in South West Africa. It was said that these countries may have some claim under Article 7 but not under Article 2. The *impasse* therefore developed because the United Nations General Assembly or the Security Council have no legal standing either to bring a contentious action before the International Court of Justice, and if the Member States cannot bring a contentious action, it is obvious that there can be no judicial decision such as would compel the Security Council to take action. Therefore, according to the majority decision which was reached in 1966 by the casting vote of the President, the position has now emerged that there can be no action either by the United Nations General Assembly or by any of the Members of the United Nations. That is where we are today so far as legal side of the matter is concerned. According to the majority judgment of the Court, the question is political and political action should be