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Editor: SEÁN MACBRIDE

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VOL. VII, No. 2

STAFF STUDY JUDGMENT OF THE INTERNATIONAL COURT
OF JUSTICE ON SOUTH WEST AFRICA

PETER PAPADATOS THE EUROPEAN SOCIAL CHARTER

DANIEL MARCHAND ABDUCTIONS EFFECTED OUTSIDE
NATIONAL TERRITORY

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LUCIAN G. WEERAMANTRY DIGEST OF JUDICIAL DECISIONS ON ASPECTS
OF THE RULE OF LAW

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JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE ON SOUTH WEST AFRICA (1966)

STAFF STUDY

The Judgment of the International Court of Justice delivered on July 18, 1966 in the case which Ethiopia and Liberia, as original Members of the League of Nations, brought against South Africa in respect of the administration of its Mandate over South West Africa has evoked considerable comment and criticism throughout the world. The Judgment has had the effect of focussing attention on some of the problems relating to the effective application of International Law both in its substantive and in its procedural aspects. It has important implications for the standing of the International Court of Justice and for its future role in adjudicating upon disputes between member States of the United Nations.

In the last decade the membership of the United Nations has considerably increased and become much more broad-based by reason of the fact that several countries which had long been under colonial rule have now become independent. These newly independent countries naturally look to the United Nations and its competent organs for guidance and direction in their relations with other nations. It is therefore vital that a predictable and systematic international legal order should exist which will not only command the respect of member States but which will also encourage them to have recourse to the International Court of Justice to settle their disputes instead of leaving them to adopt their own devices – sometimes resulting in bloodshed.

In those areas of the world where the Universal Declaration of Human Rights is known and respected there is a growing realization that effective machinery for the enforcement of human rights on an international level is essential for the safeguarding of the Rule of Law. The question has been posed by lawyers throughout the world whether the recent Judgment of the International Court of Justice is not an indication of the inadequacy of the existing machinery for the enforcement of such rights.

In view of the importance of the Judgment, it is proposed to set out in this article in some detail the history of the case, the

issues involved and some more important extracts from the Judgment of the Court and from Supporting and Dissenting Opinions. It is hoped to follow up this article with a further article on the Judgment.

After Germany was defeated in the First World War, German South West Africa, which had been a German colony, was conferred upon His Britannic Majesty by the principal Allied and Associated Powers under a Mandate to be exercised on His Majesty's behalf by the Government of the Union of South Africa¹. That Mandate was confirmed by the Council of the League of Nations on December 17, 1920. The "Sacred Trust", to use the words of the Mandate, laid by the League of Nations on the Union of South Africa imposed upon the mandatory the obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants of German South West Africa.

Article 2 of the Mandate reads:

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such modifications as local conditions may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.

It is convenient to note here that Mandates created by the League of Nations were of three categories, namely, A, B and C, depending largely upon the general level of advancement of the inhabitants of the territories in question, and the Mandate in respect of German South West Africa was a Mandate of the C category.

The Union of South Africa continued to govern South West Africa under the Mandate without interruption and after the Second World War the General Assembly of the United Nations, by a Resolution of December 1949, decided to obtain an Advisory Opinion from the International Court of Justice on the international status of South West Africa. The Resolution was duly transmitted to the Court which on July 11, 1950, gave the following Opinion:

that South West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17, 1920;

¹ On May 31, 1961 the Union became the Republic of South Africa.

that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court;

that the provisions of Chapter XII of the Charter are applicable to the Territory of South West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System; that the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations.

There were two further Advisory Opinions of this Court relating to the Mandate for South West Africa, given on June 7, 1955 and June 1, 1956.

On November 4, 1960 the Registrar of the International Court of Justice received two Applications, each instituting proceedings against the Government of the Union of South Africa, relating to "the continued existence of the Mandate for South West Africa and the duties and performance of the Union as Mandatory thereunder". One of these Applications was submitted on behalf of the Government of Ethiopia, and the other on behalf of the Government of Liberia.

To found the jurisdiction of the Court in the proceedings thus instituted, the Applications, having regard to Article 80, paragraph 1 of the Charter of the United Nations, relied on Articles 2 and 7 of the Mandate of December 17, 1920 for German South West Africa, Article 22 of the Covenant of the League of Nations and Article 37 of the Statute of the International Court of Justice.

Article 80, paragraph 1 of the Charter reads, "Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner whatsoever the rights of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

The relevant portion of Article 7 of the Mandate reads, (1) "The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.

(2) 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 relevant portion of Article 22 of the Covenant reads, "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

"The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

Article 37 of the Statute reads, "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

The Applications of Ethiopia and Liberia asked the Court to adjudge and declare that:

A. South West Africa is a Territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by His Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on December 17, 1920; and that the aforesaid Mandate is a treaty in force, within the meaning of Article 37 of the Statute of the International Court of Justice.

B. The Union of South Africa remains subject to the international obligations set forth in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa, and that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union is under an obligation to submit to the supervision and control of the General Assembly with regard to the exercise of the Mandate.

C. The Union of South Africa remains subject to the obligations to transmit to the United Nations petitions from the inhabitants of the Territory, as well as to submit an annual report to the satisfaction of the United Nations in accordance with Article 6 of the Mandate.

D. The Union has substantially modified the terms of the Mandate without the consent of the United Nations; that such modification is a violation of Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate.

E. The Union has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; its failure to do so is a violation of Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to take all practicable action to fulfil its duties under such Articles.

F. The Union, in administering the Territory, has practised *apartheid*, i.e. has 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 Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory.

G. The Union, in administering the Territory, has adopted and applied legislation, regulations, proclamations and administrative decrees which are by their terms and in their application arbitrary, unreasonable, unjust and detrimental to human dignity; that the foregoing actions by the Union violate Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to repeal and not to apply such legislation, regulations, proclamations and administrative decrees.

H. The Union has adopted and applied legislation, administrative regulations, and official actions which suppress the rights and liberties of inhabitants of the Territory essential to their orderly evolution toward self-government, the right to which is implicit in the Covenant of the League of Nations, the terms of the Mandate, and currently accepted international standards, as embodied in the Charter of the United Nations and the Declaration of Human Rights; that the foregoing actions by the Union violate Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease and desist from any action which thwarts the orderly development of self-government in the Territory.

I. The Union has exercised powers of administration and legislation over the Territory inconsistent with the international status of the Territory; that the foregoing action by the Union is in violation of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty to refrain from acts of administration and legislation which are inconsistent with the international status of the Territory.

J. The Union has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of Article 6 of the Mandate; and that the Union has the duty forthwith to render such annual reports to the General Assembly.

K. The Union has 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 is a violation of the League of Nations rules; and that the Union has the duty to transmit such petitions to the General Assembly.

The Republic of South Africa replied by raising certain preliminary objections. It submitted that the Governments of Ethiopia and Liberia had no *locus standi* in these proceedings, and that the Court had no jurisdiction to hear or adjudicate upon the questions of law and fact raised in the Applications and Memorials, more particularly because:

Firstly, by reason of the dissolution of the League of Nations, the Mandate for South West Africa is 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 said Mandate Agreement as a whole, including Article 7 thereof, and
- (b) in any event, with respect to Article 7 itself;

Secondly, 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;

Thirdly, the conflict or disagreement alleged by the Governments of Ethiopia and Liberia to exist between them and the Government of 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;

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

The Court by eight votes to seven found that it had jurisdiction to adjudicate upon the merits of the dispute and delivered judgment dismissing all four of these preliminary objections.

The Court as it was then constituted consisted of the following Members: President Winiarski (Poland); Vice-President Alfaro (Panama); Judges Basdevant (France), Badawi (United Arab Republic), Moreno Quintana (Argentina), Wellington Koo (China), Spiropoulos (Greece), Sir Percy Spender (Australia), Sir Gerald

Fitzmaurice (United Kingdom), Koretsky (U.S.S.R.), Bustamante y Rivero (Peru), Jessup (U.S.A.), Morelli (Italy); Judges ad hoc Sir Louis Mbanefo (Nigeria), Van Wyk (South Africa).

The eight Judges who were of the view that the Court had jurisdiction to adjudicate upon merits of the dispute were: Vice-President Alfaro; Judges Badawi, Moreno Quintana, Wellington Koo, Koretsky, Bustamante y Rivero, Jessup; and Sir Louis Mbanefo, Judge ad hoc nominated by Ethiopia and Liberia.

The seven dissenting Judges were: President Winiarski; Judges Basdevant, Spiropoulos, Sir Percy Spender, Sir Gerald Fitzmaurice, Morelli; and Van Wyk, Judge ad hoc, nominated by South Africa.

In dismissing the four preliminary objections, the majority of the Court found that:

- (a) The Applicants do have *locus standi*.
- (b) The Court has jurisdiction to hear and adjudicate upon the questions of law and fact raised by the Applicants.
- (c) The Mandate is a "treaty or convention in force" within the meaning of Article 37 of the Statute. It is an international agreement having that character.
- (d) A dispute exists between the Parties before the Court, constituted by their opposing attitude relating to the performance of the obligations of the Mandate.
- (e) The Mandate is an international instrument of an institutional character.
- (f) The authority which the Respondent exercises over South West Africa is based on the Mandate. If the Mandate lapsed, so did the Respondent's authority. To retain rights and deny obligations, is not justified (*International Status of South West Africa, Advisory Opinion I.C.J. Reports 1950; South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 333*).
- (g) The obligation to submit to international supervision is of the very essence of the Mandate.
- (h) The Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court, according to Article 37 of the Statute and Article 80 (1) of the Charter (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*).
- (i) The finding that Article 7 is "still in force", was unanimous in 1950 and continues to reflect the Court's Opinion in 1962 (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 334*).
- (j) The obligation to submit to compulsory jurisdiction was effectively transferred to the International Court before the dissolution of the League.
- (k) The Mandate as a whole, including of course Article 7, is still in force.

(l) Judicial protection of the "sacred trust" was an essential feature of the mandates system, the duty and right of insuring the performance of this trust was given to the League, its organs and all its Members.

(m) In the event of a veto by the Mandatory under the unanimity rule (Articles 4 and 5 of the Covenant), the only course left to defend the interests of the inhabitants would be to obtain adjudication by the Court.

(n) As neither the Council nor the League was entitled to appear before the Court, the only effective recourse for protection of the sacred trust would be for a Member or Members of the League to invoke Article 7 and bring the dispute to the Permanent Court for adjudication. Article 7 played an essential part as one of the securities in the mandates system.

(o) The right to implead the Mandatory before the Permanent Court, was specially and expressly conferred on the Members of the League because it was the most reliable procedure for ensuring protection.

(p) The clear and precise language of Article 7 refers to any dispute relating to "the provisions", meaning all or any of the provisions.

(q) The scope and purport of Article 7 indicate that the Members of the League were understood to have a legal right or interest in the observance of the Mandatory's obligations towards the inhabitants of the territory.

(r) Article 7 is clearly in the nature of implementing one of the "securities for the performance of this trust", mentioned in Article 22(1).

(s) The present dispute is a dispute as envisaged in Article 7.

(t) Repeated negotiations over a period of more than ten years in the General Assembly and other organs of the United Nations had reached a deadlock before November 4, 1960 and the impasse continues to exist. No reasonable probability exists that further negotiations would lead to a settlement.

(u) Diplomacy by conference or parliamentary diplomacy has come to be recognized as one of the established modes of international negotiation, and in cases where the disputed questions are of common interest to a group of States on one side or the other in an organized body, it has often been found to be the most practical form of negotiation. If the question at issue is one of mutual interest to many States, there is no reason why each of them should go through the formality and pretence of direct negotiation with the common adversary State after they have participated in the collective negotiation with that State.

(v) Article 7 is a treaty or convention still in force and the dispute cannot be settled by negotiation. Consequently, the Court is competent to hear the dispute on the merits.

Thereafter the second phase of the case was opened. Pleadings were amended so as to bring them in line with the matters in issue at that stage and arguments on the merits were heard. During these proceedings the facts were abundantly canvassed, the law keenly debated, and witnesses and experts examined and cross-examined, all of which took many months. Finally, on July 18, 1966 the Court delivered its Judgment.

The Judgment of the Court was delivered by the President, Sir Percy Spender (Australia), supported by Judges Winiarski (Poland), Spiropoulos (Greece), Sir Gerald Fitzmaurice (United Kingdom), Morelli (Italy), Gros (France) and Van Wyk. The seven remaining Judges, namely Judges Wellington Koo (China), Koretsky (U.S.S.R.), Tanaka (Japan), Jessup (U.S.A.), Padilla Nervo (Mexico), Forster (Senegal) and Sir Louis Mbanefo, delivered dissenting opinions.

As the Court was equally divided, the President, following the procedure laid down in Article 55 of the Statute of the International Court of Justice, gave his additional casting vote in favour of the findings now embodied in the decision of the Court, the effect of which was that, although the Court had jurisdiction to entertain the petitions of the Applicants, the Applicants were not entitled to the declarations prayed for inasmuch as they had no legal right or interest in the observance of the Mandatory's obligations².

It will be seen that the composition of the International Court of Justice at the time it delivered its Judgment was somewhat different from the composition of the Court at the time it delivered its preliminary Judgment in 1962. This difference in composition assumes great importance in the study of this particular case in view of the fact that the preliminary Judgment of 1962 was an 8 to 7 majority Judgment and the final Judgment of 1966 was a 7 to 7 Judgment which was rendered an 8 to 7 majority Judgment on the casting vote of the President being given against Ethiopia and Liberia³. The fact that Judgments relating to matters of great international importance and concern could depend on the slightest majority of votes or even on a casting vote and could depend on changes in the composition of the Court during the pendency of the litigation arising from automatic retirement, resignation, in-

² Some of the Dissenting Opinions point out that the question as to whether the Applicants had a legal right or interest in the observance of the terms of the Mandate was not even raised by the Respondent in its final submissions made at the merits stage of the case and that the Court, by raising *ex mero motu* a question which was resolved in the Preliminary Judgment of 1962, had really reverted from the stage of the merits to the stage of jurisdiction. See observations of Judge Jessup (U.S.A.), at pp. 17 and 18 and of Judge Koretsky (U.S.S.R.), at p. 20 of this Article.

³ See observations of Judge Padilla Nervo in his Dissenting Opinion (p. 41 of this Article) where he calls the majority a technical or statutory one.

capacity to act, death (as in the case of Judge Badawi of the United Arab Republic who participated in the preliminary Judgment but died before the hearing on the merits was concluded), or other factors, has given rise to grave concern in international legal circles as to how, whether by amendment of the Statute or otherwise, a greater element of certainty could be introduced into the administration of International Law by the principal judicial organ of the United Nations.

Some reference to the Statute of the International Court of Justice is necessary to explain why the composition of the Court when it heard and delivered the preliminary Judgment was somewhat different from its composition when it heard the arguments on the merits and delivered its final Judgment in July, 1966.

The Statute provides that the Court shall be composed of a body of independent Judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognized competence in International Law. The Court consists of 15 members, no two of whom may be nationals of the same state. The members of the Court are elected by the General Assembly and by the Security Council from a list of persons nominated by national groups in accordance with certain provisions and procedures. Every elector is expected to bear in mind not only that persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

The members, which means the Judges of the Court, are elected for a period of nine years but may be re-elected. Five Judges retire every three years, so that one third of the membership of the Court is renewed every third year.

Whatever views one may hold on the Judgment of the Court, it would certainly have been more satisfying if, after all the arguments advanced and evidence led, the Court had made a pronouncement one way or the other on the substantial points in issue. As it stands, the Judgment has in effect declared in 1962 that the applicants had standing to institute the case and said in 1966, four years later, that they are not entitled to an answer. By indicating that individual nations may not seek redress for alleged breaches of a mandate without also showing a personal legal interest, the Court has ruled, in effect, that it will give no binding judgment on a mandatory's obligations, for, even when the United Nations itself goes to the Court on this matter, it can only ask for an advisory opinion which is not binding on the mandatory, as was the case in 1950, 1955 and 1956. How then can the conduct of the mandatory be effectively

supervised? This is another important question which has been highlighted by the Judgment of the Court.

In order to bring out the opposing viewpoints and the reasoning underlying them, extracts from the Judgment of the Court of July 18, 1966 and from Dissenting Opinions are given below under the following headings:

- A – Applicants' Legal Right or Interest in the Subject-matter of the Claims – Is it a Preliminary Question already determined or a Question pertaining to Merits of the Case?
 - B – Features of the Mandate System and in particular the Mandate for South West Africa.
 - C – Do Applicants have a Legal Right or Interest to call for the due performance of the Mandate?
 - D – Has the Mandate Lapsed?
 - E – Is the Mandatory's Policy of Apartheid a Breach of the Provisions of the Mandate?
- A – Applicants' legal right or interest in the subject-matter of the claims – is it a preliminary question already determined or a question pertaining to the merits of the case?**

*Extracts from the Judgment of the Court*⁴

“Para. 2. In an earlier phase of the case, which took place before the Court in 1962, four preliminary objections were advanced, based on Article 37 of the Court's Statute and the jurisdictional clause (Article 7, paragraph 2) of the Mandate for South West Africa, which were all of them argued by the Respondent and treated by the Court as objections to its jurisdiction. The Court, by its Judgment of 21 December 1962, rejected each of these objections, and thereupon found that it had “jurisdiction to adjudicate upon the merits of the dispute”.”

“Para. 4. . . . the Court has studied the written pleadings and oral arguments of the Parties, and has also given consideration to the question of the order in which the various issues would fall to be dealt with. In this connection, there was one matter that appertained to the merits of the case but which had an antecedent character, namely the question of the Applicants' standing in the present phase of the proceedings, – not, that is to say, of their standing before the Court itself, which was the subject of the Court's decision in 1962, but the question, as a matter of the merits of

⁴ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 17-19.

the case, of their legal right or interest regarding the subject matter of their claim, as set out in their final submissions.”

“Para. 5. Despite the antecedent character of this question, the Court was unable to go into it until the Parties had presented their arguments on the other questions of merits involved. . . .”

“Para. 6. The Parties having dealt with all the elements involved, it became the Court’s duty to begin by considering those questions which had such a character that a decision respecting any of them might render unnecessary an enquiry into other aspects of the matter. There are two questions in the present case which have this character. One is whether the Mandate still subsists at all, as the Applicants maintain that it does in paragraph (1) of their final submissions – for if it does not, then clearly the various allegations of contraventions of the Mandate by the Respondent fall automatically to the ground. But this contention, namely as to the continued subsistence of the Mandate, is itself part of the Applicants’ whole claim as put forward in their final submissions, being so put forward solely in connection with the remaining parts of the claim, and as the necessary foundation for these. For this reason the other question, which (as already mentioned) is that of the Applicants’ legal right or interest in the subject matter of their claim, is even more fundamental.”

“Para. 7. It is accordingly to this last question that the Court must now turn. Before doing so however, it should be made clear that when, in the present Judgment, the Court considers what provisions of the Mandate for South West Africa involve a legal right or interest for the Applicants, and what not, it does so without pronouncing upon, and wholly without prejudice to, the question of whether that Mandate is still in force. The Court moreover thinks it necessary to state that its 1962 decision on the question of competence was equally given without prejudice to that of the survival of the Mandate, which is a question appertaining to the merits of the case. It was not in issue in 1962, except in the sense that survival had to be assumed for the purpose of determining the purely jurisdictional issue which was all that was then before the Court. It was made clear in the course of the 1962 proceedings that it was upon this assumption that the Respondent was arguing the jurisdictional issue; and the same view is reflected in the Applicants’ final submissions (1) and (2) in the present proceedings, the effect of which is to ask the Court to declare (*inter alia*) that the Mandate still subsists, and that the Respondent is still subject to the obligations it provides for. It is, correspondingly, a principal part of the Respondent’s case on the merits that since (as it contends) the Mandate no longer exists, the Respondent has no obligations under it, and therefore cannot be in breach of the Mandate. This is a

matter which, for reasons to be given later in another connection but equally applicable here, could not have been the subject of any final determination by a decision on a purely preliminary point of jurisdiction."

"Para. 8. The Respondent's final submissions in the present proceedings ask simply for a rejection of those of the Applicants, both generally and in detail. But quite apart from the recognized right of the Court, implicit in paragraph 2 of Article 53 of its Statute, to select *proprio motu* the basis of its decision, the Respondent did in the present phase of the case, particularly in its written pleadings, deny that the Applicants had any legal right or interest in the subject matter of their claim, — a denial which, at this stage of the case, clearly cannot have been intended merely as an argument against the applicability of the jurisdictional clause of the Mandate. In its final submissions the Respondent asks the Court, upon the basis *inter alia* of "the statements of fact and law as set forth in [its] pleadings and the oral proceeding", to make no declaration as claimed by the Applicants in their final submissions."

*Extracts from the Supporting Judgment of Judge Morelli of Italy*⁵

"1. I wish to give the reasons why, in my view, the Court's 1962 Judgment on the preliminary objections was no bar to the rejection of the claim on the merits on the ground of its not being based on substantive rights pertaining to the Applicants.

"It is my view that a judgment on preliminary objections, particularly a judgment which, like the judgment in question, dismisses the preliminary objections submitted by a party, is final and binding in the further proceedings. Its binding effect is however confined to the questions decided, and these can relate only to the admissibility of the claim or the jurisdiction of the Court.

"On the other hand, the Court's reasoning in deciding a question submitted to it in the form of a preliminary objection is devoid of any binding effect. This limitation on the binding effect of the judgment applies to all the reasons for the decision, whatever their nature, whether of fact or of law, procedural or touching on the merits. Those touching on the merits of the case must be denied any binding effect for an additional reason; since, under Article 62, paragraph 3, of the Rules of Court, the filing of a preliminary objection suspends the proceedings on the merits, it is not possible for a question concerning the merits to be decided with final effect in a judgment on preliminary objections.

"2. The 1962 Judgment requires interpretation to elucidate

⁵ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 59-66.

the exact scope of the decision on the question submitted to the Court in the third preliminary objection. In particular it is necessary to ascertain whether it was the Court's intention in dismissing that objection to hold the right to institute proceedings under Article 7 of the Mandate to be independent of any substantive right, in the sense that an applicant might avail himself of it without being required to assert the existence of a substantive right of his own. On this construction it would be sufficient for the applicant to rely on an obligation of the mandatory irrespective of whether the obligation were owed to the applicant or to some other person or persons . . .

"The decision by which the 1962 Judgment held, according to this interpretation, that the Members of the League of Nations had the right to seize the Court in respect of the Mandatory's obligations relating to the inhabitants of the Territory, irrespective of whether the applicant possessed any substantive right, would be a decision concerning the characterization of the action, conceived of as legitimately brought by the Applicants in the present case. By such a decision the Court would have settled a purely procedural question relating, on the one hand, to the Applicants' right to institute proceedings and, on the other hand, to the Court's jurisdiction. The decision would not have touched on the merits of the case at all. The Court would have said nothing about the existence of any substantive rights pertaining to the Applicants. The Court would simply have found that the existence of such rights was irrelevant not only to its jurisdiction, but also to the duty with which it had been entrusted. According to this interpretation that duty was to establish the existence, not of rights vested in the Applicants, but rather of obligations incumbent on the Mandatory, regardless of whether they were owed to the Applicants or to some other person or persons.

"3 . . . the 1962 Judgment confines itself to declaring that the dispute brought before the Court is a dispute within the meaning of Article 7 of the Mandate, without purporting to characterize the Applicants' action in any particular way.

"Far from excluding the necessity of a right pertaining to the Applicants for the claim to be able to be regarded as well-founded, the 1962 Judgment explicitly refers to the legal right or interest of the Members of the League of Nations in the observance by the Mandatory of its obligations. With reference to Article 7 of the Mandate, the Court said:

The manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members. (*I.C.J. Reports 1962*, p. 343).

"This passage seems to indicate some confusion between, on the one hand, the right to institute proceedings, the only right of Members of the League of Nations under Article 7, paragraph 2, of the Mandate, the provision to which the Court is referring, and, on the other hand, substantive rights, which appear to be correctly designated by the reference to a legal right or interest in the observance of its obligation by the person owing the obligation.

"However, whatever the criticism to which the Judgment may be open in connection with this confusion, it is clear that any possibility of taking the decision on the third objection to mean that it is not necessary to establish a substantive right pertaining to the Applicants is totally excluded by this very confusion. Once it is established that the Judgment did not draw any distinction between the right to institute proceedings and substantive rights, it becomes impossible to extract a diametrically opposite meaning from the Judgment, namely not only that the right to institute proceedings is quite separate from substantive rights, but also that it is so completely independent of any substantive right that the Court could uphold the claim as well-founded even if it were not based on a substantive right vested in the Applicants.

"4.

"Article 7 of the Mandate deals with the case of a dispute arising between the Mandatory and another Member of the League of Nations, and the need for the existence of a dispute to enable the Court to be seized is recognized in the Judgment. It is precisely in order to establish that this condition, laid down as a *sine qua non* by Article 7 of the Mandate, is fulfilled in this case that the Judgment begins by seeking to demonstrate the existence of a dispute between the Parties (*I.C.J. Reports 1962*, p. 328); then, in connection with the third preliminary objection, the Judgment finds that the dispute in question is a dispute within the meaning of Article 7 of the Mandate.

"... The need for there to be a dispute between the applicant and the Mandatory requires by implication that there should be a conflict of interest between the parties, whatever the nature of those interests. Having regard, on the other hand, to the legal character which must be possessed by the dispute, as appears from the reference in Article 7 to the legal rules contained in the provisions of the Mandate, it follows that the applicant must be able to rely on a right given to him as a means of protecting his interest.

"6.

"In paragraph 9 of the Application the Applicants state that, in the dispute which they maintain to exist between them and South Africa, they have continuously sought to assert and protect their "legal interest in the proper exercise of the Mandate" by disputing and protesting the violation by South Africa of its duties as Man-

datory. The Applicants add that during the negotiations which they assert to have taken place, they exhibited at all times their "legal interest in the proper exercise of the Mandate" by disputing and protesting the violation by South Africa of its duties as Mandatory. The Applicants add that during the negotiations which they assert to have taken place, they exhibited at all times their "legal interest in the proper exercise of the Mandate". They conclude by declaring that they instituted the proceedings for the very purpose of protecting their legal interest in the proper exercise of the Mandate.

"It is thus the legal interest, or right, of the Applicants in the proper exercise of the Mandate which constitutes the *causa petendi* of the claim. It was thus in the claim as characterized by such a *causa petendi* that the Court had to give its decision. Nothing to the contrary is to be found in the 1962 Judgment.

"7. An analysis of that part of the 1962 Judgment which relates to the third preliminary objection leads to the conclusion that the decision represented by the dismissal of that preliminary objection amounts solely to a finding that the dispute submitted to the Court, held by the Judgment to exist, was a dispute within the meaning of Article 7 of the Mandate. This decision does not in any way concern the characterization of the action provided for by that Article and utilized by the Applicants. In particular this decision does not give such action the quite unusual characterization according to which it could be utilized without the need for the applicant to rely on a substantive right of his own.

"It follows that in the merits phase of the proceedings the Court was completely unfettered with regard to the question of whether it was necessary for the Applicants to have a substantive right in order that the claim might be upheld

"8.

"9.

"It must however be observed that as between the various questions all of which concern the merits, there is no strict order of logic; the order to be followed in any particular case in dealing with the various questions of merits is dictated rather by reasons of what might be called economy, which counsel the use of the simplest means of reaching the decision. It was thus perfectly open to the Court, in this case, to begin by examining the question of standing in relation to any rights which might exist on the assumption that South Africa still owes certain obligations under the Mandate."

The following extracts from the Dissenting Opinions of Judge Jessup (U.S.A.) and Judge Koretsky (U.S.S.R.)⁶ represent a good summary of the contrary views held by the seven dissenting Judges

⁶ The Dissenting Opinions of Judges Jessup and Koretsky were not set out in numbered paragraphs.

on the point whether the Court could at that stage of the proceedings go into the question as to whether the Applicants had any legal right or interest in the subject-matter of their claims.

*Judge Jessup (dissenting):*⁷

“Having very great respect for the Court, it is for me a matter of profound regret to find it necessary to record the fact that I consider the Judgment which the Court has just rendered by the casting vote of the President in the South West Africa Case, completely unfounded in law. In my opinion, the Court is not legally justified in stopping at the threshold of the case, avoiding a decision on the fundamental question whether the policy and practice of apartheid in the mandated Territory of South West Africa is compatible with the discharge of the “sacred trust” confided to the Republic of South Africa as Mandatory.

“Since it is my finding that the Court has jurisdiction, that the Applicants, Ethiopia and Liberia, have standing to press their claims in this Court and to recover judgment, I consider it my judicial duty to examine the legal issues in this case which has been before the Court for six years and on the preliminary phases of which the Court passed judgment in 1962. This full examination is the more necessary because I dissent not only from the legal reasoning and factual interpretations in the Court’s Judgment but also from its entire disposition of the case. . . .

“The Judgment bases itself on a reason not advanced in the final submissions of the Respondent – namely on Applicants’ lack of “any legal right or interest appertaining to them in the subject-matter of the present claims”. This is said to be a question of the “merits” of the claim and it is therefore in connection with the “merits” that the nature of the requisite legal right or interest must be analysed.

“In its Judgment of 21 December 1962 the Court decided that “it has jurisdiction to adjudicate upon the merits of the dispute”.

“In reaching that conclusion the Court had to reject the four preliminary objections filed by the Respondent. It did reject the four objections and thereby substantially held:

1. that the Mandate for South West Africa is a “treaty or convention in force” within the meaning of Article 37 of the Statute of the Court;
2. that despite the dissolution of the League, Ethiopia and Liberia had *locus standi* under Article 7, paragraph 2, of the Mandate, to invoke the jurisdiction of the Court;

⁷ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 325-329.

3. that the dispute between the Applicants and the Respondent was a "dispute" as envisaged in Article 7, paragraph 2, of the Mandate; and
4. that the prolonged exchanges of differing views in the General Assembly of the United Nations constituted a "negotiation" within the meaning of Article 7, paragraph 2, of the Mandate and revealed that the dispute was one which could not be settled by negotiation within the meaning of that same provision of the Mandate.

"After the 1962 Judgment, the Respondent filed its Counter-Memorial in ten volumes plus one supplementary volume. The Applicants in turn filed their Reply and the Respondent filed its Rejoinder in two volumes supplemented by other materials, including the so-called Odendaal Report of 557 printed foolscap pages.

"Beginning on March 15, 1965, the Court devoted 99 public sessions to oral hearings which included the arguments of Agents and Counsel for both parties and the testimony of 14 witnesses.

"The voluminous record was studied by the Court and its deliberations were held over a period of some six months.

"The Court now in effect sweeps away this record of 16 years and, *on a theory not advanced by the Respondent in its final submissions November 5, 1965*, decides that the claim must be rejected on the ground that the Applicants have no legal right or interest.

"Paragraph 2 of Article 7 of the Mandate gave a member of the League the right to submit to the Court a dispute relating to the interpretation of the provisions of the Mandate if the dispute cannot be settled by negotiation. As I shall show in more detail later, the Court in 1962 decided that the Applicants qualify in the category "Member of the League"; this is *res judicata* and the Court's Judgment of today does not purport to reverse that finding. The Court in 1962 equally held that the present case involves a dispute which cannot be settled by negotiation; this double finding has the same weight and today's decision does not purport to reverse that finding. I do not understand that it is denied that the dispute refers to the interpretation of provisions of the Mandate. I do not see how this clear picture can be clouded by describing the claims as demands for the performance or enforcement of obligations owed by the Respondent to the Applicants. The submissions may indeed involve that element also, as will be noted, but this element does not exclude the concurrent requests for interpretation of the Mandate.

"Whether any further right, title or interest is requisite to support Applicants' requests in this case for orders by the Court directing Respondent to desist from certain conduct alleged to be violative of its legal obligations as Mandatory, may well be a separate question, but the Judgment of the Court denies them even the declaratory judgment. . . .

*Judge Koretsky (dissenting):*⁸

"I can in no way concur in the present Judgment mainly because the Court reverts in essence to its Judgment of 21 December 1962 on the same cases and in fact revises it even without observing Article 61 of the Statute and without the procedure envisaged in Article 78 of the Rules of Court.

"The Court has said in the operative part of its Judgment that "the Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims . . .".

"But the question of the Applicants' "legal right or interest" (referred to in short as their "interest") in their claims as a ground for instituting proceedings against the Respondent as Mandatory for South West Africa was decided already in 1962 in the first phase (the jurisdictional phase) of these cases.

"At that time, the Respondent, asserting in its third preliminary objection that the conflict between the parties "is by reason of its nature and content not a 'dispute' as envisaged in Article 7 of the Mandate for South West Africa", added, "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" (Italics added). The adjective "material" (interests) was evidently used not in its narrow sense – as a property interest.

"In dismissing the preliminary objection of the Respondent the Court then said that "the manifest scope and purport of the provisions of this Article (i.e., Article 7) indicate that the Members of the League were understood to have a *legal right or interest* in the observance by the Mandatory of its obligations both toward the inhabitants of the mandated territory, and toward the League of Nations and its Members". (Italics added.) (p. 343.) And a little later the Court said: "Protection of the material interests of the Members or their nationals is of course included within its compass, but the well-being and development of the inhabitants of the mandated territory are not less important." (p. 344).

"So the question of the Applicants' interests in their claims was decided as, one might say, it should have been decided, by the Court in 1962. The question of an applicant's "interest" (as a question of a "*qualité*") even in national-law systems is considered as a jurisdictional question. For example, "*le défaut d'intérêt*" of an applicant is considered in the French law system as a ground for "*fin-de-non-recevoir de procédure*".

"The Rules of Court, and the practice of the Court, do not

⁸ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 239-241.

recognize any direct line of demarcation between questions of the merits and those of jurisdiction. The circumstances of the case and the formulation of the submissions of the parties are of guiding if not decisive significance.

"The Respondent, as noted above, raised the question of the Applicants' interests. The Court decided this question at that time. It did not consider it necessary to join it to the merits as the character of the Applicants' interests in the subject-matter of their claims was evident. Both Parties dealt with this question in a sufficiently complete manner. The Applicants, as will be noted later, did not seek anything for themselves; they asserted only that they have a "legal interest to seeing to it through judicial process that the sacred trust of civilization created by the Mandate is not violated". To join the question of the Applicants' "interests" in their claims to the merits would not "reveal" anything now, as became evident at this stage of the cases. And it is worthy of note that in the dissenting opinion of President Winiarski, in the joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice and in the dissenting opinion of Judge *ad hoc* Van Wyk, the question of the Applicants' interests was considered on a jurisdictional plane.

"The Respondent did not raise this question in its final submission at this stage of the merits. The Court itself has now raised the question which was resolved in 1962 and has thereby reverted from the stage of the merits to the stage of jurisdiction. And thus the "door" to the Court which was opened in 1962 to decide the dispute (as the function of the Court demands (Article 38 of the Statute)), the decisions of which would have been of vital importance for the peoples of South West Africa and to peoples of other countries where an official policy of racial discrimination still exists, was locked by the Court with the same key which had opened it in 1962.

"Has the 1962 Judgment of the Court a binding force for the Court itself?

"The Judgment has not only a binding force between the parties (Article 59 of the Statute), it is final (Article 60 of the Statute). Being final, it is – one may say – final for the Court itself unless revised by the Court under the conditions and in accordance with the procedure prescribed in Article 61 of the Statute and Article 78 of the Rules of Court.

"In discussing the meaning of the principle of *res judicata*, and its applicability in international judicial practice, its significance is often limited by the statement that a given judgment could not be considered as binding upon other States or in other disputes. One may sometimes easily fail to take into consideration the fact that *res judicata* has been said to be not only *pro obligatione habetur*,

but *pro veritate* as well. And it cannot be said that what today was for the Court a *veritas*, will tomorrow be a *non-veritas*. A decision binds not only the parties to a given case, but the Court itself. One cannot forget that the principle of immutability, of the consistency of final judicial decisions, which is so important for national courts, is still more important for international courts. The practice of the Permanent Court and of this Court shows the great attention they pay to former judgments, their reasons and opinions. Consideration must be given even to the question whether an advisory opinion of the Court, which is not binding for the body which requested it, is binding for the Court itself not only *vi rationis* but *ratione vi* as well.

“Could it possibly be considered that in a judgment only its operative part but not the reasons for it has a binding force? It could be said that the operative part of a judgment seldom contains points of law. Moreover, the reasons, motives, grounds, for a given judgment may be said to be the “reasons part” of the judgment. The two parts of a judgment – the operative part and the reasons – do not “stand apart” one from another. Each of them is a constituent part of the judgment in its entirety. It will be recalled that Article 56 of the Statute says:

“The judgment shall state *the reasons on which it is based*” (italics added).

“These words are evidence that the reasons have a binding force as an obligatory part of a judgment and, at the same time, they determine the *character* of reasons which should have a binding force. They are reasons which substantiate the operative conclusion directly (“on which it is based”). They have sometimes been called “*consideranda*”. These are reasons which play a role as the grounds of a given decision of the Court – role such that if these grounds were changed or altered in such a way that this decision in its operative part would be left without grounds on which it was based, the decision would fall to the ground like a building which has lost its foundation.”

B – Features of the Mandate System and in particular of the Mandate for South West Africa

*Extracts from the Judgment of the Court*⁹

10. “The mandates system, as is well known, was formally instituted by Article 22 of the Covenant of the League of Nations. As there indicated, there were to be three categories of mandates,

⁹ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 20 and 21.

designated as 'A', 'B' and 'C' mandates respectively, the Mandate for South West Africa being one of the 'C' category. The differences between these categories lay in the nature and geographical situation of the territories concerned, the state of development of their peoples, and the powers accordingly to be vested in the administering authority, or mandatory, for each territory placed under mandate. But although it was by Article 22 of the League Covenant that the system as such was established, the precise terms of each mandate, covering the rights and obligations of the mandatory, of the League and its organs, and of the individual members of the League, in relation to each mandated territory, were set out in separate instruments of mandate which, with one exception to be noted later, took the form of resolutions of the Council of the League.

11. "These instruments, whatever the difference between certain of their terms, had various features in common as regards their structure. For present purposes, their substantive provisions may be regarded as falling into two main categories. On the one hand, and of course as the principal element of each instrument, there were the articles defining the mandatory's powers, and its obligations in respect of the inhabitants of the territory and towards the League and its organs. These provisions, relating to the carrying out of the mandates as mandates, will hereinafter be referred to as "conduct of the mandate", or simply "conduct" provisions. On the other hand, there were articles conferring in different degrees, according to the particular mandate or category of mandate, certain rights relative to the mandated territory, directly upon the members of the League as individual States, or in favour of their nationals. Many of these rights were of the same kind as are to be found in certain provisions of ordinary treaties of commerce, establishment and navigation concluded between States. Rights of this kind will hereinafter be referred to as "special interests" rights, embodied in the "special interests" provisions of the mandates. As regards the 'A' and 'B' mandates (particularly the latter) these rights were numerous and figured prominently – a fact which, as will be seen later, is significant for the case of the 'C' mandates also, even though, in the latter case, they were confined to provisions for freedom for missionaries ("nationals of any State Member of the League of Nations") to "enter into, travel and reside in the territory for the purpose of prosecuting their calling" – (Mandate for South West Africa, Article 5). In the present case, the dispute between the Parties relates exclusively to the former of these two categories of provisions, and not to the latter.

12. "The broad distinction just noticed was a genuine, indeed an obvious one. Even if it may be the case that certain provisions of some of the mandates (such as for instance the "open door" provisions of the 'A' and 'B' mandates) can be regarded as having

a double aspect, this does not affect the validity or relevance of the distinction. Such provisions would, in their "conduct of the mandate" aspect, fall under that head; and in their aspect of affording commercial opportunities for members of the League and their nationals, they would come under the head of "special interests" clauses. It is natural that commercial provisions of this kind could redound to the benefit of a mandated territory and its inhabitants in so far as the use made of them by States members of the League had the effect of promoting the economic or industrial development of the territory. In that sense and to that extent these provisions could no doubt contribute to furthering the aims of the mandate; and their due implementation by the mandatories was in consequence a matter of concern to the League and its appropriate organs dealing with mandates questions. But this was incidental, and was never their primary object. Their primary object was to benefit the individual members of the League and their nationals. Any action or intervention on the part of member States in this regard would be for that purpose – not in furtherance of the mandate as such.

13. "In addition to the classes of provisions so far noticed, every instrument of mandate contained a jurisdictional clause which, with a single exception to be noticed in due course, was in identical terms for each mandate, whether belonging to the 'A', 'B' or 'C' category. The language and effect of this clause will be considered later; but it provided for a reference of disputes to the Permanent Court of International Justice and, so the Court found in the first phase of the case, as already mentioned, this reference was now, by virtue of Article 37 of the Court's Statute, to be construed as a reference to the present Court. Another feature of the mandates generally, was a provision according to which their terms could not be modified without the consent of the Council of the League. A further element, though peculiar to the 'C' mandates, may be noted: it was provided both by Article 22 of the Covenant of the League and by a provision of the instruments of 'C' mandates that, subject to certain conditions not here material, a 'C' mandatory was to administer the mandated territory "as an integral portion of its own territory".

Judge Tanaka of Japan in his dissenting opinion¹⁰ makes the following observations concerning the legal and social nature and characteristics of the mandate system:

"The mandates system, established by the Covenant of the League of Nations, can be considered as an original method of administering certain underdeveloped overseas possessions which

¹⁰ South West Africa, Second Phase, Judgment, International Court of Justice 1966, pp. 264-268. The dissenting opinion of Judge Tanaka was also not set out in numbered paragraphs.

formerly belonged to States in the First World War. "The essential principles of the mandates system" says the 1962 Judgment in the *South West Africa* cases –

consist chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a regime of tutelage for each of such peoples to be exercised by an advanced nation as a "Mandatory" "on behalf of the League of Nations"; and the recognition of "a sacred trust of civilization" laid upon the League as an organized international community and upon its Member States. This system is dedicated to the avowed object of promoting the well-being and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights. (*I.C.J. Reports* 1962, p. 329)

"The idea that it belongs to the noble obligation of conquering powers to treat indigenous peoples of conquered territories and to promote their well-being has existed for many hundred years, at least since the time of Francisco de Vitoria. But we had to wait for the Treaty of Peace with Germany, signed at Versailles in 1919, and the creation of the League of Nations for this idea to take the concrete form of an international institution, namely the mandates system, and to be realized by a large and complicated machinery of implementation. After the dissolution of the League the same idea and principles have been continued in the "International Trusteeship System" in the Charter of the United Nations.

"The above-mentioned essential principles of the mandates system are important to decide the nature and characteristics of the Mandate as a legal institution.

"Here, we are not going to construct a more-or-less perfect definition or concept of the Mandate. We must be satisfied to limit ourselves to the points of which clarification would be necessary or useful to decide the issue now in question.

"The mandates system is from the viewpoint of its objectives, as well as of its structure, highly complicated. Since its objectives are the promotion of the well-being and social progress of the inhabitants of certain territories as a sacred trust of civilization, its content and function are intimately related to almost all branches of the social and cultural aspects of human life. Politics, law, morality, religion, education, strategy, economy and history are intermingled with one another in inseparable complexity. From the point of view of the Court the question is how to draw the line of demarcation between what is law and what is extra-legal matter, particularly politics which must be kept outside of justiciability (we intend to deal with this question below).

"The mandates system is from the structural viewpoint very complicated. The parties to the Mandate, as a treaty or convention.

are on the one side the League of Nations and on the other the Mandatory – in the present cases the Respondent. The latter accepted the Mandate in respect of the Territory of South West Africa “on behalf of the League of Nations”. Besides these parties, there are persons who are connected with the Mandate in some way, particularly who collaborate in the establishment or the proper functioning of this system, such as the Principal Allied and Associated Powers, to which these territories had been ceded by the Peace Treaty, Members of the League, and those who are interested as beneficiaries, namely the inhabitants of the mandated territories. Whether or not, and to what degree the United Nations and its Members can be considered as concerned, belongs to the matters which fall to be decided by the Court.

“The Mandate, constituting an aggregate of the said diverse personal elements, as we have seen above, presents itself as a complex of many kinds of interests. The League and Mandatory, as parties to the Mandate, have a common interest in the proper performance of the provisions of the Mandate. The inhabitants of the mandated territories possess, as beneficiaries, a most vital interest in the performance of the Mandate.

“The Mandatory does not exercise the rights of tutelage of peoples entrusted to it on behalf of itself, but on behalf of the League. The realization of the “sacred trust of civilization” is an interest of a public nature. The League is to serve as the existing political organ of the international community by guarding this kind of public interest.

“The Mandate, being of the said personal and real structure, possesses in many points characteristics which distinguish it from other kinds of treaties.

“Firstly, the Mandate is intended to establish between parties a certain legal relationship of which the aims and purposes are different from those we find in the case of commercial treaties in which two different kinds of operations stand reciprocally against each other and which are extinguished with simultaneous performance by the parties. They are a realization of identical aims, which is a “sacred trust of civilization”. In this sense, the Mandate has characteristics similar to law-making treaties, defined by Oppenheim as those “concluded for the purpose of establishing new rules for the law of nations”. (Quincy Wright, *Mandates under the League of Nations*, 1930, p. 357.)

“What is intended by the parties of the mandate agreement as a “sacred trust of civilization” is the promotion of the material and moral well-being and social progress of the inhabitants of the territory who are “not yet able to stand by themselves under the strenuous conditions of the modern world”.

"The Mandate is a legal method or machinery for achieving the above-mentioned humanitarian purposes. Therefore, between the two parties to the mandate agreement there does not exist a fundamental conflict of interests or "exchange of balancing services" such as we recognize in synallagmatic contracts (cf. Judge Bustamante's separate opinion on *South West Africa* cases, *I.C.J. Reports 1962*, pp. 357 and 359) or contracts of the type *do-ut-des*. The mandate agreement can be characterized rather as a union of two unilateral declarations, the one by the League, the other by the Mandatory, a phenomenon which we find in cases of creation of partnerships or corporations. Incidentally, this conclusion, in our view, does not prevent the construction of the mandate agreement as a kind of treaty or convention.

"This characteristic is clearly manifest in the fact that the League can be considered as a collaborator of the Mandatory by its power of supervision and an adviser in the performance of the obligations of the latter.

".....

"Secondly, the long-term nature of the mandate agreement is what characterizes it from the other contracts. This character derives from the nature of the purposes of the mandates system, namely the promotion of the material and moral well-being and social progress of the mandated territories, which cannot be realized instantaneously or within a foreseeable space of time.

"Thirdly, the mandate agreement requires from the Mandatory a strong sense of moral conscience in fulfilling its responsibility as is required in the case of guardianship, tutelage and trust. "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory..." The obligations incumbent upon the Mandatory are of an ethical nature, therefore unlimited. The mandate agreement is of the nature of a bona fide contract. For its performance the utmost wisdom and delicacy are required.

"From what is indicated above, it follows that, although the Mandatory is conferred "full power of administration and legislation over the territory", the weight of the mandates system shall be put on the obligations of the Mandatory rather than on its rights.

"The 1962 Judgment, clarifying this characteristic of the mandates system, declares as follows:

The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations (*I.C.J. Reports 1962*, p. 329).

“Judge Bustamante emphasized very appropriately (*ibid.*, p. 357) the more important aspect of responsibility rather than of rights regarding the function of the Mandatory. The Mandatory must exercise its power only for the purpose of realizing the well-being and progress of the inhabitants of the territory and not for the purpose of serving its egoistic ends. As Professor Quincy Wright puts it, “it has been recognized that the conception of mandates in the Covenant requires that the Mandatory receive no direct profit from its administration of the territory”. This is called the “principle of gratuitous administration” (Quincy Wright, *op cit.*, pp. 452-453).

“From the nature and characteristics of the mandates system and the mandate agreement, indicated above, we can conclude that, although the existence of contractual elements in the Mandate cannot be denied, the institutional elements predominate over the former. We cannot explain all the contents and functions of the mandates system from the contractual, namely the individualistic, and subjective viewpoint, but we are required to consider them from the institutional, namely collectivistic, and objective viewpoint also. This latter viewpoint is, according to Lord McNair, that of –

... certain rights of possession and government (administrative and legislative) which are valid *in rem – erga omnes*, that is against the whole world, or at any rate against every State which was a Member of the League or in any other way recognized the Mandate. (*I.C.J. Reports 1950*, p. 156).

“From the purely contractual and individualistic viewpoint the Mandate would be a personal relationship between the two parties, the existence of which depends upon the continuance of the same parties. For instance, a mandate contract in private law lapses by reason of the death of the mandator. But the international mandate does not remain, as we have seen above, purely a relationship, but an objective institution, in which several kinds of interests and values are incorporated and which maintains independent existence against third parties. The Mandate, as an institution, being deprived of personal character, must be placed outside of the free disposal of the original parties, because its content includes a humanitarian value, namely the promotion of the material and moral well-being of the inhabitants of the territories. Therefore, there shall exist a certain limitation, derived from the characteristics of the Mandate, upon the possibility of modification for which the consent of the Council of the League of Nations is required (Article 7, paragraph 1, of the Mandate).”

C – Do Applicants have a Legal Right or Interest to call for due performance of the Mandate?

*Extracts from the Judgment of the Court:*¹¹

14. "...the question which has to be decided is whether, according to the scheme of the mandates and of the mandates system as a whole, any legal right or interest (which is a different thing from a political interest) was vested in the members of the League of Nations, including the present Applicants, individually and each in its own separate right to call for the carrying out of the mandates as regards their "conduct" clauses; – or whether this function must, rather, be regarded as having appertained exclusively to the League itself, and not to each and every member State, separately and independently. In other words, the question is whether the various mandatories had any direct obligation towards the other members of the League individually, as regards the carrying out of the "conduct" provisions of the mandates.

15. "If the answer to be given to this question should have the effect that the Applicants cannot be regarded as possessing the legal right or interest claimed, it would follow that even if the various allegations of contraventions of the Mandate for South West Africa on the part of the Respondent were established, the Applicants would still not be entitled to the pronouncements and declarations which, in their final submissions, they ask the Court to make. . . .

16. "It is in their capacity as former members of the League of Nations that the Applicants appear before the Court; and the rights they claim are those that the members of the League are said to have been invested with in the time of the League. Accordingly, in order to determine what the rights and obligations of the Parties relative to the Mandate were and are (supposing it still to be in force, but without prejudice to that question); and in particular whether (as regards the Applicants) these include any right individually to call for the due execution of the "conduct" provisions, and (for the Respondent) an obligation to be answerable to the Applicants in respect of its administration of the Mandate, the Court must place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate were being framed. The Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation. Intentions that might have been

¹¹ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 22-30.

formed if the Mandate had been framed at a much later date, and in the knowledge of circumstances, such as the eventual dissolution of the League and its aftermath, that could never originally have been foreseen, are not relevant. Only on this basis can a correct appreciation of the legal rights of the Parties be arrived at. This view is supported by a previous finding of the Court (*Rights of United States Nationals in Morocco, I.C.J. Reports 1952*, at p. 189) the effect of which is that the meaning of a juridical notion in a historical context must be sought by reference to the way in which that notion was understood in that context.

18. "The enquiry must pay no less attention to the juridical character and structure of the institution, the League of Nations, within the framework of which the mandates system was organized, and which inevitably determined how this system was to operate, – by what methods, – through what channels, – and by means of what recourses. One fundamental element of this juridical character and structure, which in a sense governed everything else, was that Article 2 of the Covenant provided that the "action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat". If the action of the League as a whole was thus governed, it followed naturally that the individual member States could not themselves act differently relative to League matters, unless it was otherwise specially so provided by some article of the Covenant.

19. "As is well known, the mandates system originated in the decision taken at the Peace Conference following upon the world war of 1914–1918, that the colonial territories over which, by Article 119 of the Treaty of Versailles, Germany renounced "all her rights and titles" in favour of the then Principal Allied and Associated Powers, should not be annexed by those Powers or by any country affiliated to them, but should be placed under an international régime, in the application to the peoples of those territories, deemed "not yet able to stand by themselves", of the principle, declared by Article 22 of the League Covenant, that their "well-being and development" should form "a sacred trust of civilization".

20. "The type of régime specified by Article 22 of the Covenant as constituting the "best method of giving practical effect to this principle" was that "the tutelage of such peoples should be entrusted to advanced nations . . . who are willing to accept it", – and here it was specifically added that it was to be "on behalf of the League" that "this tutelage should be exercised by those nations as Mandatories". It was not provided that the mandates should, either additionally or in the alternative, be exercised on behalf of the members of the League in their individual capacities. The mandatories were to be the agents of, or trustees for the League, – and not of, or for, each and every member of it individually.

21. "The same basic idea was expressed again in the third paragraph of the preamble to the instrument of mandate for South West Africa, where it was recited that the Mandatory, in agreeing to accept the Mandate, had undertaken "to exercise it on behalf of the League of Nations". No other behalf was specified in which the Mandatory had undertaken, either actually or potentially, to exercise the Mandate. The effect of this recital, as the Court sees it, was to register an implied recognition (a) on the part of the Mandatory of the right of the League, acting as an entity through its appropriate organs, to require the due execution of the Mandate in respect of its "conduct" provisions; - and (b) on the part of both the Mandatory and the Council of the League, of the character of the Mandate as a juridical régime set within the framework of the League as an institution. There was no similar recognition of any right as being additionally and independently vested in any other entity, such as a State, or as existing outside or independently of the League as an institution; nor was any undertaking at all given by the Mandatory in that regard.

22. "... By paragraphs 7 and 9 respectively of Article 22 (of the Covenant), every mandatory was to "render to the Council [of the League - not to any other entity] an annual report in reference to the territory committed to its charge"; and a permanent commission, which came to be known as the Permanent Mandates Commission, was to be constituted "to receive and examine" these annual reports and "to advise the Council on all matters relating to the observance of the mandates". The Permanent Mandates Commission alone had this advisory role, just as the Council alone had the supervisory function. The Commission consisted of independent experts in their own right, appointed in their personal capacity as such, not as representing any individual member of the League or the member States generally.

24. "These then were the methods, and the only methods, contemplated by the Covenant as "securities" for the performance of the sacred trust, and it was in the Covenant that they were to be embodied. No security taking the form of a right for every member of the League separately and individually to require from the mandatories the due performance of their mandates, or creating a liability for each mandatory to be answerable to them individually, - still less conferring a right of recourse to the Court in these regards, - was provided by the Covenant.

25. "This result is precisely what was to be expected from the fact that the mandates system was an activity of the League of Nations, that is to say of an entity functioning as an institution. In such a setting, rights cannot be derived from the mere fact of membership of the organization itself: the rights that member States can legitimately claim must be derived from and depend on the par-

ticular terms of the instrument constitutive of the organization, and of the other instruments relevant in the context. This principle is necessarily applicable as regards the question of what rights member States can claim in respect of a régime such as results from the mandates system, functioning within the framework of the organization. For this reason, and in this setting, there could, as regards the carrying out of the "conduct" provisions of the various mandates, be no question of any legal tie between the mandatories and other individual members. The sphere of authority assigned to the mandatories by decisions of the organization could give rise to legal ties only between them severally, as mandatories, and the organization itself. The individual member States of the organization could take part in the administrative process only through their participation in the activities of the organs by means of which the League was entitled to function. Such participation did not give rise to any right of direct intervention relative to the mandatories; this was, and remained, the prerogative of the League organs.

26. "On the other hand, this did not mean that the member States were mere helpless or impotent spectators of what went on, or that they lacked all means of recourse. On the contrary, as members of the League Assembly, or as members of the League Council, or both, as the case might be, they could raise any question relating to mandates generally, or to some one mandate in particular, for consideration by those organs, and could, by their participation, influence the outcome. The records both of the Assembly and of other League organs show that the members of the League in fact made considerable use of this faculty. But again, its exercise — always through the League — did not confer on them any separate right of direct intervention. Rather did it bear witness to the absence of it.

28. "By paragraph 8 of Article 22 of the Covenant, it was provided that the "degree of authority, control or administration" which the various mandatories were to exercise, was to be "explicitly defined in each case by the Council", if these matters had not been "previously agreed upon by the Members of the League". The language of this paragraph was reproduced, in effect textually, in the fourth paragraph of the preamble to the Mandate for South West Africa, which the League Council itself inserted, thus stating the basis on which it was acting in adopting the resolution of 17 December 1920, in which the terms of mandate were set out. Taken by itself this necessarily implied that these terms had not been "previously agreed upon by the Members of the League". There is however some evidence in the record to indicate that in the context of the mandates, the allusion to agreement on the part of "the Members of the League" was regarded at the time as referring only to the five

Principal Allied and Associated Powers engaged in the drafting; but this of course could only lend emphasis to the view that the members of the League generally were not considered as having any direct concern with the setting up of the various mandates; and the record indicates that they were given virtually no information on the subject until a very late stage.

30. "Nor did even the Principal Allied and Associated Powers as a group have the last word on the drafting of the Mandate. This was the Council's. In addition to the insertion, as already mentioned, of the fourth paragraph of the preamble, the Council made a number of alterations in the draft before finally adopting it. One of these is significant in the present context. Unlike the final version of the jurisdictional clause of the Mandate as issued by the Council and adopted for all the mandates, by which the Mandatory alone undertook to submit to adjudication in the event of a dispute with another member of the League, the original version would have extended the competence of the Court equally to disputes referred to it by the Mandatory as plaintiff, as well as to disputes arising between other members of the League *inter se*. The reason for the change effected by the Council is directly relevant to what was regarded as being the status of the individual members of the League in relation to the Mandate. This reason was that, as was soon perceived, an obligation to submit to adjudication could not be imposed upon them without their consent. But of course, had they been regarded as "parties" to the instrument of Mandate, as if to a treaty, they would thereby have been held to have given consent to all that it contained, including the jurisdictional clause. Clearly they were not so regarded.

31. "Another circumstance calling for notice is that, as mentioned earlier, the Mandate contained a clause - paragraph 1 of Article 7 (and similarly in the other mandates) - providing that the consent of the Council of the League was required for any modification of the terms of the Mandate; but it was not stated that the consent of individual members of the League was additionally required. . . .

32. "The real position of the individual members of the League relative to the various instruments of mandate was a different one. They were not parties to them; but they were, to a limited extent, and in certain respects only, in the position of deriving rights from these instruments. Not being parties to the instruments of mandate, they could draw from them only such rights as these unequivocally conferred, directly or by a clearly necessary implication. The existence of such rights could not be presumed or merely inferred or postulated. But in Article 22 of the League Covenant, only the mandatories are mentioned in connection with the carrying out of the mandates in respect of the inhabitants of the mandated territories and as regards the League organs. Except in the procedural provi-

sions of paragraph 8 (the "if not previously agreed upon" clause) the only mention of the members of the League in Article 22 is in quite another context, namely at the end of paragraph 5, where it is provided that the mandatories shall "also secure equal opportunities for the trade and commerce of other Members of the League". It is the same in the instruments of mandate. Apart from the jurisdictional clause, which will be considered later, mention of the members of the League is made only in the "special interests" provisions of these instruments. It is in respect of these interests alone that any direct link is established between the mandatories and the members of the League individually. In the case of the "conduct" provisions, mention is made only of the mandatory and, where required, of the appropriate organ of the League. The link in respect of these provisions is with the League or League organs alone.

33. "Accordingly, viewing the matter in the light of the relevant texts and instruments, and having regard to the structure of the League, within the framework of which the mandates system functioned, the Court considers that even in the time of the League, even as members of the League when that organization still existed, the Applicants did not, in their individual capacity as States, possess any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the "sacred trust". This right was vested exclusively in the League, and was exercised through its competent organs. Each member of the League could share in its collective, institutional exercise by the League, through their participation in the work of its organs, and to the extent that these organs themselves were empowered under the mandates system to act. By their right to activate these organs (of which they made full use), they could procure consideration of mandates questions, as of other matters within the sphere of action of the League. But no right was reserved to them, individually as States, and independently of their participation in the institutional activities of the League, as component parts of it, to claim in their own name, – still less as agents authorized to represent the League, – the right to invigilate the sacred trust, – to set themselves up as separate custodians of the various mandates. This was the role of the League organs.

34. "To put this conclusion in another way, the position was that under the mandates system, and within the general framework of the League system, the various mandatories were responsible for their conduct of the mandates solely to the League – in particular to its Council – and were not additionally and separately responsible to each and every individual State member of the League. If the

latter had been given a legal right or interest on an individual "State" basis, this would have meant that each member of the League, independently of the Council or other competent League organ, could have addressed itself directly to every mandatory, for the purpose of calling for explanations or justifications of its administration, and generally to exact from the mandatory the due performance of its mandate, according to the view which that State might individually take as to what was required for the purpose.

35. "Clearly no such right existed under the mandates system as contemplated by any of the relevant instruments. It would have involved a position of accountability by the mandatories to each and every member of the League separately, for otherwise there would have been nothing additional to the normal faculty of participating in the collective work of the League respecting mandates. The existence of such an additional right could not however be reconciled with the way in which the obligation of the mandatories, both under Article 22 of the League Covenant, and (in the case of South West Africa) Article 6 of the Instrument of Mandate, was limited to reporting to the League Council, and to its satisfaction alone. Such a situation would have been particularly unimaginable in relation to a system which, within certain limits, allowed the mandatories to determine for themselves by what means they would carry out their mandates: and *a fortiori* would this have been so in the case of a 'C' mandate, having regard to the special power of administration as "an integral portion of its own territory" which, as already noted, was conferred upon the mandatory respecting this category of mandate.

36. "The foregoing conclusions hold good whether the League is regarded as having possessed the kind of corporate juridical personality that the Court, in its Advisory Opinion in the case of *Reparation for Injuries Suffered in the Service of the United Nations*, (I.C.J. Reports 1949, p. 174), found the United Nations to be invested with, – or whether the League is regarded as a collectivity of States functioning on an institutional basis, whose collective rights in respect of League matters were, as Article 2 of the Covenant implied, exercisable only through the appropriate League organs, and not independently of these."

Extracts from some of the Dissenting Opinions on the Question of the Applicants' Legal Rights or Interest

*Vice-President Wellington Koo:*¹²

¹² South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 216-217, 219-220, 222-223 and 228-229. The Dissenting Opinion of Vice-President Wellington Koo as well as those of Judges Padilla Nervo (see pp. 40-42 and pp. 47-51 below) and Isaac Forster (see pp. 42-45 and 46-47 below) were not set out in numbered paragraphs.

"I regret to be unable to concur in the Judgment of the Court which "finds that the Applicants cannot be considered to have established any substantive right or legal interest appertaining to them in the subject-matter of the present claims". Nor am I able to agree with the reasons upon which it is based. . . .

.....
"The principal question considered in the present Judgment is, again, whether the Applicants in the instant cases have a legal right or interest in the subject-matter of their claims. The Judgment finds that the Applicants have no such right or interest in the performance provisions of the Mandate for South West Africa. It seems to me that the main arguments in support of this finding are largely derived from the concepts of guardianship or tutelle in municipal law with its restricted notions of contract, parties and interests.

.....
". . . the legal right or interest of the League Members individually as well as collectively through the Assembly of the League in the observance of the mandates by the mandatories originated with and was inherent in the mandates system, as has been demonstrated above, and an adjudication clause was inserted in each mandate not to confer this right or interest, which is already necessarily implied in Article 22 of the Covenant and in the mandate agreement, but to bear testimony to its possession by the League Members and to enable them, if need be, to invoke in the last resort, judicial protection of the sacred trust.

"That the above finding of the Applicants' possession of a legal right or interest in the performance of the Mandate for South West Africa is correct is also borne out by the provision and language of Article 7(2)¹³, the text of which has already been cited earlier.

"This right or interest is not, as affirmed in effect by the Judgment, limited to the material or national interests of the individual League Members as provided for in Article 5 of the Mandate for South West Africa¹⁴ relating to freedom of missionaries "to enter into, travel and reside in the territory for the purpose of prosecuting their calling". The broad, plain and comprehensive language of the provision implies that the content and scope of the legal right or interest of the Members of the League of Nations is co-extensive with

¹³ See pages 3 and 4 above.

¹⁴ Article 5 of the Mandate: "Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling."

the obligations of the Mandatory under the Mandate; it is not restricted to the content of the said Article 5.

"If it were to be interpreted as so limited, such interpretation would obviously be incompatible with the all-embracing term "the provisions of the Mandate". If it had been intended by the authors of the instrument to be so restricted in meaning and content, it would have been a simple thing to mention "Article 5" instead of the actual term "the provisions of the Mandate" – as stated in the compromissory clause. There is a Chinese proverb put in the form of a question: why write a long and big essay on such a small subject? The alleged limited purport and scope of the terms employed in Article 7(2), such as the term "any dispute" or the "provisions of the Mandate", if the allegation were well-founded, would certainly make the actual language of the compromissory clause appear to be extravagant. And yet we know as a fact that the draft 'B' and 'C' mandates, both containing a similarly worded compromissory clause, were considered by several bodies of the Paris Peace Conference composed of eminent statesmen over a period of several months, such as the Milner Commission and the Council of Heads of Delegations in Paris and later by the Council of the League of Nations – all deeply concerned in the matter of the mandates and the proposed mandates system. In fact, within the membership of these bodies, most, if not all, of the principal mandatory Powers were represented.

.....

"It will also be recalled that the possession of this legal right or interest by the Applicants is the basis of the Court's finding in the 1962 Judgment that the dispute is one envisaged within the purport of Article 7, to establish its jurisdiction. After recalling the rule of construction based upon the natural and ordinary meaning of a provision and referring to the provisions of Article 7 of the Mandate, which mentions "any dispute whatever" arising between the Mandatory and another Member of the League of Nations "relating to the interpretation or the application or the provisions of the Mandate", the Court said:

The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating not to any one particular provision or provisions, but to "the provisions" of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory toward the inhabitants of the Territory or toward the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself. (*I.C.J. Reports 1962*, p. 343).

"In fact earlier the Advisory Opinion of 1950 by emphasizing

simultaneously "the essentially international character of the functions which had been entrusted to the Union of South Africa" and 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 or the application of the provisions of the Mandate, undoubtedly implied the existence of a legal right or interest of the League Members in the performance of the Mandate. Even the two judges who alone dissented with the Opinion of 1950 on the question of transfer of the League's supervisory functions to the General Assembly of the United Nations, affirmed the possession of a legal interest by the members of the League of Nations in the observance of the obligations of the Mandatory. Thus Sir Arnold (now Lord) McNair stated:

Although there is no longer any League to supervise the exercise of the Mandate, it would be an error to think that there is no control over the Mandatory. Every State which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate. The Mandate provides two kinds of machinery for its supervision - *judicial*, by means of the right of any Member of the League under Article 7 to bring the Mandatory compulsorily before the Permanent Court, and *administrative*, by means of annual reports and their examination by the Permanent Mandates Commission of the League. (*I.C.J. Reports 1950*, p. 158).

"Judge Read, in his separate opinion appended to the same Advisory Opinion of 1950, put the matter of the legal rights of the members of the League even more strongly. He stated:

As a result of the foregoing considerations, it is possible to summarize the position, as regards the international status of South West Africa and the international obligations of the Union arising therefrom, after the termination of the existence of the League:

First: the Mandate survived, together with all of the essential and substantive obligations of the Union.

Second: the *legal rights and interests* of the Members of the League, in respect of the Mandate, survived with one important exception - in the case of Members that did not become parties to the Statute of this Court, their right to implead the Union before the Permanent Court lapsed. (*Italics added.*) (*Ibid.*, p. 169.)

....

"The fact that only one case was brought to the Permanent Court of International Justice by any Member of the League of Nations during the 25 years of its existence under an adjudication clause similar to Article 7 of the Mandate for South West Africa (Article 26 of the Palestine Mandate) in respect of alleged injury to the material interests of a national of the Applicant and that no recourse was

ever made to the Court to invoke its protection and ensure due observance by the mandatory Power of its substantive obligations under a given mandate towards the inhabitants of the mandated territory does not necessarily prove that individual League Members had no legal right or interest in such observance. As stated by Judge Read in his separate opinion in 1950, when referring to the obligation of the Union of South Africa to submit to the compulsory jurisdiction of this Court in the case of a dispute relating to the interpretation or the application of the provisions of the Mandate under the provisions of Article 7 of the mandate agreement and Article 37 of the Statute, reinforced by Article 94 of the Charter:

The importance of these provisions cannot be measured by the frequency of their exercise. The very existence of a judicial tribunal, clothed with compulsory jurisdiction, is enough to ensure respect for legal obligations. (*I.C.J. Reports 1950*, p. 169.)

“The legal right or interest of the League Members in the performance of the mandate obligations by the Mandatory has always existed though it might appear to be latent. For so long as the conflict of views on a given subject-matter between the Council of the League of Nations and the Mandatory, either as an *ad hoc* or as a regular member of it, continued to be under discussion and the possibility of reaching an eventual agreement remained, there was no occasion for any member State to resort to judicial action under Article 7, paragraph 2, of the Mandate. For example, the objection of the Mandates Commission to the statement in the preamble of a Frontier Agreement concluded between the Union and Portugal relating to the boundary between Portuguese Angola and the mandated territory that “the Government of the Union of South Africa, subject to the terms of the Mandate, *possesses sovereignty* over the Territory of South West Africa” was raised at its meetings every year in 1926, 1927, 1929 and 1930. After the Council adopted resolutions on the basis of the Commission’s reports and no word of acceptance came from the Mandatory Power, the Commission continued to press for a reply. Finally, “the Union of South Africa, by a letter of 16 April 1930, stated its acceptance of the definition of the powers of the Mandatory contained in the Reports of the Council”. (*I.C.J. Pleadings*, 1950, p. 198.) However, if the Mandatory had persisted in its own view on this question to the end even after the Council should have obtained an advisory opinion of the Court confirming the interpretation by the Council as being in complete conformity with the Covenant and the mandate agreement, there was no certainty that no member State of the League of Nations, in the exercise of its substantive right or legal interest in the performance of this Mandate, would have brought an action in the Permanent Court to obtain a binding decision on the legal

question involved in the dispute with the Mandatory. The infrequency of exercising this legal right or interest does not in any sense prove its non-existence.”

*Judge Jessup:*¹⁵

“Although the Judgment of the Court recognizes that some of the Applicants’ submissions request “pronouncements and declarations” and that the first and second submissions are included in that class, the Judgment says –

... the question which has to be decided is whether ... any legal right or interest (which is a different thing from a political interest) was vested in the members of the League of Nations, including the present Applicants, individually, and each in its own separate right to call for the carrying out of the mandates as regards their conduct clauses.

“But the question also is whether the same Applicants individually had a right to ask the Court to interpret the Mandate so that – for example – those States might then determine whether to proceed through political channels to induce the Mandatory to act in a certain way. Such an inter-relation of the function of the Permanent Court of International Justice and of the political organs of the League of Nations was frequently illustrated in connection with the peace settlements after World War I. Thus, under Article 11 of the Covenant, it was “declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international peace or the good understanding between nations upon which peace depends”. Under Article 35 (1) of the Charter of the United Nations, Members have a comparable right if there is a “situation which might lead to international friction”. Assume a Member of the League (or of the United Nations) considered that the practice of apartheid in the mandated territory of South West Africa was in violation of the Mandate and that it might disturb “good understanding between nations” – as indeed it has – or that it might “lead to international friction” – which indeed it has. Assume that such hypothetical member, before taking the matter to the Assembly (or General Assembly) wished to secure an authoritative pronouncement from the International Court as to whether its interpretation of the mandate was correct. Surely it would have a legal interest cognizable under paragraph 2 of Article 7 of the Mandate. Even a potential intention to act under Article 11 of the Covenant (or Article 35 of the Charter) would justify an application to the

¹⁵ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 423-425.

Court and there is no legal requirement that an applicant should declare the reason why it wished the information. It might, as the Permanent Court said in the *Memel* case, merely wish a "guide for the future".

"The Judgment accepts or rejects certain conclusions by the test of their acceptability as being reasonable. By this test I find it impossible to find that because the "missionary" rights under Article 5 may constitute what the Judgment calls "special interests" rights, or may have what it calls in some contexts a "double aspect", the Applicants' legal right or interest to prosecute a claim to judgment in regard to missionaries must be admitted but that they have no such right or interest in regard to the practice of apartheid. This seems to me an entirely artificial distinction, and, as I have shown, not supported by the history of the drafting. Because Applicants did not specifically invoke Article 5 in their Applications, the Judgment denies them the right to obtain a finding whether the Mandate - on which any such right would rest - still subsists. Applicants do base their ninth submission on Article 7 (1) which provides that the terms of the Mandate may not be changed without the consent of the Council of the League; the Judgment denies them the right to know whether even their admitted rights under Article 5 could be terminated by the unilateral act of the Mandatory although it is said that "there is no need to inquire" whether the consent of the Member would have been necessary. The Judgment does not say whether the consent of every Member would be necessary for the termination of a procedural clause. Looking at the history of the drafting of the Mandate with the intimate connection between the two paragraphs of Article 7, it again seems highly artificial to take a position as follows: the decision of the Court in 1962 that paragraph 2 of Article 7 survives, in whatever form or way, is accepted, but this surviving right of resort to the Court does not entitle Applicants to learn from the Court whether paragraph 1 of Article 7 is still in force, although if it is not, the Mandatory might also terminate the second paragraph of Article 7 and deny to Applicants even what are - under the Judgment of the Court - the meagre rights to file their applications and learn that the Court has jurisdiction. Jurisdiction to do what? Jurisdiction, according to the Judgment, to say that the Court cannot give effect to the claims because Applicants lack a legal right or interest.

"The intimation in the Judgment that the Applicants' interest in, for example, the practice of apartheid in the mandated territory of South West Africa, is only political and not legal, harks back to the Joint Dissent of 1962. At page 466 of that Joint Opinion, it was said that while a Court generally must "exclude from consideration all questions relating to the merits" when it is dealing with an issue of jurisdiction:

It is nevertheless legitimate for a Court, in considering the jurisdictional aspects of any case, to take into account a factor which is fundamental to the jurisdiction of any tribunal, namely whether the issues arising on the merits are such as to be capable of objective legal determination.

"The opinion continued to say that the principal question on the merits would be whether the Mandatory is in breach of its obligations under Article 2 of the Mandate. They concluded – provisionally, it is true – that the problems presented are suitable for appreciation in a technical or political forum but that the task "hardly appears to be a judicial one". The thesis that the interpretation of Article 2 of the Mandate is more political than legal is in effect another way of saying as today's judgment says, that the interest of Applicants in the interpretation or application of Article 2 is political rather than legal. The question, viewed in this light, is a question of justiciability and thus requires an examination of the criteria which the Court could use in discharging this task. At least the third submission of the Applicants should be rejected if it is not a justiciable issue to determine whether the practice of apartheid in the mandated territory of South West Africa promotes "the material and moral well-being and the social progress of the inhabitants of the Territory"

*Judge Padilla Nervo:*¹⁶

"I voted against the decision of the Court because I am convinced that it has been established beyond any doubt that the Applicants have a substantive right and a legal interest in the subject-matter of their claim; the performance by the Mandatory of the sacred trust of civilization, by complying with the obligations stated in Article 22 of the Covenant of the League of Nations; and in the Mandate for German South West Africa.

"Furthermore, the Applicants, by virtue of Article 7 of the Mandate (an instrument which is "a treaty or convention in force", within the meaning of Article 37 of the Statute), have a right to submit their dispute with the Respondent to this International Court of Justice.

"The present case is not an ordinary one, it is a *sui generis* case with far-reaching implications of juridical, social and political nature. It has been, since its inception, a complex, difficult and controversial one, as can be seen, by the fact that the present decision of the Court, to which I am in fundamental disagreement, rests on a *technical* or *statutory* majority, resulting from the exercise by the President of his prevailing vote, in accordance with paragraph 2 of Article 55 of the Statute of the Court, which reads:

¹⁶ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 443 and 452-453.

1. All questions shall be decided by a majority of the Judges present.
2. In the event of an *equality* of votes, the President or the Judge who acts in his place shall have a *casting* vote. (Italics added.)

“The Court has dealt with one single question, namely: Have the Applicants a legal interest in the subject-matter of the claim? Upon this the Court has found –

that the Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims: and that, accordingly, the Court must decline to give effect to them. For these reasons, the Court decided to reject the claims of the Empire of Ethiopia and the Republic of Liberia.

“The Court, in my view, has been able to do that from an unwarranted assumption of the presumed intentions of the framers of the Covenant and the mandates system in 1919, and from an analysis and *interpretation* of such instruments consequent with the particular assumption, which serves as the basis or premise of the Court’s analysis and reasoning. This process has accordingly led the Court to its present decision.

.....

“The merits of the dispute have been presented and developed before the Court through the written and oral arguments of the Parties to the present case.

“Much time, effort and expense have been used in these pleadings, and the Court is acquainted with all the necessary elements to form a considered opinion and to pass judgment on the merits of the Applicants’ claim.

“This, in my opinion, the Court should have done, and the majority should not have limited and restricted the whole field of these contentious proceedings on the merits to the narrow point of the question regarding legal interest or substantive right.

“It cannot be ignored that the status of the mandated territory of South West Africa is the most explosive international issue of the post-war world; and the question whether the official policy of “apartheid” as practised in the Territory, is or is not compatible with the principles and legal provisions stated in the Covenant, in the Mandate and in the Charter of the United Nations, begs an answer by the Court which, at the present stage, is dealing with the merits of the case.

“During these proceedings of exceptionally long duration, the Court has been hearing and examining the arguments of the opposing Parties in support of their respective *submissions*, requesting the Court to adjudge and declare upon them. Nevertheless, the majority of the Court has deemed fit and proper not to do this, thus rendering it unnecessary for it to pronounce on the main issues

on the ground that "the Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims".

.....
"I believe that the Applicants' legal interest in the performance by the Mandatory of its obligations under the Mandate derives not only from the spirit, but from the very terms of the Covenant and the Mandate, and is clearly expressed in Article 7 (2)."

*Judge Isaac Forster:*¹⁷

.....
"And now today this same Court, which gave the three above-mentioned Advisory Opinions in 1950, 1955 and 1956 and which in 1962 delivered a judgment upholding its jurisdiction to adjudicate upon the merits of the dispute, this Court now declares the claim to be inadmissible and rejects it on the ground that Ethiopia and Liberia have no legal interest in the action.

"This passes my understanding.

"It is not that I turn a blind eye on the old maxim "no interest, no action", but I find it difficult to believe that in proceedings concerning the interpretation and application of an international mandate based on the altruistic outlook of the time, legal interest can be straight-jacketed into the narrow classical concept of the individual legal interest of the applicant State.

"The requirement that there should be an individual interest is no doubt the rule, but every rule has its exceptions. In international law there exists a form of legal interest which may, in certain circumstances, be quite separate from the strictly individual interest of the applicant State. I find evidence of this, for example, in the Convention on the Prevention and Punishment of the Crime of Genocide. In its Advisory Opinion of 28 May 1951, the Court held as follows:

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

"The concept of a legal interest separate from the individual

¹⁷ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 478-480.

interest of the applicant State is thus not unknown in international law. It can even be clearly seen in certain international treaties for the protection of minorities concluded after the Great War of 1914-1918. It there takes the form of a compulsory jurisdiction clause which confers the status of international dispute on any difference of opinion in regard to questions of law or of fact concerning the application of the treaty between the minority State and any Power which was a member of the Council of the League of Nations. It was not required that the Power which was a member of the Council of the League of Nations should be a contracting party to the minorities treaty, nor was it required it should have an individual legal interest. It was sufficient for it to apply to the Court in the general interest of a correct application of the régime.

"In my view the circumstances are similar in this case. It was in the interest of the Native inhabitants that the Mandate for German South West Africa was instituted, and its essential provisions have no other purpose than "to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory". The Mandate was not concluded in the interest of the State Members of the League of Nations or in that of the League itself. It was concluded in the interest of Native peoples not yet capable of governing themselves. It was a "sacred trust" conferred and accepted without any corresponding advantage for either the Mandator or the Mandatory. The circumstances were those of complete altruism. However, the beneficiaries of the generous provisions of the Mandate, namely the Natives of South West Africa, have no capacity to seise the International Court of Justice as they do not yet constitute a sovereign State. Nor do they enjoy the nationality of a State capable of seising the Court for the protection of its nationals. This being so, what is the compelling rule which prevents the Court, in examining the admissibility of the claim, also taking into account, as in the field of international protection of minorities, the principle of the general interest in a correct application of the mandate régime? Ethiopia and Liberia were Members of the League of Nations, and can it not be said that here the legal interest consists of the interest possessed by any Member in securing observance of a convention prepared in a League in which it participated? While it is true that the Mandate for South West Africa does not contain terms which are absolutely identical with those in the compulsory jurisdiction clause in the treaties for the international protection of minorities to which I have referred, there is at least the following provision in the second paragraph of Article 7:

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 (*sc.* the International Court of Justice) provided for by Article 14 of the Covenant of the League of Nations.

“Contrary to the view taken by the majority, I personally am convinced that this provision made it possible for the Court to declare admissible the claims of Ethiopia and Liberia which, having been Members of the League of Nations, retain a legal interest in securing observance by the Mandatory of its undertakings so long as its presence in South West Africa continues. I find it hard to believe, as is held by the majority, that the second paragraph of Article 7 of the Mandate, providing for resort to an international tribunal, covered disputes relating only to the individual interests of States under the provisions of Article 5. It is not possible for me to accept that the authors of a Mandate, the essential (and highly altruistic) purpose of which was the promotion by all the means in the Mandatory’s power of the material and moral well-being and social progress of the inhabitants of the territory, when they came to Article 7 had lost the generous impulses by which they were inspired at the beginning and, selfishly, no longer had in mind, in the event of resort to international justice, anything more than the individual legal interest of Member States. This would not fit in with the context or with the terms of the provision itself, which reads:

... 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 ...

“I therefore believe the claims of Ethiopia and Liberia to be completely admissible.

“I therefore consider that it was the duty of the Court to examine the Applicants’ complaints, and adjudge and declare them to be well-founded or otherwise.

“It was the duty of the Court to declare whether South Africa, as Mandatory, is properly and conscientiously performing its obligations under the Mandate.”

In view of the Court’s finding that the Applicants had no legal right or interest in the subject-matter of their claims, the judgment of the Court did not proceed to consider those aspects of the merits of the case such as 1) the question of whether the Mandate had lapsed or continued to be in force. 2) the question whether the Mandatory had practised apartheid in the mandated territory in violation of the terms of the Mandate. However the Dissenting Opinions make some reference to these as well as other aspects of the merits.

D – Has the Mandate lapsed?

*Judge Jessup:*¹⁸

“Another argument has been advanced which, if well-founded, would negative the existence of Applicants’ right to institute proceedings under Article 7(2) of the Mandate. The first of Respondent’s final submissions as presented to the Court by Respondent’s Agent on 5 November 1965 reads as follows:

That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder.

“It has already been pointed out that there is nothing in the so-called “new facts” presented by Respondent which would lead the Court to reconsider the view which it has consistently taken since 1950 that the Mandate did not lapse on the dissolution of the League. On this point the Court was unanimous in 1950 and there were no opposing views expressed in 1955 or 1956. Moreover it is still true, as the Court stated in its Advisory Opinion of 1950, quoted by the Court in its 1962 Judgment, that –

If the Mandate lapsed, as the Union Government contends, the latter’s authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified. (*I.C.J. Reports 1962*, p. 333.)

“In the present phase of the case, Respondent sought to surmount this difficulty by alleging that it had a title to South West Africa based on conquest. On 27 May 1965, counsel for Respondent stated (C.R. 65/39, p. 37): “The Respondent says, Mr. President, that the legal nature of its rights is such as is recognized in international law as flowing from military conquest.” It is doubtful whether Respondent relied heavily on this argument which is in any case devoid of legal foundation.

“It is a commonplace that international law does not recognize military conquest as a source of title. It will suffice to quote from Lauterpacht’s *Oppenheim* (8th ed., Vol. 1, p. 567):

Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory. Such annexation makes the enemy State cease to exist, and thereby brings the war to an end. And as such ending of war is named subjugation, it is conquest followed by subjugation, and not conquest alone, which gives a title and is a mode of acquiring territory. It is, however, quite usual to speak of “title by conquest”, and everybody knows that subjugation after conquest is thereby meant. But it must be specially mentioned that, if a

¹⁸ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 418-419.

belligerent conquers a part of the enemy territory and afterwards makes the vanquished State cede the conquered territory in the treaty of peace, the mode of acquisition is not subjugation but cession.

“It is of course known that Germany did not cede South West Africa to South Africa and that South Africa did not conquer the whole of the territory of Germany.”

E – Is the Mandatory’s Policy of Apartheid a Breach of the Provisions of the Mandate?

*Judge Isaac Forster:*¹⁹

“It is not playing politics or taking into account only ethical or humanitarian ideals to ascertain whether the Mandatory’s policies are a breach of the provisions of the Mandate, which is the subject-matter of the dispute; for a Court seised of a breach of obligations under the Mandate is competent to appraise all the methods used in the application of the Mandate, including the political methods. The Court would be within its powers in declaring whether or not the policy of apartheid on which the laws and regulations applied in the Mandated Territory of South West Africa are based is conducive to the purpose laid down in the second paragraph of Article 2 of the Mandate. In fact by now the Court is the only body which can do so, since the Mandatory has obstinately declined to accept any international supervision.

“The Court’s silence concerning the Mandatory’s conduct is disturbing when it is recalled that the very same Court, in its earlier Judgment of 1962, upheld its jurisdiction to adjudicate upon the merits of the dispute. The Court now declines to give effect to the claim of Ethiopia and Liberia on the ground that the Applicants have no legal interest in the action. I repeat once again my conviction that the classic notion of individual legal interest is not the only acceptable one, and that it is not necessarily applicable in proceedings instituted with reference to the interpretation and application of an international mandate, the beneficiaries of whose provisions are not the States which subscribed to them but African peoples who have no access to the Court because they do not yet constitute a State. Nor is the doctrine of legal interest one of crystal-line clarity. Distinguished lawyers when discussing the subject have on occasion had to admit that “the concept of interest is however inherently vague and many-sided . . .” (Paul Cuche, quondam Dean of the Grenoble Law Faculty; Jean Vincent, Professor of Law and Economics at Lyon University. *Précis Dalloz*, 12th ed., 1960, p. 19.)

¹⁹ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 481-483.

.....
 "If the Court had only consented to take its examination of the merits a little further it would have found the multiplicity of impediments put in the way of coloured people in all fields of social life. Barriers abound: in admission to employment, in access to vocational training, in conditions placed on residence and freedom of movement; even in religious worship and at the moment of holy communion.

"Creating obstacles and multiplying barriers is not, in my view, a way to contribute to the promotion of "the material and moral well-being and the social progress of the inhabitants of the territory". It is, on the contrary, a manifest breach of the second paragraph of Article 2 of the Mandate."

*Judge Padilla Nervo:*²⁰

"The assertion that "apartheid" is the only alternative to chaos, and that the peoples of South West Africa are incapable of constituting a political unity and being governed as a single State does not justify the official policy of discrimination based on race, colour or membership in a tribal group.

"Paragraph 3 of Article 22 of the Covenant did not presuppose a static condition of the peoples of the territories. Their stage of development had to be transitory, and therefore the character of the Mandate, even of a given mandate, could not be conceived as a static and frozen one; it had to differ as the development of the people changed or passed from one stage to another. Are the people of South West Africa in the same stage of development as 50 years ago?

"Are the economic conditions of the territory the same? Article 2 (2) of the Mandate states:

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.

"Even if the geographical situation is to be considered under the angle of its remoteness from centres of civilization, and remoteness being a relative term, can it be said that South West Africa is now as remote as 50 years ago from centres of civilization?

"I do not share the view that the Court, in the interpretation and application of the provisions of the Mandate, is limited or restricted in its jurisdiction to the narrow term of Article 7, paragraph 2, and has not jurisdiction to consider the existence and applicability of a "norm" and/or "standard" of international conduct of non-

²⁰ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 467-470.

discrimination. In my view the jurisdiction of the Court is not so limited or restricted.

"The Court cannot be indifferent to the fact that the Mandate operates under the conditions and circumstances of 1966, when the moral and legal conscience of the world, and the acts, decisions and attitudes of the organized international community, have created principles, and evolved rules of law which in 1920 were not so developed, or did not have such strong claims to recognition. The Court cannot ignore that "the principle of non-discrimination has been recognized internationally in most solemn form" (Jenks).

"Since the far away years of the drafting of the Mandate, the international community has enacted important instruments which the Court, of course, must keep in mind, the Charter of the United Nations, the Constitution of the International Labour Organisation, the Universal Declaration of Human Rights, the Declaration on Elimination of All Forms of Racial Discrimination, and numerous resolutions of the General Assembly and the Security Council, having all a bearing on the present case for the interpretation and application of the provisions of the Mandate. All these instruments confirm the obligation to promote respect for human rights.

"It has been said rather in soft terms, that "South African racial segregation policies appear to be out of harmony with the obligation under the Charter".

"All this must be taken into account by the Court in determining whether it has been a breach of international law or of the obligation of the Respondent under the Mandate, as interpreted by the Court.

"There are cases where – in the absence of customary laws – it is permissible to apply rules and standards arising from certain principles of law above controversy. The principles enacted in the Charter of the United Nations are – beyond dispute – of this nature.

"The resolutions of the General Assembly are the consequence of the universal recognition of the principles consecrated in the Charter and of the international need to give those principles their intended and legitimate application in the practices of States.

"The Court, as an organ of the United Nations, is bound to observe the provisions of the Charter regarding its "Purposes and Principles", which are of general application to the Organization as a whole and hence to the Court, as one of the principal organs of the United Nations, and whose Statute is an integral part of the Charter. As Rosenne remarks:

In general it cannot be doubted that the mutual relations of the principal organs ought to be based upon a general theory of cooperation between them in the pursuit of the aims of the Organization.

"And Judge Azevedo: "The General Assembly has retained a

right to watch over all matters concerning the United Nations." It has also been recognized that:

The Court must co-operate in the attainment of the aims of the Organization and strive to give effect to the decisions of other principal organs, and not achieve results which would render them nugatory.

"The question whether or not the Respondent has complied with its obligations under Article 2 (2), is a sociological fact which has to be measured and interpreted by the current principles, rules and standards generally accepted by the overwhelming majority of Member States of the United Nations, as they were continuously expressed, through a great number of years, in the relevant resolutions and declarations of the General Assembly and other organs of the international community, in accordance with the binding treaty provisions of the Charter.

"It might be said that the ultimate decision of this question is a political one, to be evaluated by the General Assembly to whose satisfaction, as today's supervisory organ, the Mandatory has to administer the territory having an international status. The Court, however, in my view, should declare whether or not an official policy of racial discrimination is in conformity with the provisions of the United Nations Charter, and in harmony with principles of equality and non-discrimination based on race or colour, proclaimed and accepted by the international community.

"The arguments and evidence presented by the Respondent for the purpose of attributing to the numerous resolutions on South West Africa, adopted by the General Assembly during the past 20 years, a political character and the claim that they have been politically inspired, do in fact emphasize the duty of the Court to give weight and authority to those resolutions of the General Assembly, as a source of rules and standards of general acceptance by the Member States of the International Organization.

"The Court should also recognize those decisions as embodying reasonable and just interpretations of the Charter, from which has evolved international legal norms and/or standards, prohibiting racial discrimination and disregard for human rights and fundamental freedoms.

"Many of the activities of the General Assembly and the Security Council – among them, those relating to the problem of South West Africa – are in the nature of political events concerned with the maintenance of international peace, which is also the concern of the Court, whose task is the pacific settlement of international disputes.

"From those activities and under the impact of political factors, new legal norms or standards emerge.

"Examining the close interrelation between the political and

legal factors in the development of every branch of international law, Professor Rosenne makes some observations and comments which I consider pertinent to quote:

That interrelation explains the keenness with which elections of Members of the Court are conducted . . . But that interrelation goes further. It explains the conflict of ideologies prevalent today regarding the Court. (Rosenne, *The Law and Practice of the International Court*, Vol. 1, p. 4.) The Charter of the United Nations and the urgency of current international problems and aspirations have turned the course of Organized International Society into new directions . . . The intellectual atmosphere in which the application today of international law is called, has changed, and with it the character of the Court as the Organ for applying international law, is changing too. (*Ibid.*, pp. 5-6.)

“Rosenne remarks also that the full impact upon the Court of those changes is found in the activities of the General Assembly and the Security Council.

“Whatever conclusions one might draw from these activities, it is evident that their far-reaching significance is the fact that the struggle towards ending colonialism and racism in Africa, and everywhere, is the overwhelming will of the international community of our days.

“The Court, in my view, should take into consideration that consensus of opinion.

“The General Assembly, as a principal organ of the United Nations, empowered to “discuss any questions or any matters within the scope of the present Charter” (Article 10), especially those questions “relating to the maintenance of international peace” (Article 11), and to “recommend measures for the adjustment of any situation resulting from a violation of the provisions of the Charter, setting forth the purpose and principles of the United Nations”, has enacted, with respect to the situation in South West Africa, numerous resolutions – in the legal exercise of such functions and powers – resolutions which have the character of rules of conduct, standards or norms of general acceptance, condemning “racial discrimination” and violations of “human rights and fundamental freedoms”, as contrary to the Charter, the Covenant and the Mandate.

“There is no principle of general international law which could be validly invoked to contradict, or destroy, the essential purpose and the fundamental sources of the legal obligations rooted in the very existence of the Covenant, the mandates system and the Charter of the United Nations.

“The resolutions of the General Assembly adopted before 1960, when the Application was made, are an almost unanimous expression of the conviction of States against the official policy of apartheid as practised in the mandated territory of South West Africa.”

THE EUROPEAN SOCIAL CHARTER

by

PETER PAPADATOS *

The European Social Charter was signed by the Member-States of the Council of Europe in Turin on October 18, 1961. For the countries ratifying it this international treaty came into force on February 26, 1965, that is 30 days after its ratification by the fifth signatory State, as provided for in Article 35, paragraph 2, of the Charter.

The Charter completes the protection and safeguard of fundamental human rights at the international level – a task undertaken by the Member-States of the Council of Europe. The Charter, as a sequel to the 1950 Treaty of Rome which enshrines fundamental political and civil rights, sets out the economic and social rights.

The limited scope of the present study does not permit of a detailed analysis of social rights; it will therefore be limited to defining, first, the concept of social rights, with particular mention of the specific characteristics which distinguish them from other human rights. It will then analyse separately each social right and principle laid down in the Charter, examining the main problems posed by their incorporation into an international treaty. Finally, it will put forward certain conclusions concerning the meaning and importance of the Charter and the way in which it contributes to fulfilling the present-day postulates of social justice in the liberal democracies of contemporary Europe.

I. THE CONCEPT OF SOCIAL RIGHTS

When modern legal systems were instituted in the nineteenth century – to speak only of the immediate past – the fundamental aim was to abolish the political oppression to which the individual was subject and to secure to him his freedom as a citizen – freedom enabling him freely to devote himself to the pursuit of happiness.¹ Under the influence of this guiding principle, fundamental human rights were thus aimed at protecting the individual against the abuse of power by preserving his rights in certain fields, for which they guaranteed freedom from interference by the State.

Practical considerations, however, soon brought about profound changes in this purely individualistic conception. Political,

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¹ Cf. Virginia Bill of Rights of 1776 (Section 1, Declaration of Independence).

economic and social evolution brought to the forefront of history the consuming desire of the peoples to free themselves not only from political oppression but also from all other forms of constraint. It was realised that "political" freedoms were not enough and were, indeed, illusory and divorced from real life. Questions concerning effective freedoms then arose inexorably in the minds and awareness of peoples – questions such as: Did a free choice of work really have any meaning for a person exposed to arbitrary action by his employer or to the threat of unemployment? Or, again, was inviolability of domicile of any real worth to a person who lacked even the most elementary home?

Thus overwhelmed by such acute and often exasperating financial and social problems, twentieth-century man finally came to use his ballot paper not as a means of participating in the management of the affairs of the nation but rather as a means of advancing his social demands, thereby transforming the very essence and function of the right to vote.

The freeing of man from his financial and social problems became a theme of general concern, particularly after the First World War. This concept, which was based primarily on justice and which gave rise to what has been called the "modern form of freedom", found concrete expression in the formulation of new fundamental human rights. Thus liberal "social democracy" came to acknowledge as fundamental rights, on an equal footing with political rights, the aspirations of every man to work, to education, to social and medical assistance and, in general, to rid himself finally of poverty, insecurity and, to the greatest extent possible, of the inequalities imposed by nature.

The realisation of these aspirations brought collective needs and the general interest, in its widest sense, within the scope of State action and thus progressively transformed the State from an organ for the protection of the liberty of the individual into an organ for the attainment of common objectives and the protection of the general interest. With these aims in view, State action now follows a specific direction, on the basis of a preconceived economic and social policy; this in turn leads to State intervention, by way of regulation, in the life of individual citizens.²

A radical and far-reaching change in the role of the State in social life was the ineluctable result of the advent of social rights.

² For economic and social rights see, in particular: *Vlachos*: La nouvelle constitution bavaroise 1948, pp. 10 ff. *Mirkine-Guetzevitch*: Les constitutions européennes 1951, pp. 161 ff. *Gurvitch*: La déclaration des droits sociaux 1946. *Rivero-Vidal*: Les problèmes économiques et sociaux de la Constitution du 27 octobre 1946, in *Droit social*, No. 31, 1947. *P. Duclos*: L'évolution des rapports politiques depuis 1750, 1950. *Colliard*: Libertés publiques, 1959, pp. 426 ff. *Burdeau*: Les libertés publiques, 1961, pp. 12 ff., 23 ff., 307 ff. *Ibid.*:

In fact such rights are nothing but the claims of the individual on the community, their object is to provide him with the means of enabling him to develop his personality fully and effectively. In this way, social rights differ fundamentally from the "classic" human rights, which constitute freedoms precisely by reason of the fact that it rests with the individual to realise these rights himself by developing his initiative and his capabilities in the field of free action which they open to him. Social rights, in contrast, do not define any actual freedom – rather do they "proclaim" a liberation which will be achieved by collective action organised and directed by the governing authorities rather than by individual effort.

The advent of social rights is a necessary stage in the evolution of modern liberal democracy. At the same time, however, these rights embody a postulate of justice of high moral value and one which is indissolubly bound up with our humanist culture and our whole European civilisation. That this is so is now generally acknowledged, even in those countries of the free world which remain particularly attached to the individualist tradition. Contemporary economic thinking in the free world, regardless of the different individualist or socialist variations it may encompass, unanimously rejects the concept of pure liberalism which holds that private initiative is always good and State intervention always bad. Even in the countries which are most closely attached to the principles of economic liberalism a certain degree of State "management" is nowadays to be found, since it is the State which ensures monetary equilibrium, price stability, control over investments, the undertaking of works of general benefit, etc. Moreover, in our time economic progress outstrips the capacities of private enterprise because such progress depends essentially on scientific research, which is generally so costly that only the State can afford to engage in it

Droit constitutionnel et institutions politiques, 11th edition, 1965, pp. 70 ff. *Duverger*: *Institutions politiques et droit constitutionnel*, 8th edition, 1965, pp. 211ff. *Forsthoff-Grewe-Bachof-Meuzel*: *Begriff und Wesen des Sozialen Rechtsstaates*, 1954. *Nipperdey*: *Die Grundrechte, I-III*, 1929-30. *Nawiasky*: *Die Grundgedanken des Grundgesetzes für die Bundesrepublik Deutschland*, 1950, pp. 25 ff. *Maunz*: *Deutsches Staatsrecht*, 12th edition, 1963, pp. 31 ff. *Pergolesi*: *Orientamenti sociali delle Costituzioni contemporanee*, 1950. *Pope John XXIII*: *Pacem in terris*, Encyclical Letter, 1963. *Sh. Gluek*: *The Welfare State and the National Welfare*, 1952. *Ranney*: *The Governing of Men. An Introduction to Political Science*, 1958 pp. 48 ff. *G. Myrdal*, *Beyond the Welfare State*, 1960 p. 62. *T. R. Adam*: *Elements of Government. An Introduction to Political Science*, 1960 pp. 319 ff. *A. Briggs*: *War on Insecurity. Welfare and the State*, in *Nato Letter*, 1962 No. 11 pp. 1 ff. *A. Rr. Ulam*: *Philosophical Foundations of English Socialism*, 1951. *Brogan-Verney*: *Political Patterns in Today's World*, 1963 pp. 106 ff. *P. Hall*: *The Social Services of Modern England*, 1959. *R. B. Brandt*: *Social Justice*, 1962. *W. Fleisher*: *Sweden. The Welfare State*, 1956. *G. L. Weil*: *The European Convention on Human Rights*, 1963. *G. Daskalaki*: *Constitutional Protection of Social Rights*, 1964 (in Greek).

(atomic energy, for example). Again, intervention by the State protects the individual against powerful social and financial groups and against monopolies, which it prevents from abusing their power, so that individual freedoms are now no longer guaranteed solely against the power of the State but also against the power of capital.

Mention should also be made of the relative character of the "classic" human rights, particularly as regards the right to property, a right which is no longer absolute, sacred and inviolable but has become a social function exercised in conformity with the social objective it is intended to serve; it can be set aside through expropriation or nationalisation or through various limitations imposed in the public interest.

The attainment of social democracy nevertheless brought with it a serious problem: the ever-growing intervention of the State in the life of the individual impinges appreciably on his freedom of action, even in fields formerly regarded as sacred and inviolable. In entrusting to the State the organisation and conduct of his life in order to secure a guarantee of his social freedoms, man is abandoning to an increasing degree the creative freedom and spirit of enterprise which for centuries were the inalienable attributes of his personality and of his human dignity and at the same time provided a powerful creative stimulus. Together with this freedom, man seems to have abandoned his whole life, placing it in the hands of those who govern him.

There does not appear to be any easy solution to this problem, because it seems to be due, at least in part, to certain paradoxes which exist as between logic and law, and which in social life take real form in the shape of the ethical, logical and political *impasses* so evident in our own time. As Valéry said, the more society develops, the more apparent become the profound antitheses between all forms of social life.

At the present time the finding of a solution to this problem has become a matter of particularly critical urgency, since what is at stake is the rule of freedom in the world. The current conflict between the free world and totalitarianism, whether Communist or other, can, it is submitted, be solved only at the moral and intellectual level. The justification for modern liberal democracy, conceived as a way of life, and the futility of authoritarianism in general will depend, in the final analysis, on whether the former will succeed in achieving through freedom the social justice which the latter proposes to achieve by force and oppression.

In the free world the problem is seen as the search for a synthesis which will enable the harmonious coexistence of the "classic" freedoms with the element of State control necessary to ensure that the State fulfils its social function in a modern society.

This problem will not be discussed further here, because the

European Social Charter contains only those fundamental economic and social rights which must be at least acknowledged by any developed liberal democracy, since they represent the essential pre-conditions for the effective exercise of the "classic" freedoms rather than obstacles to the achievement thereof.

II. THE DRAFTING OF THE CHARTER AND ITS OBJECTIVES

The domestic law of the developed liberal democracies acknowledges and lays down, in their Constitutions and legislation, most of the fundamental economic and social rights. At the international level a movement favouring the acknowledgment and international protection of social rights has also become apparent, particularly since the Second World War. The Universal Declaration of Human Rights, drawn up by the United Nations General Assembly in 1948, makes considerable provision for economic and social rights. It was even regarded by its authors as being an introduction to two international conventions, the first of which was to protect the fundamental civil rights of the individual, and the second his economic, social and cultural rights. The United Nations Human Rights Commission even prepared drafts of these two conventions and submitted them to the United Nations Economic and Social Council in 1954³; they are still awaiting examination by the General Assembly. The draft Pan-American Convention on Human Rights, based on the United Nations draft, also makes provision, in a single text, for civil rights and economic and social rights.⁴ This draft has, similarly, not yet resulted in an international treaty.

Apart from the Charter, the only international conventions making provision for social rights now in force are the international labour Conventions adopted by the General Conference of the International Labour Organisation. These texts were of great value in drawing up the Charter. The United Nations draft text concerning social, economic and cultural rights is very close to the Charter; while it is more progressive – even though drafted in general and very vague terms – it particularly influenced those provisions of the Charter relating to control of its application. Mention should also be made of the active and very important role played by the International Labour Office in the work of drawing up the Charter. The comparisons which the I.L.O. supplied, at different stages of the preparatory work, between the rights protected by the Charter

³ Doc. E/CN4/705, February 1954.

⁴ See the text of this draft in *Journal of the International Commission of Jurists*, Vol. IV, No. 1, 1962.

and those covered by International Labour Conventions were of particular value.⁵

When, in May 1954, the Committee of Ministers of the Council of Europe announced to the Consultative Assembly⁶ of that organisation that it intended to draw up a "social charter" it stressed that the aim of the charter was to complement, through the protection of economic and social rights, the 1950 Treaty of Rome, which itself had also been drawn up within the framework of the Council of Europe and which dealt only with fundamental civil rights. This Charter was also intended to establish clearly the common objectives of the Member States in the social field and to lay down the guidelines of the social policy of the Council of Europe in general.

The efforts undertaken by the Council towards this end were made in two directions, so that the two aspects, political and technical, of the subject might be adequately reflected. Thus, the preparation of the Charter was undertaken, on the one hand, by a committee of the Consultative Assembly composed of representatives of the different parliaments and, on the other hand, by the Social Committee of the Council of Europe, composed of experts from the ministries of labour, of social welfare and of social affairs of the Member States. Further, an initial draft of the Charter was prepared by a tripartite conference composed of representatives of the governments and of the principal organisations of employers and workers of the Member States; this conference was convened in Strasbourg in 1958 under the auspices of the I.L.O. and of the Council of Europe.

One of the most delicate problems facing the authors of the Charter was that of determining the scope and level of the social policy which they were going to impose on the Member States of the Council of Europe by means of this convention. For, despite their cultural and politico-social homogeneity, there still exist appreciable differences between these States as regards the various sectors of social organization, in regard both to their structure and to their degree of development. It would therefore have been neither realistic nor appropriate to lay down an excessively progressive and ambitious social policy which could not be implemented by the Member States less advanced in this field; on the other hand, however, such a

⁵ See, in extenso, *International Labour Review*, November and December, 1961.

⁶ The Council of Ministers is the executive organ of the Council of Europe: it is composed of the ministers of foreign affairs of the Member States or their deputies. The Consultative Assembly, on the other hand, constitutes what might be called the Parliament of Europe; it is composed of deputies who represent, in proportion to the numerical strength of their parties, the parliaments of the Member States of the Council.

policy could not be limited to matters currently within the capacities of the signatory States since one of the main objectives of the Charter was to set long-term goals which would provide a stimulus to the social development of the countries of the Council of Europe.

It is interesting to note the pressure constantly brought to bear during the drafting of the Charter by the representatives of France, Belgium and the Netherlands – and which resulted from the pressure exercised by the workers' organisations in these countries – with a view to achieving the highest possible level of social protection, and which was resisted by other States such as Greece, Italy and Turkey, in which the capacity to implement such an advanced policy was much more limited. Similarly, countries with a high level of emigration, such as Greece, Italy and Ireland, endeavoured to ensure that the Charter would provide extensive and effective protection for migrant workers, whereas the immigration countries, such as the United Kingdom and the Scandinavian countries, were reserved in their approach to this question.

By and large, the Charter adopted a middle-of-the road approach to the problem, limiting itself to laying down the most important basic rules of social policy, those which are at present generally acknowledged by the modern liberal democracies.

So it was that certain advanced positions proposed by the Social Committee of the Consultative Assembly in a draft Convention in 1955 were in the end not adopted by the Assembly; among such proposals mention may be made of those relating to workers' participation in the management of undertakings, profit-sharing, the protection of savings and pensions against the dangers of monetary fluctuation, the right to education and the constitution of a European Economic and Social Council with equal representation of employers, workers and the general public to watch over the application of the Charter.

The Charter gives signatory States the possibility of accepting progressively and at their own choice the various rights and principles incorporated in it, with the exception, however, of certain rights and principles which Contracting Parties must undertake to accept on ratifying the Charter. This is a system which had already been employed in certain International Labour Conventions and which considerably facilitates ratification of the Charter. This system will be further dealt with at a later stage.

There follows an analysis of the provisions of the Charter.⁷

⁷ Very little has so far been written on the Charter. No doubt scientific interest will be aroused when the problems posed by the practical application of the Charter become apparent. See, in particular: *Delpérée et Gilon: La Charte sociale européenne*, in *Revue du travail*, Brussels, No. 10, October, 1958, pp. 1216-32. *Valticos: The European Social Charter and International Labour Standards*, in *International Labour Review*, Nov. and Dec. 1961. *Ibid:*

III. STRUCTURE AND CONTENTS OF THE CHARTER

The objectives of the Charter and the nature of the rights and principles it establishes condition its structure and the particular manner in which it enshrines each of these rights and principles.

The Charter is composed of five parts and an appendix which forms an integral part of it. Part I is a declaration of the general principles of the social policy of the Contracting Parties. Part II sets forth, in 19 Articles, the economic and social rights. Part III, consisting of a single Article, lays down the undertakings of the Contracting Parties; Part IV provides for a system of international supervision of the application of the Charter; and Part V deals with a number of special points connected with the implementation of the Charter. Finally, the Appendix specifies the meaning of certain provisions of the Charter.

A. Declaration of General Principles (Part I of the Charter)

Part I formulates the general principles of the social policy of the Contracting Parties. The Parties "accept as the aim of their policy, to be pursued by all appropriate means, both national and international, the attainment of conditions in which the following rights and principles may be effectively realised". There follows a summary list of all the rights and principles dealt with in detail in Part II. The provisions of Part I pose a problem as to their legal nature: are they merely the Preamble to the Convention, non-binding in character, or do they bind the Contracting Parties, and if so, what is the nature of the obligation they entail? For a reply to this question one must refer to the characteristic feature of these rights mentioned above, i.e. that their practical realisation depends upon the active participation of the State which, to this end, draws up and implements a specific economic and social policy.⁸

It is therefore quite natural that this action by the State, which constitutes the essential condition precedent for the existence and preservation of these rights, should be provided for and regulated

La Charte sociale européenne: Sa structure, son contenu, le contrôle de son application, in *Droit social*, No. 9-10, Sept.-Oct., 1963, pp. 466-82. *M. Raphaël*: Social Protection in the Europe of Tomorrow, in "*Spoudé*", Vol. 11, No. 5-6 (in Greek). *Taquet et Gosseries*: La Charte sociale européenne, Brussels and Paris, 1962. *Cannella*: Le droit à la sécurité sociale et les droits connexes de la Charte sociale européenne, in *Revue belge de sécurité sociale*, Jan., 1963, pp. 1-45. *Heise*: Vor der Ratifizierung der europäischen Sozialcharta durch die BRD, in *Soziale Sicherheit*, Cologne, Nov. 1963, pp. 329-32. *Khol*: Die europäische Sozialcharta und die österreichische Rechtsordnung, in *Juristische Blätter*, Feb. 1965, pp. 75-82. *Bulletin of the International Commission of Jurists*, No. 18, March, 1964, pp. 1-9.

⁸ For that reason, moreover, the rights in question constitute, as has been said, a "programme" rather than the affirmation of an existing legal order (cf. *Burdeau*, in *Les libertés publiques*, p. 316).

in Part I of the Charter. And it is precisely for this reason that the provisions in question constitute, it is submitted, the basic rules of the Charter, organically linked with, and of the same force as, the other rules contained therein. This point of view is based not only on the intrinsic nature of social rights but also on two other factors. The first of these is that these provisions are contained in the body of the Charter, and indeed constitute Part I thereof, and are not set apart from the principal text as is the case with the preambles to international treaties. The second factor is that Article 20 of Part III of the Charter, entitled "Undertakings", expressly provides that the first undertaking of each Contracting Party is the obligation to "consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that Part".

Compulsory application of these rules is, of course, impossible at the present time because of the structure of the international community, which permits of no effective supra-state intervention in the internal policy of States and also because of the serious difficulties inherent in the approval and implementation, in contemporary liberal democracies, of a veritable "social policy". It is furthermore for that reason that the Charter refrains from setting any time limit for its implementation.

The importance of these provisions nevertheless remains considerable. At the present time they are mainly important in two ways. First, the declaration of general principles contained in Part I, in accordance with which the Contracting Parties will attain the objectives set by the social policy of the Charter, creates for them, it is suggested, an obligation which is negative in character: while not obliging the Parties to put their social policy into practice within a fixed time-limit, it nevertheless deprives them of the possibility of taking legislative or administrative measures opposed to such a policy or which merely represent obstacles to the normal development of economic and social freedoms in their countries. This follows directly from the very logic of the rules contained in Part I, as well as from the above-mentioned provision of Article 20 respecting the undertakings of Contracting Parties. Moreover, in accordance with Article 31 of the Charter, when the rights and principles set forth in Part I have been effectively realised they are not to be subject to any restrictions or limitations not specified in Parts I and II - with the exception of the limitative provisions contained in Article 31 itself.

In consequence it can be concluded that any political activity whatsoever which is fundamentally opposed to, or which even merely hinders, the realisation of the social policy set forth in Part I is as much a violation of the Charter as is a breach of any of its other provisions.

The importance of the provisions of Part I is also apparent in another field. As will be seen, the Charter obliges the Contracting Parties to accept, at the time of ratifying the Charter, certain rights and principles provided for in it. As regards the other provisions, each country will be free to acknowledge them progressively, when it deems that its degree of economic and social development enables it to do so. Such a system, which in principle is fair and necessary, can nevertheless in practice weaken the efforts of the Contracting Parties towards accepting without delay all the rights provided for under the Charter, and not limiting themselves to those which are "obligatory", thus weakening the stimulus of the Parties towards achieving the social progress to which the Charter aspires. This danger has been limited thanks to Part I; by specifically setting as objectives for the Parties all the rights and principles set forth in detail in Part II of the Charter, Part I gives considerable emphasis to the intrinsic unity of all these rights and principles, and highlights the fact that the ultimate aim of the Charter is the acknowledgment by the Contracting Parties of all the rights contained therein and not only of some of them.

B. The Individual Economic and Social Rights (Part II of the Charter)

The rights and principles established in Articles 1 to 19 of the Charter are an expression of the fundamental social freedoms of contemporary liberal democracy.

The Contracting Parties are not obliged to consider themselves bound by all of them when they ratify the Charter. They are given the possibility of accepting them progressively, in accordance with their internal conditions and with their level of economic and social development. However, in accordance with Article 20 each State is obliged to accept, at the time of ratifying the Charter, at least ten Articles or 45 numbered paragraphs, out of a total of 19 Articles. Five of these Articles must, however, be selected from among seven expressly laid down by the Charter. The others may be selected without restriction from among the other rights provided for in the Charter. Such a system permits the classification of the rights provided for in the Charter into two groups: the first contains the seven more or less "obligatory" rights, while the second comprises the other rights.

It should be noted that the choice of the rights in the first group was not made solely on the basis of their intrinsic importance; similarly, other factors were equally decisive in the inclusion of certain rights in the second group. Two of the most important factors may be mentioned: the fact that certain rights are worded in such vague and general terms as to render supervision of their application very difficult, if not impossible, e.g. the provisions concerning the

fixing of "reasonable" daily and weekly working hours (Article 2), of "fair remuneration" of workers (Article 4), concerning the duty of the State "to remove, as far as possible, the causes of ill-health" (Article 11), and to create social services (Article 14), etc.

The recognition of certain rights furthermore presupposes the existence or creation of new public services, a matter beyond the current financial capacities of some countries; such provisions include those relating to vocational guidance (Article 9), vocational training (Article 10), etc.

The rights provided for in the Charter will now be examined separately, beginning with those in the first group.

(a) *The Rights and Principles in the First Group*
The Right to Work.

Article 1 lays down the bases of a general employment policy. With a view to ensuring effective exercise of the right to work, the Contracting Parties undertake the following obligations:

- (1) to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment.
- (2) to protect effectively the right of the worker to earn his living in an occupation freely entered upon.

The Appendix, however, specifies that this provision shall not be interpreted as prohibiting or authorising any union security clause or practice.

- (3) to establish or maintain free employment services for all workers.
- (4) to provide or promote appropriate vocational guidance, training and rehabilitation.

The Right to Organise.

Article 5 of the Charter contains a general provision concerning the right to organise. It imposes on Contracting Parties the obligation to refrain from impairing, through their national legislation or the application thereof, the freedom of employers and workers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations. This provision is based on the Freedom of Association and Protection of the Right to Organise Convention adopted by the International Labour Conference in 1948, which constitutes the basic text in this field; it has been ratified by some 70 countries.

The Charter limits itself to stating the principle; it lays down no special rights, or guarantees arising therefrom, as does the above-mentioned international labour convention. Nevertheless it does provide for two exceptions to the general rule: these relate to the

right to organise of the police and of the armed forces, which shall be determined by the national legislation or regulations of each country.

The Right to Bargain Collectively

The effective exercise of this right is ensured, in accordance with Article 6, by the Contracting Parties, who enter into the following undertakings for this purpose:

- 1) To promote joint consultation between workers and employers.
- 2) To promote machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.
- 3) To promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes.

It should be noted that the "voluntary" nature of arbitration for the settlement of disputes was particularly emphasised when this provision was being drafted.

The Contracting Parties go on to "recognise" the right of workers and employers to collective action in cases of conflicts of interest. It is expressly mentioned that such action includes "the right to strike".

Such action is, however, limited by the obligations which might arise out of collective agreements previously entered into. Provision is furthermore made in the appendix that each Contracting Party may, in so far as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article 31. As will be seen, this Article mentions such restrictions or limitations as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals.

Article 6 is remarkable for the fact that it is the first provision in international law in which the right to strike is expressly protected. Even the International Labour Organisation's Freedom of Association and Protection of the Right to Organise Convention, 1948, which is considerably more progressive and detailed in determining trade union rights, does not make express provision for this right. As a statement of principle this provision therefore constitutes considerable progress. The application and scope of the principle will naturally depend on the use which the Contracting Parties will make of the limitations provided for in Article 31, as well as on the international supervision to which they will be subject in this connection in accordance with the relevant provisions of the Charter.

The Right to Social Security

In this field also the Charter limits itself to stating the general principle and to laying down the minimum limits of social security.

In accordance with Article 12 the Parties undertake:

- 1) To establish or maintain a system of social security.
- 2) To maintain this system at a satisfactory level at least equal to that required for ratification of the International Labour Convention (No. 102) Concerning Minimum Standards of Social Security.

The authors of the Charter intended in this case to refer to the European Social Security Code which at that time was still being prepared by the Council of Europe. It should be pointed out that this Code, while being based on International Labour Convention No. 102, was to provide for a higher level of protection. For that reason, it was noted that when the Code was adopted – which took place in 1964 – consideration would be given to amending the Charter in order to incorporate reference to it.

- 3) To endeavour to raise progressively the system of social security to a higher level.

Here, too, the authors of the Charter had in mind the protocol appended to the European Social Security Code.

- 4) To take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, in order to ensure equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties.

The Parties further undertake to ensure the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties.

Finally, in the Appendix it is specified that, as regards benefits which are available independently of any insurance contribution, a Contracting Party may, within the framework of the above-mentioned agreements, require the completion of a prescribed period of residence.

The Right to Social and Medical Assistance

With a view to ensuring the effective exercise of these rights the Contracting Parties undertake the following obligations (Article 13):

- 1) To ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate social and medical assistance.

- 2) To ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights.
- 3) To provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want.
- 4) To apply the above-mentioned provisions on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, concluded in 1953 within the framework of the Council of Europe.

The Right of the Family to Social, Legal and Economic Protection

With a view to ensuring the full development of the family, which is "a fundamental unit of society" in accordance with the terms of Article 16 of the Charter, the Contracting Parties undertake to promote the economic and social protection of family life, particularly by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married etc.

The Right of Migrant Workers and Their Families to Protection and Assistance

To ensure the effective exercise of this right the Charter imposes on Contracting Parties a series of obligations which are set forth in Article 19, as follows:

- 1) To maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps against misleading propaganda relating to migration and immigration.
- 2) To adopt appropriate measures to facilitate the departure, journey and reception of such workers and their families, and to provide for health, medical attention and good hygienic conditions during the journey.
- 3) To promote co-operation between social services, public and private, in emigration and immigration countries.
- 4) To secure for such workers, in so far as such matters are regulated by law or regulations, treatment not less favourable than that of their own nationals in respect of remuneration and other employment and working conditions, membership of trade unions and enjoyment of the benefits of collective bargaining, and accommodation.
- 5) To secure for such workers treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons.

6) To facilitate as far as possible the reunion of the family of a foreign worker.

In accordance with a provision contained in the Appendix, the term "family of a foreign worker" is interpreted as meaning at least his wife and dependent children under the age of 21 years.

7) To secure for such workers treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this Article.

8) To secure that such workers are not expelled unless they endanger national security or offend against public interest or morality.

9) To permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire.

10) To extend the protection and assistance provided for in Article 19 to self-employed migrants.

*b) The Rights and Principles in the Second Group
The Right to Just Conditions of Work*

The Charter lays down the five fundamental conditions to be observed with a view to ensuring the effective exercise of the right to just conditions of work (Article 2).

These conditions, which are imposed upon the Contracting Parties, are:

1) The provision of reasonable daily and weekly working hours.

When the Charter was being drawn up the workers' representatives proposed, and their proposal was adopted by the Consultative Assembly, that hours of work be determined in a more concrete fashion and that, in particular, the 40-hour week be introduced. This proposal was finally not adopted. Article 2 simply provides that the working week should be progressively reduced to the extent that the increase of productivity and other relevant factors permit.

2) To provide for public holidays with pay.

3) To provide for a minimum of two weeks annual holiday with pay.

4) To provide for additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations as prescribed.

5) To ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest.

This last condition was drafted in accordance with the corresponding provisions of the international labour conventions concerning weekly rest. The proposal of the Consultative Assembly that the duration of weekly rest be established at a minimum of 36 consecutive hours was not adopted.

In several countries the above-mentioned conditions are pre-

scribed, as general rule, not by law but in the collective agreements entered into between employers or employers' organisations and workers' organisations or by some other means than by law. In the case of such countries the Charter provides (Article 33) that they may give the undertakings contained in Article 2 and that compliance with them shall be treated as effective if their provisions are applied through such agreements or other means to the great majority of the workers concerned. Furthermore, in countries where these provisions are normally the subject of legislation the Contracting Parties may likewise give these undertakings and compliance with them shall be regarded as effective if the provisions are applied by law to the great majority of the workers concerned (Article 33).

The Right to Safe and Healthy Working Conditions

Article 3 provides that the Contracting Parties undertake to issue safety and health regulations and to provide for the enforcement of such regulations by measures of supervision. The Contracting Parties are similarly bound to consult, as appropriate, employers' and workers' organisations on measures intended to improve industrial safety and health.

The Right to a Fair Remuneration

With a view to ensuring the effective exercise of this essential right the Contracting Parties undertake:

- 1) To recognise the right of workers to a remuneration such as will give them and their families a decent standard of living.
- 2) To recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases.
- 3) To recognise the right of men and women workers to equal pay for work of equal value.

This is the principle of equal remuneration embodied in the Equal Remuneration Convention adopted in 1951 by the International Labour Conference.

- 4) To recognize the right of all workers to a reasonable period of notice for termination of employment. In accordance with the Appendix this right does not, however, prohibit immediate dismissal for any serious offence.
- 5) To permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards.

The Appendix further provides that a Contracting Party may give this undertaking if the great majority of workers are not permitted to suffer deductions from wages either by law or through collective agreements or arbitration awards, the exceptions being those persons not so covered.

The Right of Children and Young Persons to Protection

Article 7 imposes on Contracting Parties a series of obligations aimed at ensuring the protection of children and young persons. The Contracting Parties undertake:

- 1) To provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education.
- 2) To provide that a higher minimum age of admission to employment shall be fixed with respect to prescribed occupations regarded as dangerous or unhealthy.

When this provision was being drafted the workers' representatives, with the support of the Consultative Assembly, unsuccessfully proposed that this minimum age be specified and that it be set at 18 years.

- 3) To provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education.
- 4) To provide that the working hours of persons under 16 years of age shall be limited in accordance with needs of their development, and particularly with their need for vocational training.
- 5) To recognize the right of young workers and apprentices to a fair wage or other appropriate allowances.
- 6) To provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day.
- 7) To provide that employed persons of under 18 years of age shall be entitled to not less than three weeks annual holiday with pay.

When this provision was being drafted the workers' representatives proposed four weeks as a minimum holiday.

The Charter provides (Articles 33) that in the case of Member States where the provisions of paragraphs 4, 6 and 7 above are matters normally left to agreements between employers or employers' organisations and workers' organisations or are normally carried out otherwise than by law, the undertakings of these paragraphs may be given and compliance with them shall be treated as effective if their provisions are applied to the great majority of the workers concerned. Similarly, in the case of Member States where these provisions are normally the subject of legislation the undertakings may likewise be given and compliance with them shall be regarded as effective if the provisions are applied by law to the great majority of the workers concerned.

- 8) To provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations.

This regulation has been relaxed by a provision in the Appendix under which a Contracting Party complies with the undertaking if it provides by law that the great majority of persons under 18 years of age shall not be employed in night work.

9) To provide that persons under 18 years of age employed in certain occupations prescribed by national laws or regulations shall be subject to regular medical control.

When this provision was being drafted the workers' representatives proposed that a medical examination be established for all workers aged under 18 years with a view to the effective protection of their health. This proposal was not adopted, but, on the other hand, far-reaching protection is ensured by the following provision.

10. To ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.

The Right of Employed Women to Protection

The Charter provides special protection for employed women (Article 8). To this end the Contracting Parties undertake the following obligations:

1) To provide either by paid leave, by adequate social security benefits or by benefits from public funds for women to take leave before and after childbirth up to a total of at least 12 weeks.

The international labour conventions which afford similar protection do not permit that the benefits in question be borne by the employer; this is to avoid the danger of unequal treatment of women workers and of difficulties in collecting the funds. A proposal by the Consultative Assembly that a similar solution be adopted was, however, not accepted.

2) To consider it as unlawful for an employer to give a women notice of dismissal during her absence on maternity leave or at such a time that the notice would expire during such absence.

3) To provide that women who are nursing their infants shall be entitled to sufficient time off for this purpose.

4) (a). To regulate the employment of women workers on night work in industrial employment.

(b). To prohibit the employment of women workers in underground mining, and, as appropriate, on all other work which is unsuitable for them by reason of its dangerous, unhealthy or arduous nature.

This provision represents a compromise solution between two extreme positions which had been adopted when this rule was being drafted. Some representatives of Scandinavian countries were opposed to the principle of affording special protection to women workers, apart from protection in case of pregnancy and nursing

mothers. Others, in contrast, proposed special regulations for all night work of women, not limited solely to industrial employment.

The Right to Vocational Guidance

The Charter establishes this right in general terms without going into detailed regulations such as are contained in the international labour conventions.

In accordance with Article 9 the Contracting Parties undertake to provide or promote a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity. This assistance should be available free of charge, both to young persons, including school children, and to adults.

The Right to Vocational Training

To ensure the exercise of this right the Contracting Parties undertake (Article 10):

- 1) To provide or promote the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations and to grant facilities for access to higher technical and university education, based solely on individual aptitude.
- 2) To provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments.
- 3) To provide or promote adequate and readily available training facilities for adult workers and special facilities for the retraining of adult workers needed as a result of technological development or new trends in employment.
- 4) To encourage the full utilisation of the facilities provided by appropriate measures such as reducing or abolishing any fees or charges, granting financial assistance in appropriate cases, including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment and ensuring, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally.

In Member States where the above provisions are matters normally left to agreements between employers or employers' organisations and workers' organisations, or are normally carried out otherwise than by law, the undertakings may be given and compliance with them shall be treated as effective if their provisions are applied to the great majority of the workers concerned. Similarly,

in Member States where these provisions are normally the subject of legislation, the Contracting Parties may likewise give the undertakings and compliance with them shall be regarded as effective if the provisions are applied by law to the great majority of the workers concerned.

The Right to Protection of Health

With a view to ensuring the effective exercise of this right the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures. Article 11 lists, in illustration, measures such as: the removal as far as possible of the causes of ill-health; the provision of advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; and the prevention, as far as possible, of epidemic, endemic and other diseases.

The Right to Benefit from Social Welfare Services

The Contracting Parties undertake, in Article 14, to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community and to their adjustment to the social environment. Similarly, they undertake to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

The Right of Physically or Mentally Disabled Persons to Vocational Training, Rehabilitation and Social Re-settlement

The effective exercise of this right is also ensured (Article 15) by undertakings of a general nature entered into by the Contracting Parties. They undertake to take adequate measures for the provision of training facilities including, where necessary, specialised institutions, public or private. They also undertake to take adequate measures for the placing of disabled persons in employment, such as specialised placing services, facilities for sheltered employment and measures to encourage employers to admit disabled persons to employment.

The Right of Mothers and Children to Social and Economic Protection

To ensure the exercise of this right the Charter merely provides, in Article 17, that the Contracting Parties will take all appropriate and necessary measures, including the establishment or maintenance of appropriate institutions or services.

The Right to Engage in a Gainful Occupation in the Territory of Other Contracting Parties

The exercise of this right is effectively ensured through certain undertakings entered into by the Contracting Parties, such as undertakings to apply existing regulations in a spirit of liberality, to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers and to liberalise the regulations governing the employment of foreign workers.

The Contracting Parties also expressly acknowledge the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other signatory States (Article 18).

c) Undertakings by the Contracting Parties (Part III of the Charter)

It has been seen that, as a condition for ratification, the Charter requires a declaration by each Contracting Party that it will consider itself bound by a certain minimum number of rights and principles contained in the Charter.

Any Contracting Party may, at a later date, declare by notification to the Secretary-General of the Council of Europe that it considers itself bound by any Article or paragraph of Part 2 of the Charter which it had not already accepted. The Secretary-General will communicate to the signatory governments and to the Director-General of the International Labour Office any notification he may have received pursuant to this provision (Article 20).

Article 20 also provides that each Contracting Party shall maintain a system of labour inspection appropriate to national conditions.

It may further be pointed out that it is expressly stated in the Charter (Article 32) that its provisions represent a minimum degree of protection and consequently do not prejudice the provisions of domestic or international law which are already in force, or may come into force, and under which more favourable treatment would be accorded to the persons protected.

This provision is identical to that contained in Article 19, paragraph 8 of the Constitution of the International Labour Organisation.

d) Derogations and Restrictions (Part V of the Charter)

The Charter provides for certain derogations from its provisions and for a number of restrictions on their application.

In accordance with Article 30, in time of war or other public emergency threatening the life of the nation, any Contracting Party may take measures derogating from its obligations under the Char-

ter. In the Appendix it is specified that such cases also include the "threat of war". Such derogations must in all cases be limited to the extent strictly required by the exigencies of the situation and must not be inconsistent with the State's other obligations under international law.

Furthermore any Contracting Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary-General of the Council of Europe fully informed of the measures taken and of the reasons therefor. It shall likewise inform the Secretary-General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

The Secretary-General shall in turn inform other Contracting Parties and the Director-General of the International Labour Office of all communications received in accordance with this provision.

As regards restrictions on the application of the Charter (Article 31), they are forbidden, with the exception of such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals. It is also stated that these restrictions shall not be applied for any purpose other than that for which they have been prescribed.

It is true that in this form Article 31 does give Contracting Parties the possibility of introducing serious restrictions. When the Charter was being drawn up the Article was, furthermore, the subject of strong criticism by the workers' representatives who requested that it be deleted, fearing abuses in its application. Such a danger does exist, but a rule of this kind is none the less inevitable. In the final analysis the basic problem is the possibility of ensuring effective international supervision of the application of the Charter, a point which will be reverted to below.

e) Other Provisions

Territorial Application of the Charter (Article 34)

The Charter applies to the metropolitan territory of each Contracting Party; each Party may specify, by declaration addressed to the Secretary-General of the Council of Europe, the territory which shall be considered to be its metropolitan territory for this purpose.

Any Party may declare at any time, by notification addressed to the Secretary-General, that the Charter shall extend in whole or in part to a non-metropolitan territory or territories specified in its declaration and for whose international relations it is responsible. The procedure laid down for extending the undertakings already

entered into by a Contracting Party is also applicable to non-metropolitan territories.

Amendments to the Charter (Article 36)

Any Member of the Council of Europe may propose amendments to the Charter. The communication in which it does so is addressed to the Secretary-General of the Council of Europe who shall transmit it to the other Members of the Council. Any amendment shall be considered by the Committee of Ministers and submitted to the Consultative Assembly for opinion. Any amendments approved by the Committee of Ministers shall enter into force as from the thirtieth day after all the Contracting Parties have informed the Secretary-General of their acceptance. The Secretary-General shall notify all the Members of the Council of Europe and the Director-General of the International Labour Office of the entry into force of such amendments.

Denunciation of the Charter (Article 37)

No Contracting Party may denounce the Charter before the end of a period of five years from the date on which the Charter entered into force for it, or at the end of any successive period of two years. In each case six months notice shall be given to the Secretary-General of the Council of Europe, who shall inform the other parties and the Director-General of the International Labour Office accordingly.

Such denunciation does not affect the validity of the Charter in respect of the other Contracting Parties provided that at all times there are not less than five such Contracting Parties. Denunciation may be partial, relating only to certain Articles or paragraphs, provided that the total number of Articles by which the Party remains bound is not less than ten, and number of paragraphs not less than 45, and that the "obligatory" minimum (Article 20) is also respected. Total or partial denunciation of the Charter in respect of non-metropolitan territories may be made in the same manner.

f) Supervision of the Application of the Charter (Part IV)

The Charter establishes a system for supervising its application; the Appendix also contains some guidance on this point. Such supervision is primarily international in character. It may be divided into two phases - "technical" supervision, and "political" supervision.

In accordance with Article 21, the Contracting Parties shall send to the Secretary-General of the Council of Europe a report at two-yearly intervals, in a form to be determined by the Committee of Ministers, concerning the application of such provisions of Part II

of the Charter as they have accepted.

The Contracting Parties shall also send (Article 22) to the Secretary-General, at appropriate intervals as requested by the Committee of Ministers, reports relating to the provisions of Part II of the Charter which they have not yet accepted. The Committee of Ministers shall determine from time to time the provisions in respect of which such reports shall be requested and the form of the reports.

Copies of these two reports shall be sent by each of the Contracting Parties to such of its national organisations as are members of the international organisations of employers and trade unions which, as will be seen later, are to be invited to be represented at meetings of the Sub-committee of the Governmental Social Committee. Similarly, the Contracting Parties shall forward to the Secretary-General any comments on these reports received from these national organisations, if so requested by them (Article 23).

The above reports and observations will be examined by a Committee of Experts (Article 24) consisting of not more than seven members appointed by the Committee of Ministers from a list of independent experts of the highest integrity and of recognised competence in international social questions. These experts will be nominated by the Contracting Parties; the members of the Committee are appointed for a period of six years and may be re-appointed (Article 25). The International Labour Organisation shall be invited to nominate a representative to participate in a consultative capacity in the deliberations of the Committee of Experts (Article 26).

The second phase of supervision, which we have described as "political", begins with the examination of the reports of the parties and of the conclusions of the Committee of Experts by a Sub-committee of the Governmental Social Committee of the Council of Europe, composed of one representative of each of the Contracting Parties (Article 27).

The Sub-committee shall invite not more than two international organisations of employers and two international trade union organisations to be represented as observers in a consultative capacity at these meetings. Moreover, it may consult not more than two representatives of international non-governmental organisations having consultative status with the Council of Europe in respect of questions with which these particular organisations are particularly qualified to deal. The Sub-committee shall present its conclusions to the Committee of Ministers, appending the report of the Committee of Experts (Article 27).

The Secretary-General of the Council of Europe shall transmit to the Consultative Assembly the conclusions of the Committee of Experts and the Assembly shall communicate its views on these conclusions to the Committee of Ministers (Article 28). Finally,

by a majority of two-thirds of the members entitled to sit thereon, the Committee of Ministers may, on the basis of the report of the Sub-committee and after consultation with the Consultative Assembly, make to each Contracting Party any necessary recommendations (Article 29). Such a recommendation is the final step to which the machinery for supervising the application of the Charter leads.

The authors of the Charter desired that this be the only form of supervision. The Appendix contains a provision worded as follows: "It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof". This provision was added by the Council of Ministers in the final stages of drafting the Charter, at the proposal of the Federal Republic of Germany.⁹ The aim of the provision is to exclude the possibility of supervision of the Charter by the domestic courts of any of the Contracting Parties, a form of supervision which might be undertaken on the application of an individual claiming his rights on the basis of the provisions of the Charter. This could be the case in countries where the ratification and promulgation of an international convention automatically confer the status of law on that convention and make it an integral part of the law of the land.¹⁰ Such an eventuality would be contrary to the intention of the authors of the Charter, who wished to give its provisions the character of guidelines for social policy, which would merely commit the Parties to protect, by internal legislative or administrative measures, the various economic and social rights provided for in the Charter.

It is submitted that this provision of the Appendix is erroneous from several aspects. First, it is useless because almost all the provisions of the Charter are so formulated as normally to exclude any doubt as to the fact that they establish only principles of social policy which are aimed at and bind solely the Contracting Parties and not a right which could be directly applied to an individual.¹¹

⁹ See Council of Europe document CM (61) 86 of May 16, 1961 (confidential) and also the note CM (61) 87 of May 15, 1961 from the Secretariat-General of the Legal Division of the Council of Europe.

¹⁰ This is the system which, in essence, has been established, with some variations, in a number of countries, such as Greece, Austria, Belgium, France, Federal Republic of Germany, Italy, Luxembourg, Netherlands and Turkey. In contrast, in other countries such as Denmark, Iceland, Norway, Sweden and the United Kingdom an international convention, as such, cannot become law. In order that the provisions therein relating to matters covered by domestic law may be applied by the courts in these countries they must be introduced into national legislation through the normal legislative channels.

¹¹ This is, moreover, clearly specified in the formula employed at the beginning of each Article in Part II: "The Contracting Parties undertake", and by a number of terms widely used in the text, such as: the Parties undertake "to provide", "to introduce", "to encourage", "to maintain", "to ensure", "to regulate", etc.

Only two provisions could be regarded as establishing a right applying directly to the individual: that in Article 6, paragraph 4, which "recognises" the right of workers and employers to collective action, including the right to strike, and that in Article 18, paragraph 4, which "recognises" the right of nationals to leave the country to engage in a gainful occupation in the territories of the other contracting Parties.

The fear that the domestic courts of the Parties might interpret these principles as establishing rights for the individual does not therefore seem justified. The two above-mentioned cases, in which it is suggested that such rights are in fact incorporated, should not pose any problem for the Member States of the Council of Europe since these are fundamental rights of capital importance, which are now effectively recognised in any developed liberal democracy.

It is therefore submitted that it is not appropriate to exclude, from the outset, the possibility of the Charter's establishing rights directly in favour of the individual. It may well be, and as will be pointed out later it would even be desirable, that the application of the Charter should, by successive amendments, lead to the transformation of the social principles which it now lays down into clear and precisely-defined economic and social rights, which would be provided directly in favour of the individual and could, in consequence, be invoked by him before the domestic courts.

IV. CONCLUSIONS AND PROSPECTS FOR THE FUTURE

It would, of course, be very foolhardy to attempt at the present stage to give an over-all judgment on the value of the Charter and to forecast its role in the future, all the more so since the realisation of its provisions is indissolubly bound up with political, economic and social factors which are in large measure uncertain, unforeseen and unforeseeable.

In terminating this study, therefore, no more will be attempted than to give some reflections on the meaning and importance of the Charter as it stands at present, representing as it does a stage in the evolution towards the protection of social rights at the international level. An attempt will also be made – based on present-day realities – to indicate some conditions which must be fulfilled if the Charter is to make an effective contribution to the future attainment of social democracy in the international community.

The European Social Charter constitutes the first instance in which fundamental social rights and principles have been systematically guaranteed in international conventional law by means of a single, organically coherent text. With the advent of the Charter the recognition and fulfilment of the fundamental postulates of modern social policy are no longer an internal matter for each country;

they have become an international undertaking entered into by the State, which binds itself at the international level and is subject to supra-state supervision. Furthermore in each signatory State the essential foundations of social democracy need no longer be a matter for the programmes of the various political parties and the objective of their social demands, since they will have become fundamental human rights, the achievement of which will in future be a matter for the national community as a whole, based on an international undertaking.

It appears that this is the essential contribution and achievement of the Charter. Its very existence already represents two conquests made by social progress, the importance of which should not be overlooked. The first is that – as maintained above¹² – the Contracting Parties can no longer follow in their respective countries a policy conflicting with the fundamental principles of the social policy of the Charter, nor can they any longer impede the normal process of social evolution. The second is the beneficial influence exercised by the Charter on the general development of the internal policy of the European liberal democracies and on the drawing together of the signatory States through the unification of their economic and social institutions with a view to future unity.

The Charter leads, first, to an “obligatory” modernisation of conservative parties, since if they are in power they will be bound to implement a social policy which is probably more advanced than that advocated by them; on the other hand, if they are in opposition, they can no longer attack the basic principles of such policy. Again, the Charter considerably strengthens the progressive centre parties in that their social policy, in so far as it is identical with that of the Charter, is, thanks to the Charter, no longer a matter of political controversy and these parties are thus enabled further to develop their social policy in seeking and achieving even more advanced stages of social justice and political freedom. Finally, for extreme Left-wing parties – those which are ready to sacrifice the political and intellectual freedom of the individual to the attainment of social justice – the guarantee at the international level of the modern fundamental principles of social justice is accompanied by the already considerable achievements in this field by the European liberal social democracies; these achievements furnish eloquent and solid proof – based on fact – that social justice and the happiness of peoples can be achieved without depriving man of his freedom, contrary to the practice followed by the totalitarian regimes which call for the absolute freedom of man, while in the meantime subjecting him to a regime of bondage which destroys his personality as a morally and intellectually autonomous being.

¹² See above, p. 222.

The Charter does not, of course, make provision for everything. Rather, as has been pointed out, its provisions are the result of a compromise and in certain respects one may well consider that the Charter might have adopted a more advanced position, particularly since most of the social principles it establishes are already widely protected by the Member States of the Council of Europe for which the Charter itself was drawn up. One must nevertheless refrain from passing judgment on the Charter as it is today, since the very nature of the objectives it lays down requires one to consider it not as static but rather as dynamic, i.e. to consider it from the viewpoint of its function as an organ for the orientation and development of the social policy of a group of European countries which have the same cultural background and which aspire to future unification.

What can be stated here and now is that the Charter can only fulfil that function if certain conditions are met:

- a) It is indispensable that the Charter be ratified without delay and by the largest possible number of States. Again, ratifying States must assume the largest possible number of undertakings and not merely the obligatory minimum.¹³
- b) The manner and the spirit in which supervision of the application of the Charter is undertaken will be of great importance, since the formulation in general and often vague terms of the majority of the undertakings entered into by the Contracting Parties may give rise to a restrictive interpretation thereof, which would result in supervision being a mere formality devoid of any stimulus towards social progress. For that reason it would be appropriate and desirable that a greater degree of participation, direct or indirect, in such supervision be accorded to the representatives of the workers who, by definition, are best suited to impart to the supervisory machinery the dynamic spirit and the effectiveness it calls for.

It is, of course, too early to propose amendments at this stage, before practical experience has revealed the strong and the weak points of the machinery set up. This machinery does in any case offer good prospects of satisfactory supervision, thanks particularly to the regular reports to be submitted by the Contracting Parties to the Committee of Experts concerning the application of the provisions of the Charter they have accepted and those which they have not yet accepted. Similarly, the participation in a consultative capacity of the International Labour Organisation in the deliberations of the Committee of Experts, and the participation in a similar capacity of representatives of the international organisations of employers and

¹³ To date, the Charter has been ratified by the following States: Norway: 25.10.62; Sweden: 17.12.62; United Kingdom: 11.7.62; Ireland: 7.10.64; Fed. Rep. of Germany: 27.1.65; Denmark 3.3.65; Italy: 22.10.65. Almost all these States have undertaken many more obligations than the minimum established.

of workers in the work of the Sub-committee, may have a powerful influence. Finally, the fact that provision is made for participation by the Consultative Assembly in the supervisory process enables the Member States of the Council of Europe to follow continuously the social policy of Contracting Parties and gives them at the same time an opportunity to express their views thereon.

c) As has already been stated, the Charter must be regarded in its dynamic aspects. By reason of the fact that it contains principles and directives of social policy it is inherently subject to becoming outmoded. It can be said that in reality it constitutes only the first stage in the realisation of a common intent, at the international level, to guarantee and develop economic and social freedoms. This intent should, it is submitted, continue to be expressed by the Charter when this first stage has been accomplished, that is to say, the Charter should continue to function as a supra-State organ which would establish and lay down guidelines for the further development and unification of the social policy of the Member States of the Council of Europe through amendments and additions to be incorporated at future stages.

These successive transformations of the Charter would take two forms. On the one hand, the principles and directives at present provided for in the Charter could be made progressively more concrete by formulating the fundamental social rights of the individual, with all the consequences that such a step would entail, including in particular the possibility of applications to the domestic courts and later to the European Courts of Human Rights. On the other hand, higher goals of social policy would be set by the Charter in fields in which it was deemed appropriate and possible to do so, by amending the existing principles or introducing new ones.

It is true that the amendments and modifications suggested above would, by reason of the heterogeneity of the provisions which they would introduce into the Charter, destroy its permanence and cohesion. This is, however, inevitable in view of the intrinsic nature of the Charter if it is wished that it really carries out its function in the European community.

ABDUCTIONS EFFECTED OUTSIDE NATIONAL TERRITORY

by

DANIEL MARCHAND *

While in voluntary exile at Colonus, Oedipus had to call Theseus to his rescue and appeal to Athenian law in order to foil the attempts of Theban agents to bring him back to Theban territory by deception or by violence.

Under the ancien régime, the French Kingdom included numerous places of sanctuary, notably the enclave of Avignon, a true "Court of miracles", open to all notorious criminals of the Kingdom by international law, and so effectively closed to the King's police that the latter were often obliged to ignore its borders in order to carry out their duties. Condemned by the old law in the name of the principle of asylum, the practice of pursuit was already the object of vehement protests.

The abduction of the Duke of Enghien has remained one of the most famous cases because of the feelings of revulsion and horror which it inspired in France and in Europe when his execution at the Chateau of Vincennes on March 21, 1804, was announced, shortly after his abduction from the territory of Baden upon Napoleon's orders.

The abduction of Eichman on May 11, 1960, from the suburbs of Buenos Aires, as well as the abduction of Argoud¹ on February 25, 1963 from Munich, by unknown persons in both cases, are still fresh in everyone's mind.

These examples of past abductions show that they are most often motivated by political reasons, the stronger nation violating the territory of the weaker in order to obtain possession of the wanted individual.

The purpose of this article is not to enumerate all the known cases of abduction, past or contemporary, nor to intervene in proceedings which may still be pending, but to define, with the help of the most significant examples, the principles of international law which are applicable to the subject.

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¹ A particularly detailed study of this case was made by Mr. Poret, "L'exercice de la puissance coercitive en territoire étranger", Thesis, Paris, 1965.

As intercourse between nations became more frequent, the principle of international solidarity gave birth to the law of extradition, which is the corollary of the right to asylum in a foreign country. Thus, a person who has fled to another country can be brought back to the jurisdiction of the country from which he has fled in various ways: first, legally by virtue of regular extradition proceedings; or illegally by irregular extradition proceedings, or, even more serious, by an abduction on the territory of the state offering asylum, an abduction which may be effected by agents of the state which wants to try the person abducted, but also by agents of the state giving asylum, perhaps even by private individuals, or with their collaboration.

There are, in fact, few rules of international law which are so well defined and at the same time so frequently violated as the one prohibiting abduction outside national territory.

It should be clearly understood that two fundamental principles of international law are violated when an extra-territorial abduction takes place: on one hand, the abduction violates the territorial sovereignty of the state on whose territory the abduction is effected and, on the other, it violates one of the fundamental rights of the individual who has received asylum from the state whose sovereignty is violated.

This article will therefore examine these two fundamental aspects of international law which are involved in extra-territorial abduction.

I

THE VIOLATION OF TERRITORIAL SOVEREIGNTY

In an analysis of the violation of the territorial sovereignty of a state which takes place when an abduction is effected, and the ensuing rights to compensation, there are two factors which must be considered: the place and the agent of the action.

A. The place of abduction

When studying the violation of territorial sovereignty, the situation leaves no room for controversy when the territory of the state itself has been violated; complications appear when the illegal activities take place in zones of an international character.

1. *Violation of Territory*

... Territorial sovereignty implies the exclusive right to exercise governmental activities; this right carries with it a corresponding duty: the obligation to protect within its territories the rights of other states, in

particular their right to integrity and inviolability in time of peace and in time of war, as well as the rights that each state can claim for its nationals on foreign territory.²

... Independence in relation to a part of the globe is the right to exercise the functions of state in that region to the exclusion of all other states. Independence, understood in this sense, must be respected, in principle, by other states. If it were otherwise, international order would be disturbed. In principle, it is necessary that each state acts alone in its sphere, that it acts freely but in conformity with the Rule of Law.³

Territorial sovereignty thus defined is therefore exclusive and represents one of the most striking aspects of the independence of the state.

International Law here equates the sphere of validity of a state's legal order with the sphere of its efficacy. The state territory here means, by virtue of international law, the area in which the state can effectively maintain its domination in a lasting manner, i.e., the area where the organs of the legal order are in the process of constantly applying the legal measures prescribed by this order. It is the principle of effectiveness which applies here.

... The sphere of territorial validity of a state's law is guaranteed by international law in the following manner: states are obliged, by a norm of general international law to refrain from all acts by which they would encroach upon the sphere of territorial validity of the legal order of another state; e.g., acts of compulsion of one state applied on the territory of another, or individual or general rules prescribing acts of compulsion to be applied on the territory of another state. The injured state can consequently demand the abrogation of these rules and, in appropriate cases, of the situation resulting from their application.

... This obligation on states to respect the sphere of territorial validity of the legal order of other states, an obligation decreed by international law, is the basis of the right of each state to require that all other states should refrain from similar violations of the sphere of territorial validity of its own established order. This right of states is called 'territorial sovereignty', and a state, referred to in its relationships with the territory subject to its sovereignty, is called the 'territorial state'.⁴

² These precedents were established by the decision of the Permanent Court of Arbitration of April 4, 1928 in litigation between the United States and the Netherlands relating to sovereignty on Palmas Island or Miangos. The Court also established the principle according to which a state can be called to account for a deed contrary to international law which occurs on the territory of the state (Text in the *Revue Générale de Droit International Public*, 1935).

³ J. Basdevant, "L'intervention anglo-italo-allemande au Vénézuéla", *Revue Générale de Droit International Public*, 1904, p. 388.

⁴ Kelsen, *Théorie générale du Droit international*, Recueil des Cours de l'Académie de Droit international, 1932, IV, pp. 192 to 209.

This principle was established at the end of the Middle Ages, and legal theory has since declared illegal the arrest of an individual which is effected by violence on foreign territory. In 1773, Vattel wrote:

Not only must the territory of others not be violated, it is in addition necessary to respect it and to refrain from all acts contrary to the laws of the sovereign, for a foreign nation cannot claim any rights there. One cannot therefore, without causing injury to a state, enter its territory armed in order to pursue an offender and abduct him. It constitutes both an infringement of the security of the state and offends the right of sovereignty, or of supreme authority, which belongs to the sovereign. It is called violation of territory, and nothing is more universally recognized as an offence which must be vigorously repulsed by every state which does not want to be oppressed.⁵

A state does not, therefore, have the right to send its troops, police force or men in arms into a foreign territory, or to commit an administrative or judicial act in a foreign state, but neighbouring states very often give each other this authority by means of a treaty, and thus derogations from the principle of irregularity arise.

For example, states accord each other mutual assistance for the repression of military offences and forestry or customs offences. There is also by treaty a right of pursuit between friendly states or states united by special bonds (Swiss cantons, German states, France and Monaco), or when a relationship of subordination exists between states.

According to certain writers, the right of pursuit exists in customary law and examples are to be found in the practice of the United States on its northern and southern frontiers, as well as in South-East Asia during the Korean war and in South Vietnam. It was also the practice of France and Great Britain during the periods of colonization and decolonization. However, this practice of pursuit overland, that is sometimes equalled with the right of maritime pursuit, meets with the hostility of the sheltering states, as well as doubt on the part of the pursuing state, and it does not seem that the two concepts can be equated for the simple reason that the right of pursuit on the high seas takes place in an international zone, outside the sovereignty of any state, and ceases "as soon as the ship enters the territorial waters of the country to which it belongs or those of a third power".⁶

⁵ *Le Droit des Gens, ou Principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains*, 1773, book II, p. 295, No. 93.

⁶ Article 23 of the Geneva Convention of April 29, 1958, on the high seas.

II. *Zones of an international Character*

Abductions effected on the territory of a foreign state can be compared to abductions effected in a zone having an international character, of which the following are a few examples. The abduction of Mr. Ben Bella, whose aeroplane was intercepted over the high seas while in transit between Tunisia and Morocco in order to avoid flying over Algeria which was then under French rule, is still fresh in everyone's memory. Mr. Ben Bella and his companions were taken into captivity in France.

Captain Curutchet, the OAS leader sought by France, had left Switzerland by plane for Uruguay and had called at Rome. In this city, the French Embassy is said to have provided him with a passport and paid for his trip. Curutchet refused to take a flight calling at Dakar because of the friendly relations which existed between France and Senegal, but he was assured by an Italian official that in an Alitalia plane he would be under the protection of Italy and that, in any case, the French authorities had given their agreement. However, when the aeroplane landed at Dakar on November 29, 1963, seven Senegalese policemen boarded the airplane under the command of a French lieutenant (there was a number of French officers in the armies and police forces of certain francophone states of Africa) and Curutchet was arrested in spite of the vigorous protests of the Italian captain of the aeroplane and of the Alitalia representative. During his trial, Curutchet repeatedly protested against the conditions in which he was arrested. His lawyers requested the examining magistrate to send international rogatory commissions to Senegal and to Italy in order to try to throw some light on this about-turn of the French authorities. In addition, Curutchet's wife submitted the matter to the Italian authorities in order to persuade them to protest to the French government against what she declared to be a violation of territorial sovereignty. Curutchet was sentenced to a term of life imprisonment.⁷

A similar situation arose on October 29, 1966, when the Ghanaian authorities arrested the Guinean delegation to the Conference of the O.A.U., consisting of 19 persons including the Guinean Minister of Foreign Affairs, and fourteen Guinean students, when the aeroplane which was taking them to Addis Ababa stopped at Accra. The Accra Government stated that the Guineans "will only be freed if Guinea frees the Ghanaians illegally detained in that country. The Ghanaian Government has been compelled to take these measures in order to obtain satisfaction from a country which has shown a total disregard for international customs." Numerous forms of pressure were brought to bear on the two countries con-

⁷ *Guardian*, December 20, 1963. *Le Monde*, May 6, 1964.

cerned; Guinea agreed to allow those Ghanaians who expressly requested it to leave its territory, and on November 5 the Government of Ghana agreed to free the nineteen members of the Guinean mission. There was however no news of the fourteen Guinean students detained in Accra.^{7b}

Two days after the abduction just described, on October 31, a similar procedure took place at Prague on board an aeroplane of the Soviet company Aeroflot: Mr. V. J. Kazan, an American citizen, was discreetly removed by the police while on his way to Paris from Moscow where he had attended a congress. The aeroplane was originally scheduled to fly direct from Moscow to Paris but, according to the Czech authorities, was compelled to land in Prague for technical reasons. The Czech police identified the man in question as Vladimir Komarek, of Czech origin, who had been accused in Prague in 1963 of high treason, espionage and attempted assassination.

Mrs. Helene-Véra Pouillon was arrested on Monday, April 27, 1964, in the railway station of Geneva-Cornavin in the area set aside for passport control between France and Geneva where the French customs officers enjoy the privilege of extraterritoriality. Mrs. Pouillon was accompanying a person leaving for France and was recognized by the border police on the station platform, questioned and asked to board the train, then taken to Bellegarde. A French arrest warrant had, in fact, been issued for Mrs. Pouillon for having helped her husband to escape in the night of December 8-9, 1963, while he was detained in a clinic. The Federal Department of Justice and the police of Berne were of the opinion that the arrest of Mrs. Pouillon by the French police had been effected in circumstances incompatible with the Franco-Swiss Convention of 1960, which deals with police control in juxtaposed customs offices. According to the Swiss authorities, the French police can only make an arrest at Geneva Railway Station on the departure platform for France subject to two conditions: 1. that the person apprehended is about to leave for France; 2. that the person is guilty of an offence against French customs regulations. The Swiss were of the opinion that neither of these conditions applied to Mrs. Pouillon, since she went onto the station platform in order to accompany a person leaving for France. Mrs. Pouillon was released after three weeks' detention.⁸

On November 17, 1964, an incident known as the "Diplomatic Trunk", took place at Rome airport. Two secretaries of the Egyptian Embassy appeared at the airport with a case from the U.A.R.

^{7b} See *The Times* and *Guardian* from October 31 to November 7, 1966.

⁸ *Le Monde*, April 29, May 2, 5, 10-11, 12, 17-18, 1964.

Embassy in Rome, destined for the Egyptian Ministry of Foreign Affairs. A customs officer heard moans coming from this "diplomatic trunk" and, assisted by a policeman, wanted to open it. The embassy secretaries pushed them aside and fled aboard the lorry in which they had arrived. They were pursued and caught, while the case, which they had tried to dispose of, was found in a bush. Inside, a drugged man was discovered, bound and gagged, of Israeli nationality and probably a secret single, double, or even triple agent.⁹

Italian justice has had to deal with the arrest of foreigners, effected on a foreign boat on the high seas or in port.¹⁰

At the beginning of the century, Germano-Brazilian relations were affected by the search conducted in a Brazilian port for a sailor who had deserted from the German gunboat "Panther", in violation of the very simple extradition procedure in force between many nations for cases of desertion by sailors.¹¹

On July 23, 1963, at Nogales, a small city situated partly in American territory (Arizona) and partly in Mexican territory (Sonora state), the sheriff of the American township was on the Mexican side of the street when he noticed an outlaw, Jesus Garcia, a Mexican citizen, on the other side and therefore in American territory; he rushed towards him, accompanied by an American. Garcia started to run towards the Mexican side of Nogales, but just as he was about to reach it, a man who was running towards him, but in Mexican territory, struck him so violently that the outlaw was knocked unconscious and fell with his head on the Mexican side of the street and the rest of his body on the American side. The American sheriff, assisted by two American citizens, pulled him by the feet, brought him completely over to American soil and placed him under arrest.¹²

For the sake of brevity, these cases of abduction on the high seas, in a port, an airport, an international station or on a border, will be equated with the "classic" abductions effected on the territory of a foreign state.

III. Jurisprudence

Jurisprudence has acknowledged and sanctioned the illegality of such abductions. One of the most significant cases, although it necessitated a reasoning *a contrario*, was the decision of the Permanent Court of Arbitration of the Hague of February 24, 1911,

⁹ *Le Monde*, November 19, 1964.

¹⁰ *Arresto di Stranieri eseguito su nave straniera e diritto di inseguimento*, C. de Vincentiis, *Rivista di Diritto Processuale Penale*, IV, No. 2, 1957.

¹¹ *Brazilian Official Gazette* of January 10, 1906, p. 159 et seq.

¹² Moore, *A Digest of International Law*, Volume II, p. 380. This affair could be compared with the unfortunate incidents which took place on the Berlin Wall.

which was the result of a compromise between the government of the French Republic and the government of his Britannic Majesty on the subject of the Savarkar affair.¹³

By a letter dated June 29, 1910, the chief of the Metropolitan Police of London informed the Director of the Criminal Investigation Department in Paris that the British Indian subject Vinayak Damodar Savarkar was being sent to India to stand trial for assassination (for abetment of murder, etc., but in reality for a political offence) and that he would be on board the vessel "Morea" calling at Marseille on July 7 or 8. Following this letter, the Minister of the Interior, by a telegram dated July 4, 1910, alerted the Prefect of the Bouches du Rhône that the British police were sending Savarkar to India aboard the "SS Morea"; this telegram mentioned that "Certain Hindu revolutionaries at present on the continent could take advantage of this opportunity to facilitate the escape of this foreigner", and the Prefect was urged "to take the appropriate precautions in order to foil any such attempt". On July 7, the "Morea" arrived at Marseille; the next day, Savarkar, almost naked, climbed out of a porthole of the ship, jumped into the sea and swam to the quay; at the same moment, some people on board ran down the gangway, gesticulating, in order to pursue him. In addition, many people who were on the quay started to shout "stop him"; a sergeant of the French military police immediately gave chase, caught the fugitive after a chase of about 500 metres and arrested him. A member of the ship's crew and two Indian policemen who arrived after Savarkar's arrest helped the sergeant, who was still holding Savarkar, to bring the fugitive back to the ship's gangway. The entire incident lasted only a few minutes.

The Court found that the sergeant who had made the arrest was aware of Savarkar's presence on board the ship and that, like all French agents and police, he had instructions to prevent all Hindus who were not in possession of a ticket from boarding the ship. It was not a case where deception or violence had to be employed in order to take possession of a person who had taken refuge on foreign territory. There was nothing in the arrest, the delivery and the transportation of Savarkar to India to violate French sovereignty. For these reasons, the Court of Arbitration decided that the government of his Britannic Majesty was not obliged to return the man Vinayak Damodar Savarkar to the Government of the French Republic.

This decision is extremely significant for two reasons: first, because it implies *a contrario* that if there had been deception infringing French sovereignty the government of his Britannic Majesty

¹³ Robin, "Un différend franco-anglais devant la Cour d'Arbitrage", *Revue générale de Droit international public*, 1911, pp. 303 et seq.

would have been obliged to return Savarkar to the Government of the French Republic; secondly, because it deals only with the alleged violation of French sovereignty and at no time considers the right of asylum that Savarkar might have acquired by setting foot on French territory. (It is this aspect of the problem that will be examined in Part II.)

The different types of violation of the territorial sovereignty of a state, even when they are complicated by elements of an international character, must be distinguished since they have differing consequences in international law, depending upon the position of the person effecting the abduction and the circumstances in which it took place.

B. The agent effecting the abduction and the attendant circumstances

I. The Agent Effecting the Abduction

It is necessary to distinguish between the acts of agents of the state and those of private individuals. Abductions effected by agents of the state – agents of the central government, of decentralized bodies¹⁴ or of superior or subordinate authorities¹⁵ – necessarily involve the international responsibility of the state, but actions carried out by simple private individuals tend to be controversial. The most distinctive example of such a situation is obviously the abduction of Adolf Eichmann on May 11, 1960 in a suburb of Buenos-Aires. A refugee in South America since 1950, the Nazi criminal was discovered in August 1959. On the evening of May 11, 1960. Eichmann, returning home from work, got off a bus; a car, apparently in trouble, was stationary in the road that he had to take in order to get home. As he was passing it, he was seized, overpowered and driven away in the direction of a house owned by a Zionist organization in the suburbs of Buenos-Aires. Eichmann was drugged and taken to Israel in an El AL airplane which had landed a few days earlier at Buenos-Aires with the Israeli delegation that had been invited to attend the celebrations of the 150th anniversary of Argentine independence. Mr. Ben Gurion, the Prime Minister of Israel, stated in Parliament on May 23 that Eichmann was in the hands of

¹⁴ See *Tribunal correctionnel* of Avesnes, *Jolis* case for acts committed by the gamekeeper. July 22, 1933, *Sirey* 1934, II, p. 105.

¹⁵ "The responsibility of the foreign state is involved, even if the act is the deed of subordinate agents, with or without the mandate of their superior." *Franco-Swiss Conciliation Commission* meeting in 1955 to examine the problem of the violation of Swiss territorial sovereignty by agents of the French tax authorities. See Mme Bastid in *Annuaire français de Droit international*, 1956, pp. 436 to 440 and *Gazette de Lausanne*, November 25, 1955.

the judicial authorities. The Israeli Prime Minister then declared that the former SS Colonel had been discovered on Argentine territory "by a group of Israeli volunteers"; he added that "the volunteer group has therefore removed Eichmann from Argentina with his full agreement . . . If the volunteer group has violated Argentine law, the government of Israel would like to express its deepest regrets in this matter".¹⁶

In 1911, the Permanent Court of Arbitration of the Hague had pronounced a decision in the *Blair* case which raised the question of abductions effected by simple private individuals¹⁷: following a fraudulent bankruptcy in Great Britain, Blair fled to the USA where a private detective, assisted by American police, arrested Blair and transported him to Great Britain. The British government announced that as soon as it had been aware of the facts, an investigation had been conducted, resulting in an order to release Blair and to escort him to the place where he had been arrested at the expense of his Majesty. But it was out of pure courtesy that the British government acted in this manner.

A decision of the Supreme Court of Iowa¹⁸ reflects traditional jurisprudence according to which an arrest made by private persons is not in the strict sense a violation of international law, although the person responsible can be prosecuted by the state in which the arrest took place.

II. *The Circumstances of the Abduction*

There are circumstances which play an important role in the matter in that they transform the character of an arrest; they render it illegal when *force majeure* can be established or when an error has been committed as to the person arrested; on the other hand, they render it "legal" when agents of the sheltering state have participated in the arrest of the individual.

a) *Force majeure*

The interested state has often been known to release an individual apprehended as the result of, for example, a shipwreck. In this respect, the decision of the consuls of the 18 Frimaire VIII regarding Englishmen shipwrecked at Calais can be quoted: "They were not provided for in any of the cases anticipated by the laws relating to *émigrés* and . . . it is outside the scope of the law of civilized nations to take advantage of the mishap of a shipwreck in order

¹⁶ *Le Monde*, June 8, 1960.

¹⁷ *Revue Générale de Droit International Public*, Volume 18, 1911, p. 349.

¹⁸ *State v. Ross*, 21 Iowa 467.

to hand over, even to the righteous wrath of the law, unfortunate survivors of the waves".¹⁹

A decision to the same effect was pronounced in 1832 in the case of the *Carlo Alberto*, chartered by the Duchess of Berry at Leghorn to transport royalist conspirators, and which had to put into La Ciotat (France) following serious damage to the boiler. It was at this point that the conspirators were arrested.

b) *Error*

The delivery by error of a criminal in flight by one state to another, is also an influencing factor. It is then a case of irregular extradition and the individual must be returned to the country in which he was arrested.

The *Lamirande* case in 1867 is a striking example: Lamirande, a cashier in the Poitiers branch of the *Banque de France*, was arrested in Canada and extradited for fraud, but while the extradition proceedings were pending, Lamirande commenced proceedings in Canada which resulted in a decision that the charges made against him were not covered in the extradition treaty in force. He was nevertheless returned to France. Her Majesty's government then informed the French government of the error which had vitiated the extradition proceedings and requested that Lamirande be returned to Canada; however, while diplomatic discussions were in progress, Lamirande himself formally waived his right to take advantage of a decision which would allow him to return to Canada.²⁰

There is also the *Keyes* case of 1901: a British officer named Keyes had been killed in Nigeria by French citizens who then fled to French territory. The fugitives were handed over to the Nigerian authorities by a French officer who seemed to have forgotten that nationals of the extraditing country cannot be extradited. His Majesty's government returned the criminals to the French authorities.²¹

Finally, it should be recalled that the *Savarkar* case, where the error would have been committed by the French sergeant in the performance of his duty, was not upheld by the Arbitration Court of the Hague.²²

¹⁹ "Des arrestations en cas de venue involontaire sur le territoire", Maurice Travers, 1917, *Revue de Droit International Privé*, pp. 627 ff.

²⁰ Paul O'Higgins, "Unlawful Seizure and Irregular Extradition", *British Year-book of International Law*, 1960, pp. 279 ff.

²¹ P. Leboucq, *De l'erreur sur la nationalité des extradés*, Clunet 1903, pp. 271 ff, in particular p. 283.

²² "All those who took part in the incident did so in good faith with no thought of circumventing the law", op. cit.

c) *Agents of the Sheltering State Participating in the Abduction*

When the sheltering state agrees to the arrest, as well as when the agents of the sheltering state participate in an irregular arrest, there is no breach of international law, as was decided by the Arbitration Court of the Hague in the *Savarkar* case.²³

C. Reparations

The violation of the territorial sovereignty of a state and the resulting responsibility entail the obligation to make redress, as affirmed by legal text book writers²⁴ and international jurisprudence, when the elements necessary for legal responsibility are present.

Thus, the Permanent Court of International Justice stated: "Reparation is the corollary of the violation of an obligation arising out of an agreement between states. Therefore, when there is violation of an agreement between states, the obligation of reparation is the necessary corollary."²⁵ Likewise, in the *Corfu Channel* case, the International Court of Justice concluded: "If the answer to the question: is Albania responsible according to international law? is in the affirmative, it follows that reparation is due."²⁶

In the *Chorzow* case, the Permanent Court of International Justice affirmed that the essential principle which follows from the very notion of an illicit act is that the reparation must, as far as possible, efface all the consequences of the illicit act and re-establish the state which would have been likely to exist if the said act had not been committed.²⁷ The principle is therefore one of *restitutio in integrum*; in cases of violation of territorial sovereignty, the application of this principle consists in physical restitution, i.e., the return of the victim of the abduction to the state in which he would have been likely to be present if the illicit act had not been committed.

Therefore, in the *Savarkar* case, the Court ruled that his Majesty's government was not "obliged to restore the man Vinayak Damodar Savarkar to the government of the French Republic" be-

²³ "Since the conduct of the sergeant was not repudiated by his superiors before the morning of July 9, i.e., before the departure of the "Morea" from Marseilles, the British agents naturally had cause to believe that the sergeant had acted in accordance with their instructions or that his conduct had been approved."

²⁴ See for example: *International Law, a Treatise*, L. Oppenheim, 8th edition by H. Lauterpacht, 1954, par. 150.

²⁵ Decision No. 13, *Permanent Court of International Justice: Report*, Series A, no. 17, p. 47, *Chorzow* Case.

²⁶ Judgment of December 15, 1949, Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice, 1949, pp. 244-265. Chung, Il Yung, *Legal Problems Involved in the Corfu Channel Incident*, Geneva, 1959.

²⁷ *Op. cit.*, p. 47.

cause there had not been any deception on the part of a British agent on French territory. It is therefore easy to deduce by *a contrario* reasoning that if the English agents had acted in such a manner as to violate French territorial sovereignty the Court would have ordered the release of Savarkar and his restitution to the French authorities.

Diplomatic practice follows this principle; thus, the Swiss government, in a note dated April 1, 1935, protested forcefully against the abduction of the reporter Berthold Jakob on Swiss territory on March 9, effected with the collaboration of the German authorities, and demanded the immediate return of the victim; the demand was complied with.²⁸ Likewise, the French Police Superintendent, Schnoëblé, who had been invited to Germany, was arrested by the German police on April 20, 1887, as he crossed the frontier between France and the Moselle, which was then under German sovereignty, and was imprisoned at Metz. Prince Bismarck, by a letter dated April 28, 1887, to the French Ambassador at Berlin, denied any violation of French sovereignty because it was not established that he had been arrested in France, but on the strength of the safe-conduct that was constituted by the letter of invitation it was indicated that Schnoëblé would be released; his release followed on April 30.²⁹

Domestic jurisprudence has also been to the same effect. As an example, the following quotation is taken from the case of *Jolis*³⁰: "The depositions made (against Jolis) by French agents in a foreign country can have no legal effect and are absolutely void . . . this nullity being a matter of public policy, judicial notice must be taken of it by the court. There is therefore cause to annul the proceedings . . . beginning with the depositions of July 10, 1933, particularly the remand in custody and the order of transfer to the Criminal Court; the court orders the immediate release of the man Jolis . . ."

If the restitution of matters to the pre-existing state of affairs is not possible, reparation may consist of an indemnity. This indemnity can be accorded as the principal reparation or as complementary reparation when the illicit coercive action has caused damage of a physical or material nature or the death of the victim.

A characteristic example is supplied by the *Brignan case*³¹: following the murder of the game-beater on the Franco-German border by a German agent, the German government offered an

²⁸ Ch. Rousseau, *L'indépendance de l'Etat*, Recueil des cours de l'Académie de Droit international, 1948, II.

²⁹ *Questions de droit relatives à l'incident franco-allemand de Pagny-sur-Moselle* Clunet, 1887.

³⁰ Tribunal correctionnel of Avesnes, July 22, 1933, *op. cit.*

³¹ Baron F. de Holzendorff, *Les incidents de Pagny et de Schmirck à la frontière franco-allemande*, *Revue de Droit international et de Législation comparée*, Volume XX, 1888, p. 217.

indemnity of 50,000 francs (1887 value) in settlement, the entire amount going to Brignon's widow.

But abductions outside national territory also injure the state in its honour, its dignity, its prestige; these damages call for reparation of a moral nature, which is known as satisfaction.

II. *Satisfaction*

Satisfaction takes the form of an autonomous institution, being different from penal sanctions which are unknown in international law, and from purely material reparation. Satisfaction can be rendered according to two methods, each having a specific purpose: the first, by process of international law, restores the pride of the injured state; the second, by measures of an internal nature, is intended, in addition, to avoid the recurrence of a similar act.

a) *The Procedures of International Law*

These are excuse, regrets, apology and judicial pronouncement of the law.

The *Eichmann* case, during which the Israeli government constantly endeavoured to identify the expression of regrets with reparation, certainly represents the most outstanding example in this respect. The Security Council, when seized of the case, adopted a resolution on June 23, 1960, of which point 2 "requests the Israeli government to assure an adequate reparation in conformity with the United Nations Charter and the norms of international law".³² In fact, on June 3, the government of Tel Aviv replied to the Argentine request for an explanation of June 1, that if "the group of volunteers had violated the laws of Argentina, the Government of Israel would like to express its profoundest regrets in this matter".³³

Mrs. Golda Meir, Israeli Minister of Foreign Affairs, representing her government at the Security Council, considered that the regrets already expressed directly to the Argentine government, and again expressed before the Council, constituted an adequate reparation.³⁴ This was the point of view consistently maintained by Israel until relations between the two countries in question deteriorated and the Argentine government declared the Israeli ambassador at Buenos Aires *persona non grata*. Then, without warning, the affair ended suddenly following a brief communiqué published simultaneously in both capitals, and that incident was considered to be closed, thereby adding to the confusion between reparation and satisfaction.

³² United Nations Document: S/PV 868.

³³ *Le Monde*, June 8, 1960, note published on June 6.

³⁴ United Nations Document: S/PV 866, No. 45 and 46.

Similarly, the establishment by an international political or judicial body of the violation of the sovereignty of the state is a measure of satisfaction.

During the proceedings before the Security Council on the Eichmann affair, the representatives of the great western powers, such as Mr. Cabot Lodge, declared: "The delegation of the United States considers that there is adequate reparation in the fact that the Council will have expressed its views in the resolution that it will adopt."³⁵

The International Court of Justice was even more precise in the Corfu Channel case: "By the actions of its man-of-war in Albanian waters on November 12-13, 1946, during the course of negotiations, the United Kingdom violated the sovereignty of the Albanian Republic. This declaration by the Court in itself constitutes an appropriate satisfaction."³⁶

b) Measures of a Domestic Nature

Measures of a domestic nature can also be intended to give satisfaction to the wronged state while at the same time providing for the non-recurrence of such acts. These measures are of an administrative or penal nature.

Among administrative measures, disciplinary sanctions are the most meaningful. So it was that, following search operations carried out in Brazil by a patrol of the "Panther" under orders of Captain Count Saurma-Jeltsch for the purpose of finding a seaman deserter, the former was relieved of his command as soon as an inquiry had confirmed the facts. As far as penal sanctions are concerned, once he was back in Germany, having already been relieved of his command, Count Saurma-Jeltsch was also brought before a court martial.

II

THE RIGHTS OF THE INDIVIDUAL

As soon as an individual, who through fear of losing his liberty is fleeing from the authorities of his native country, touches the territory of a third state, he has a right to asylum; this in no way implies that the right of asylum is granted to him on this basis; rather, he has the right to ask the state whose territory he has reached for asylum³⁷. The state then has the right to grant asylum or not; if it decides not to do so, the state expels the foreign national, but nevertheless grants him the option of going to a state other

³⁵ United Nations Document: S/PV 867.

³⁶ Decision of the International Court of Justice, already cited.

³⁷ See the *Savarkar* case, already cited in this respect.

than the one which he left, so that he has the opportunity to renew his request for asylum.

When asylum is granted to an individual by a third state, the only means open to the state of origin of acquiring possession of that individual in order to try him, is to make a regular application to the state granting asylum for his extradition. Any other procedure, particularly irregular extradition procedures and abductions, must be declared contrary to the rules of international law.

Abductions outside the national territory of the abducting state, principally involve individuals who have sought refuge outside their country because of their political or religious convictions. In effect, if an individual is wanted for an ordinary criminal offence, the state which wants to apprehend him can have recourse to proceedings, which are generally provided for this type of case by international treaty or by domestic legislation, but which never cover political offences.

The individual who has been irregularly apprehended by the state which wants to try him, may have his rights defended by the state on whose territory he was enjoying asylum, if that state protests, the main basis of its protest being against the violation of its territory. But in the unfortunately numerous cases in which the state does not act, the individual must seek whatever means of redress, national and international, are available to him, in order to enable him to demand the protection of a right which he possesses in his capacity as an individual and which is intended to safeguard his liberty, i.e. the right of asylum.

It is therefore necessary to consider the position of the individual who enjoys asylum on foreign territory, as well as the manner in which he can be deprived of it, i.e., extradition, before examining the forms of redress available to him when, as the result of an abduction on the territory of the state according him asylum, his fundamental right to liberty is endangered.

A. The Right of asylum and extradition

I. *Asylum*

Certain writers, diverging from the traditional concepts of international law, consider that any system intended to safeguard human rights on the international level would be incomplete without the right of the individual to seek and to obtain asylum, because it represents the only effective means for the protection of the individual against the attacks of his own government.³⁸

³⁸ See especially: Manuel R. Garcia-Mora, *International Law and Asylum as a Human Right*, Washington 1956.

The international practice of states is to grant asylum to a foreigner whose life or liberty is in danger or who is afraid of being persecuted because of his race, his religion, his nationality, his political opinions, etc. But no foreigner has a *right to asylum*, either in international law or in national law; the state is sovereign in the evaluation of the factors which move it to grant or to refuse asylum.³⁹

The person who enjoys asylum in foreign territory is in general called "refugee" when he is not protected *de facto* by his state of origin; he can also be "stateless" when he is not protected *de jure* by any state.

From 1921, the League of Nations concerned itself with the international protection of refugees by naming Mr. Nansen to the post of High Commissioner for Refugees for the purpose of aiding and assisting the resettlement of a million and a half Russians who, following the Revolution and Counter-Revolution in their country, found themselves outside the frontiers of their fatherland and could not or would not return there.⁴⁰

In 1951, the United Nations High Commission for Refugees was created for the purpose of assuming "the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present statute and of seeking permanent solutions for problems of refugees..." (Article 1 of the Statute)

On July 28, 1951, a Convention relating to the status of refugees was adopted. Articles 31 to 33 deal with the principle of non-expulsion and, more particularly, Article 32 stipulates that a refugee, finding himself regularly on the territory of a contracting state, will be expelled only for reasons of national security or of law and order. The expulsion may take place only in execution of a decision reached in accordance with the procedure provided for by law and the contracting states undertake to accord such a refugee a reasonable delay in order to allow him to find a way of being regularly admitted to another country. Article 35 gives authority to the High Commission to supervise the application of the provisions of this Convention.

Today, the principle of the non-expulsion of *bona fide* refugees to countries where they would suffer persecution can be considered as one of the customs of civilized countries.

There still remains, however, the difficulty of determining what

³⁹ L. Koziębrodzki, *Le droit d'asile*, 1962. Me J. Rochette, *The Right of Asylum on France and L. J. Blom-Cooper, Right of Asylum in this Journal*, Vol. V, No. 1, (Summer 1964) pp. 127-140.

⁴⁰ *Forty years of international assistance to Refugees*, United Nations High Commissioner for Refugees.

persons have the status of refugee.⁴¹ The case of Dr. Cort illustrates the limitations of this concept: he was an American citizen, and had been exempted from military service before leaving the United States because of a tubercular infection. While he was residing in Great Britain, the American authorities contacted him for the purpose of a medical examination relating to his military service, but Dr. Cort was convinced that the American government wanted to extract from him evidence of his communist activities, as had been done in the case of friends of Dr. Cort. Consequently, the doctor refused to comply with the American request. The British authorities then informed him that his residence permit would not be renewed and that he must leave the country. The government was challenged on this subject in the House of Commons, but it refused to grant asylum to Cort, alleging that on the facts there was no case for the granting of asylum. According to the government, it was not evident that the United States would suppress the liberty of Dr. Cort because of his political opinions; Cort had therefore to leave Great Britain and fearing to return to the United States, emigrated to Czechoslovakia.⁴²

II. Extradition

The sphere of the right of asylum has become progressively restricted; it only exists now in its political form and, in this respect, it is the counterpart of extradition, which is an act whereby a government hands over an individual to the government of another state so that he may be tried by its courts, or, if he has already been convicted, so that he may serve the sentence which has been imposed upon him.

The first extradition agreement was signed in 1174 between England and Scotland. Since then, a dense network of extradition treaties between states has been built up. In addition, each state has enacted legislation concerning extradition and designed to implement the treaties, or be applied in the event of the silence or non-existence of a treaty.⁴³

At the present time, all extradition treaties contain an express clause excluding the extradition of political offenders. The inviolability of asylum in foreign territory is an unconditional principle when

⁴¹ P. Weis, *Le Statut international des réfugiés et apatrides*, *Journal de Droit international*, 1956, No. 1, pp. 5ff.

⁴² Harry Street, *Freedom, the Individual and the Law*, Penguin Books, pp. 263, 264.

⁴³ However, it is a fact that, in violation of these treaties and legislation, i.e., without the individual benefitting from the guarantees that these instruments accord him, it is common practice to hand over, at some point on the frontier, offenders wanted by one state from another when these states enjoy good relations, in order to avoid the onerous procedure of extradition. See, e.g., *Home Secretary v O'Brien* (1923) A.C., p. 603 at 646 (H.L.).

it is a matter of political offences.⁴⁴

The French Constitution of October 25, 1946, declares that "any man persecuted because of his activity on behalf of liberty, has the right to asylum on the territories of the Republic". The French law of March 10, 1927, specifying the conditions, the procedure and the effects of extradition, stipulates in Article 5:

"Extradition is not granted:

- 1) when the individual who is the object of the request is a French citizen or a protected person; the capacity of citizen or protected person being assessed at the time of the offence for which extradition is requested.
- 2) when the crime or offence is of a political nature or when it is clear from the circumstances that the extradition is requested for political reasons . . ."⁴⁵

An exception to the principle of non-extradition in political matters exists within the British Commonwealth where extradition is allowed even for political offences; this has resulted in extremely unfortunate incidents, such as the case of Anthony Enahoro⁴⁶ who, in 1963, after six months of legal debate and political controversy, was extradited from Great Britain to Nigeria where he was sentenced to imprisonment for 15 years for treason – in reality for a political offence. Recently, the Ministers of Justice of the 22 Commonwealth countries met in London for the purpose of modifying the Fugitive Offenders Act of 1881 in order to prevent the recurrence of similar cases. It is therefore anticipated that the Law of 1881 will be brought into line with the law which governs extradition for individuals not belonging to the Commonwealth countries.

It is also a generally accepted principle that a state does not extradite its nationals. No further comment is necessary here, except in cases where the state commits an error concerning the nationality of the extradited individual.⁴⁷ In this respect, the *Keyes* case of 1901 cited above is recalled (French fugitives handed over by a French officer to the Nigerian authorities).⁴⁸

It is clear that the individual can only be tried for the offence, covered by the extradition treaty, in respect of which he has been extradited; the Supreme Court of Spain ruled accordingly in 1934:⁴⁹

⁴⁴ Phocion S. Papathanassion, *L'extradition en matière politique*. Sirey, Paris 1954.

⁴⁵ Official Gazette of the French Republic, March 11, 1927.

⁴⁶ Chief A. Enahoro, *Fugitive Offender, an Autobiography*, London, 1965.

⁴⁷ P. Leboucq, *op. cit.*

⁴⁸ P. Leboucq, *op. cit.* p. 283.

⁴⁹ Annual Digest of Public International Law Cases 1938-1940, *Fiscal v. Samper*, case No. 152; see also E. D. Dickinson, Jurisdiction following seizure or arrest in violation of International Law, *American Journal of International Law*, Vol. 28, 1934.

Article 9 (of the extradition treaty between Spain and Portugal) stipulates that the individuals handed over by virtue of the said convention must not be tried for offences other than those which were the subject of the extradition . . . The crime in respect of which the sentence is imposed is distinct from the one on which the extradition was based . . . Therefore the appellants cannot be convicted.

The problem of the classification of the crime must also be considered. A case in point is the request to Holland for the extradition of Kaiser Wilhelm II where he was a refugee, in accordance with article 227 of the Treaty of Versailles, which stated that the allied powers and their associates publicly accused William of Hohenzollern, ex-Kaiser of Germany, of supreme injury to international morality and the inviolable authority of treaties, and which resulted in the objection of jurists and of the Dutch government that the charges against William II related to political matters and consequently did not fall within the province of extradition.⁵⁰

So far as social offences are concerned, i.e., those which are directed against any kind of social organization and not only against a specific state or form of government, almost all writers consider that these offences are not political and that consequently their perpetrators are liable to extradition.⁵¹ Applying these principles, French jurisprudence has always refused to consider anarchist acts as political offences and has dealt with them as common law crimes. Similarly, most of the treaties concluded since 1858 have expressly provided that attempts on the life of a foreign sovereign or the members of his family do not have a political character. Individuals guilty of such crimes do not raise serious difficulties and extradition has been accorded by England to France (the case of the anarchist François), by France to Italy (the Lucchessi case), by Switzerland to Italy (the Rivolta case). Recent conventions provide that terrorism and counterfeiting shall constitute offences against common law even if the political intent of their perpetrators is established.⁵²

The case of Dr. Soblen in 1962 illustrates the relationship which exists between extradition, expulsion and the right of asylum.⁵³ Dr. Soblen had been found guilty in the United States of handing over defence secrets to the Soviet Union and had been sentenced to life imprisonment. He was released on bail between the trial at first instance and appeal, and fled to Israel. The United States then requested Israel to expel him and sent a sheriff to the state of asylum to bring him back. He was abducted by force in Israel, placed

⁵⁰ Phocion S. Papathanassiou, *op. cit.*

⁵¹ International Law Institute, Geneva 1892, Resolution, art. 4.

⁵² Juris-Classeur d'instruction criminelle: "*De l'extradition*", Librairie de la Cour de Cassation, Paris, 1950.

⁵³ Harry Street, *op. cit.*, pp. 265, 268.

under American escort in an EL AL airplane en route for the United States via London. Before arriving in Great Britain, he tried to commit suicide. He was seriously wounded, and received permission to be admitted to hospital, but was not granted asylum. By *habeas corpus* proceedings, Soblen contested the decisions taken with regard to him, and the case was taken to the House of Lords. It was also discussed in the House of Commons, and it was decided that the Home Office had a complete discretion in the matter. The latter decided to respect the *statu quo ante* and handed over Soblen to EL AL. Soblen committed suicide before arriving at the airport on September 11, 1962.

A recent ruling by the Public Law Chamber of the Swiss Federal Court supplies an interesting detail:⁵⁴

An offender extradited by Germany to Switzerland can only be re-extradited by Switzerland to France with the consent of Germany; once that consent has been granted, re-extradition to France becomes a normal extradition procedure; the consent of the offender is not necessary. The delinquent cannot contest his re-extradition to France by asserting: that he had agreed to his extradition from Germany to Switzerland on condition that he would be returned to the German authorities after the termination of criminal proceedings in Switzerland; that the criminal offences for which France requested his re-extradition were merely a pretext for his prosecution for political offences.

It clearly follows that the individual is completely disregarded in the international rules relating to matters of asylum and extradition, which are left entirely to the sovereignty of the states concerned. This situation is most regrettable.

But if the states are free to decide whether they will grant asylum or extradition in relation to an individual they are nevertheless bound by the strict rules of international law, the violation of which the individual can use to his advantage.

B. The remedies of the individual

I. The Possibility of Redress

The individual to whom asylum has been granted on the territory of a third state and whose right is violated by agents of the state of origin, or by any individual who effects his abduction, can obtain reparation for the prejudice sustained: he must be restored to his previous condition of liberty. This principle is not, however, generally acknowledged on the ground that the individual is not a subject of international law.

⁵⁴ *Gillette c. Ministère public fédéral*, May 12, 1965, *Journal des Tribunaux*, I, pp. 219, 220.

National legislation has sometimes condoned illegality in this field. Thus, for example, the Palestine Immigration Ordinance of 1941 imposed sanctions on any ship which illegally brought immigrants to Palestine, as well as on any person coming within its jurisdiction by this means, "whether he came there voluntarily or not".⁵⁵

The most outstanding example in this respect is the case of *Ker v. Illinois*, in which the U.S. Supreme Court decided that "the physical presence of the accused before the Court, no matter how he came there, sufficed to validate the proceedings".⁵⁶

"The arrest of the accused, who claims to have regained French territory only after deception intended to set a trap for him or to facilitate his arrest, can be considered as regular only by reason of the fact that it did not take place until several days after his arrival in France, as if there had not been any coercion by the French authorities in a foreign country." Such is the more moderate decision taken by the 3rd Court Martial of Paris on July 20, 1917.⁵⁷

It seems to follow, therefore, from these citations, that the individual is not competent to speak in the name of foreign sovereignty and that the foreign state, as master of its sovereignty, can make such concessions as it judges convenient, and thus ratify all irregular acts. Its silence amounts at least to a presumption of ratification.

Many writers have not, however, conceded this viewpoint and "if the municipal courts have occasionally failed in this sphere to affirm their readiness to enforce international law, they have done so for reasons unconnected with the merits of the subject under discussion. Their decisions thus cannot be said to affect the principle . . . that an arrest in violation of international law can have no legal effect."⁵⁸

II. *The Methods of Redress*

It must be strongly stated that the individual whose right to asylum has been violated, or who has been the victim of an irregular extradition, can institute proceedings himself for the purpose of having his rights and liberty restored to him, even in cases in which the state whose sovereignty has been violated does not protest nor takes sides with the victim.

⁵⁵ *Molvan v. Attorney-General for Palestine* (1948), AC 35, Annual Digest of Public International Law Cases, 1948, Case No. 37.

⁵⁶ 119 U.S. 436 (1886), cited by D. P. O'Connell, *International Law*, pp. 906 ff: *Illegal Seizure of Persons on Foreign Territory*.

⁵⁷ *Weisler c. Ministère Public*, cited by M. Travers, *op. cit.*

⁵⁸ Miss F. Morgenstern, "Jurisdiction in Seizures Affected in Violation of International Law", *British Year Book of International Law*, 1952, p. 273-4.

It is obvious that the only adequate reparation in the matter is the release of the individual, which involves giving him the opportunity to return to the state in which he enjoyed asylum.

a) *Redress before National Courts*

It is sufficient to cite a few decisions of different courts in order to provide convincing examples of the validity of this method of redress.

Thus, in the *Jabouille* case tried by the Bordeaux Court of Appeals on February 3, 1904⁵⁹, France applied to Spain for the extradition of Jabouille, but before the proceedings were concluded the latter had been handed over to the French Police. The Spanish government did not protest against this irregular procedure and Jabouille complained to the Court about it. The latter decided that Jabouille "could be legally apprehended by the French authorities only after extradition had been requested and obtained in the conditions provided for by international treaties or after his voluntary and spontaneous return to the country". He was set free and allowed 15 days to reach the frontier.

The U.S. Supreme Court in the case of the *United States v. Ferris*⁶⁰, dealing with the subject of individuals of British nationality accused of violating the Prohibition Act and arrested on a Panamanian boat 270 miles from the United States coast, ruled that the arrest under review had been made outside the limits fixed by the treaty of 1924 between the United States and Panama, that it was a pure case of aggression and a violation of the treaty, that it must not therefore be sanctioned by a court and must not serve as the basis for proceedings prejudicial to the defendants.⁶¹

"On the night of August 26, 1961, a party of six South African policemen crossed the border from the Republic of South Africa into the neighbouring former British territory of Basutoland. There they entered a hut by force and overpowered Anderson Ganyile, a political refugee from South Africa, and two other refugees. They took the three men forcibly and secretly across the border into South Africa. There the men were kept in prison secretly and without trial for four and a half months. Ganyile smuggled a note out of prison. His whereabouts thus became known to his friends, who began legal proceedings which led ultimately to the release of the three men."⁶² The Ministry of Justice stated that: "As it had now

⁵⁹ *Review of Private International Law*, 1905, p. 704.

⁶⁰ *Annual Digest of Public International Law Cases*, 1927-1928, case No. 127.

⁶¹ See also: U.S. Supreme Court in the Case of *Cook v. United States*, Annual Digest 1931-32, case No. 1, also known as the case of the "*Mazel Tov*".

⁶² *South African Incident: The Ganyile Case*, International Commission of Jurists, Geneva 1962.

been established that the arrest of Anderson Ganyile had taken place within the border of Basutoland, the Attorney-General at Grahamstown had decided not to proceed against Ganyile in the preparatory examination of allegations of attempted murder and incitement to murder."⁶³

The decisions cited above do not give the full picture, and it may be objected that in some instances legal theory⁶⁴, jurisprudence and even legislation, have not recognized this principle. It is argued, however, and this argument can be supported by sound reasoning, which fully supports the cases cited, that weight should no longer be given to opinions based on the classic conception of international law which only takes account of the states and their sovereignty. At the present stage of its development international law indisputably accords a place to the individual and to the rights which he possesses by virtue of rules as firmly established as those relating to asylum and extradition.

It is therefore the duty of national jurisdictions to extend their protection to the individual who is brought before them in violation of these rules of international law; if in the past they have failed in this duty, it was for reasons extraneous to the proper administration of justice, and very often, unfortunately, for political reasons.

In cases where the individual's rights are not protected at the national level, he must have recourse to an international tribunal; not being subject to the requirements and influences which could be exerted on domestic courts, the latter should, with due impartiality, be able to protect the freedom of the individual.

b) Redress before International Tribunals

Private individuals can evoke, before some of the more advanced international jurisdictions,⁶⁵ the illegal acts of which they claim to be the victim, and it is to be expected that this practice will extend to the entire body of international tribunals. These courts will take over from defective national tribunals; it seems logical that they shall be invoked only after the exhaustion of all domestic remedies by the wronged individual. Their jurisprudence will be a guide for domestic tribunals, and consequently this fundamental right to liberty, which is guaranteed by asylum, will be protected by any jurisdiction before which the individual may appear.

⁶³ See also: *The State (Quinn) v Ryan and others*, Supreme Court of Ireland (1963/118), in this Journal, Volume VI/2, p. 312.

⁶⁴ See in particular M. Travers, *op. cit.*

⁶⁵ American Center Court of Justice (1907-1917); Mixed arbitration tribunals established by the peace treaties of 1919; Mixed arbitration tribunal charged with settling the disputes arising from the problem of Upper Silesia; and particularly bodies created by a number of specialized agencies of the United Nations.

The example of the European Court of Human Rights merits study in this respect. The European Convention on Human Rights affirms the existence for the benefit of the individual of a number of fundamental rights on the international level. It institutes a judicial system of international guarantee for the rights which it recognizes. It is practically the first time that individual citizens have had the possibility of direct access to a permanent international judicial body.⁶⁶

A very large number of cases brought before the European Commission of Human Rights deal with cases involving the right of asylum and expulsion or extradition proceedings. This right is not protected by the Convention and it is indirectly, by invoking article 3, which prohibits inhuman treatment, that the question has been raised. By a decision of October 6, 1962, the Human Rights Commission conceded for the first time that the expulsion of a foreigner to a specific country could constitute inhuman treatment. This liberal position has been reaffirmed on various occasions (cases 1802-63, case 2143).

It may be asked whether the application of article 5 would not lead to a similar result on more satisfactory legal grounds. Article 5 provides that:

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty, save in the following cases and in accordance with a procedure prescribed by law:

...

b) the lawful arrest or detention of a person . . .

(5) Everyone who has been the victim of an arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

From this it seems obvious that an individual abducted outside national territory, i.e. irregularly arrested, could appeal to the European Commission of Human Rights, which could refer the case to the Court, by analogy with what has been decided in the cases cited above, either on the ground of inhuman treatment, or by virtue of the provisions of Article 5 of the European Convention.⁶⁷

⁶⁶ See the *Journal of the International Commission of Jurists*, Spring-Summer 1958, Vol. I, No. 2, pp. 198 et seq., and *Bulletin of the International Commission of Jurists*, No. 24, 1965, pp. 12 et seq., Karel Vasak, *La Convention Européenne des Droits de l'Homme*, Paris, 1964.

⁶⁷ The compulsory jurisdiction of the Court applies to the same states as the competence of the Commission in matters of "individual" appeals. These are Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom; eleven states in all.

The refusal to recognize the right of the individual to have recourse to legal proceedings in respect of a violation of international law, *a fortiori* when the wronged state does not protest, is based on a classic conception of international law which gives rise to a number of objections.

It is becoming increasingly evident that international law is not only the law regulating the relations between states, but is a system of law in which the individual is being accorded an increasing role.

Conclusion

Since the Middle Ages, legal theory and, progressively, jurisprudence, have vigorously denounced violations of the territorial sovereignty of a state when an abduction has been effected in defiance of the rules of international law on asylum and extradition. A principle so widely defended and expounded should have been long since ensured against attack. However, the independence of the states in the eyes of international law at the present stage of its development is such that it is still common practice for even the most advanced states to effect, shamelessly and openly, abductions on the territory of foreign states, or to lend their support to such acts.

It is no less astonishing to read statements such as the one which was made in June 1966, at the time of writing this article:

General Ankrah, head of the National Liberation Council of Ghana, declared yesterday that ex-President Nkrumah would be abducted if necessary, but not executed (sic), and brought back to Ghana to be tried ... "No matter where he may be, we can get him, we will do it ..."⁶⁸

Before such acts, classical international law defends the territorial sovereignty of the state, and sanctions the violations to which it has been subjected, by requiring that reparation and satisfaction be accorded to the wronged state. The present stage in the development of international law recognizes that, in the case of abductions effected outside national territory, the rights of the individual cannot be ignored and he must always have individual means of redress, national or international, to enable him to ensure that his right to liberty, a right guaranteed by asylum, is respected, even if the state which granted him asylum does not take steps to protect him, being in a position of inferiority vis-à-vis the aggressor state or simply because it does not attach sufficient importance to the violation which has been committed of its territory.

⁶⁸ British United Press, in *the Guardian*, June 20, 1966.

THE SUPREME COURT OF JUSTICE OF CHILE

by

OSVALDO ILLANES BENITEZ *

Introduction

The basic structure of our country is that of a State under the Rule of Law. To say this is not, of course, to make a mere assertion. On the contrary, it establishes a concept of far-reaching scope in the legal, social and economic fields. It encompasses all the aspects of the life of man, so that, without hindrance, he can develop all his faculties in a free society.

As soon as Chile became independent in the year 1810, it began to implement principles designed to distinguish the three Powers of the State, according to Montesquieu's formulation. And it gave to any Chilean citizen and to any foreigner residing in its territory the freedoms that are essential to enable him to develop his personality and attend to his material wellbeing.

If Chile had a strong government in the early years of independence, the object was to lead the nation along a new path of order and liberty, which the people had not yet known and to which they were not accustomed.

It is no easy task to guide a nation that has lived under a colonial system towards the Rule of Law. The Chilean national hero, Bernardo O'Higgins, had to strive mightily to teach the people liberty and the legal order which is a part of it; and those who came after him have had a similarly difficult task.

For this is a phenomenon that affects all the peoples that have found themselves in the same situation. The important thing is that there should not be much delay in starting along the new path. Chile was fortunate in this respect. Perhaps it was influenced by the Basque and Castilian populations which are predominant in the country.

The Constitution

A number of eminent men contributed to the establishment of the Chilean legal system. Two of them, Diego Portales and

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Mariano Egana, drew up the Constitution with the assistance of Andrés Bello. The latter also drafted the Civil Code with the assistance of Manuel Mont. Gabriel Ocampo played a decisive role in the formulation of the Commercial Code. The Penal Code was modelled on that of Spain and influenced by a number of theories formulated by Spanish writers. The principal contributors to the Codes of Civil and Penal Procedure were Manuel Egidio Ballesteros, Luis Barriga, Francisco Vargas Fontecilla, José Bernardo Lira and Leopoldo Urrutia.

The Constitution, drawn up in the year 1833, was comparatively advanced for that time. It provided for a State under the Rule of Law in Chile and clearly specified the respective attributions of the public powers. So far as the Judiciary was concerned, although it spoke only of the "Administration of Justice", it was nevertheless a true power of the State. The Constitution was amended in the year 1925 and the term "Administration of Justice" was replaced by "The Judicial Power".

The independence of the courts of justice is clearly proclaimed in article 80 of the Constitution, which states: "The power of judging civil and criminal causes belongs exclusively to the tribunals established by law. Neither the President of the Republic nor Congress can in any case exercise judicial functions, remove pending cases from one court to another, or revive terminated proceedings." In general, the independence of the three Powers is proclaimed by article 4 of this fundamental charter: "No magistracy, or person, or assembly of persons, not even under the pretext of extraordinary circumstances, is empowered to assume any other authority or rights than those that have been expressly conferred upon it by law. Every act in contravention of this article is void." Article 85 of the Constitution lays down the irremovability of the judges, who remain in office during good behaviour, and may only be deprived of their post for a legally determined cause.

The legal system

A special law, the Organic Code of the Courts, determines the organization and jurisdiction of the courts, with the object of ensuring that the administration of justice is both speedy and comprehensive throughout the territory of the Republic; no change in the jurisdiction of the courts or in the number of their members may be made except by virtue of a law (article 81 of the Constitution).

The Organic Code of the Courts states the qualifications required for judges and the number of years that persons appointed to the bench must have practised at the bar. Such appointments are made from lists of three or five persons. The list of three is drawn

up by the Supreme Court in respect of vacancies in the Courts of Appeal and by the Courts of Appeal in respect of vacancies in the various courts of first instance. It must include the senior judge and two other judges, chosen by merit, of the courts inferior to that in which there is a vacancy. For appointment of a judge of the Court of Appeal of Santiago, the list may include one or two judges of provincial Courts of Appeal, or another judge of equal rank with them.

The list of five persons, which is the method used for appointing a judge of the Supreme Court, is drawn up by that same Court. It consists of the two Senior Judges of the Courts of Appeal, and three persons chosen by merit; the latter may include an advocate who does not hold judicial office.

The following qualifications are required for membership of the Supreme Court: (a) Chilean nationality by birth or naturalization; (b) minimum age of 36 years; (c) the candidate must be a qualified advocate, and (d) he must have practised at the bar for 15 years, or must have served as a judge for 8 years in a district court, or for 6 years in a court of a provincial capital, or for 4 years in a court of a town in which there is also a Court of Appeal, or for two years as a judge of a Court of Appeal.

There are at present 13 Supreme Court judges, one of whom is the President, elected by a majority vote.

The system established in Chile for the appointment of judges is mixed – that is to say, the executive and the judiciary both intervene. The President of the Republic designates one of the three or one of the five. Under a reform now under way, any judge who has been included in a three-name or a five-name list three times will automatically be appointed.

The Supreme Court of Justice

Any proposed institution, whether of a legal or any other character, goes through various vicissitudes before finally coming into existence, and Chile's Supreme Court of Justice was no exception. This court began, in the colonial period, as the "Royal Assize" which in those days was a body primarily of a political character. One could apply to it by means of the writs of "second application" and "manifest injustice", corresponding to some extent to an appeal by way of cassation as now heard by the present Court. Following the nation's proclamation of independence in 1810 the first act of the Government was to abolish the "Royal Assize" and replace it by the "Appellate Chamber". Under the Regulations on the Administration of Justice of October 14, 1811, a "Supreme Judicial Tribunal" was created; its jurisdiction comprised "the receipt, hearing and decision of appeals based on "manifest injustice", "second application" and other extraordinary remedies that may

be available against the final decisions of the courts of the realm. The jurisdiction formerly exercised by the "Royal Assize" was thus perpetuated in this manner.

The Tribunal was composed of three professional judges appointed by Congress. They remained in office "until such time as this body is dissolved or subsequent events make a change necessary". The judges were addressed as "your Highness" when sitting as a body or when in court. Otherwise they had no special position. Their reward was "the gratitude of the country earned by their worthy administration of justice". Clearly, this state of affairs dated back to colonial times.

Under the 1823 Constitution, this tribunal was re-named the "Supreme Court of Justice". It was composed of four judges, one President and the Procurator-General who were required to have the same qualifications as a Minister of State, and in addition to have practised at the bar for a period of 10 years.

This Court acted as a court of appeal in cases heard at first instance by the Courts of Appeal. Under the Constitution, the Supreme Court exercised directive, disciplinary and economic supervision over the courts and tribunals of the nation. Each judge of the Court was also a conciliator in the capital; in other words, it was provided that before a case could be brought before the courts of first instance, it should be heard by the conciliators. This formality has since been abolished because it delayed the course of justice.

The 1828 Constitution, which succeeded that of 1823, maintained the organization of the Supreme Court in its general outline. Article 93 stated that the judicial power was vested in the Supreme Court, Courts of Appeal and courts of first instance. The Supreme Court consisted of five judges and one procurator; the number of judges could be increased by Congress. The qualifications required of a judge were Chilean nationality by birth or naturalization, not less than 30 years of age and six years' practice at the bar. Under this Constitution, the Supreme Court had wider jurisdiction and was seized by means of the application called the "prayer" (*de suplicas*). Certain guarantees for citizens were also established through this Court in relation to acts of judges, courts and the authorities. Some human rights were already recognised by law at that time.

It should be mentioned that in the Fundamental Charter of 1828 the justices of the peace were conceived of as arbitrators or conciliators – a need that is still felt today in many parts of the country.

The 1833 Constitution did not substantially alter the organic structure of the Supreme Court. On the contrary, it provided in one of its transitional articles that, pending the enactment of the Law on the Organization and Jurisdiction of the Courts and the Administration of Justice, the existing system should remain in force.

It laid down the fundamental rule, already embodied in the 1823 and 1828 Constitutions, that the Supreme Court "exercises directive, disciplinary and economic supervision over all the tribunals of the Nation, in accordance with the law determining its organization and jurisdiction". The anticipated law was enacted in 1875 and today, as already mentioned, bears the title "Organic Code of the Courts". During the period from 1833 to 1875 further laws, decrees, edicts and various provisions of a procedural organizational character were issued, including provisions of substantive law, as preparatory elements for future codification.

A Decree-Law dated March 1837 was devoted to the application for annulment, which today corresponds to the appeal by way of cassation on procedural grounds. The object of such an application was to set aside a decision by reason of procedural defects, on grounds specified in the law. It was based on the provisions existing at the time of the Royal Assize. The Courts of Appeal were empowered to hear appeals against a decision of a court of first instance, and the Supreme Court to hear appeals against judgments of the Courts of Appeal.

Appointments were made under the Law of December 30, 1842. The Council of State¹ presented the lists of three to the President of the Republic. In establishing the lists, the Council of State took as a basis two annual reports on the eligibility of judicial officers.

The Supreme Court was composed of seven members at the time when the Law of 1875 was enacted. The President of the Court was the senior member and held that function for one year. The composition of the Court remained unchanged until the Code of Civil Procedure was enacted, whereupon the number of judges was raised to 10. The Court's work had increased with the introduction of appeals by way of cassation on both substantive and procedural grounds. Law No. 3390 made a further change in the membership of the Court, raising it to 13, one of whom was to be the President of the Court, appointed by the President of the Republic from a list of three drawn up by the whole Tribunal. He held office for 3 years and could be re-elected. Decree Law No. 27 of 1924 reduced the membership to 11. In order to have jurisdiction to hear appeals by way of cassation on substantive grounds or in applications for a re-trial, it provided that the full Court of a quorum of not less than 7 of its members must sit.

Law No. 5980 of 1937, which is the most recent legal provision on this subject, raised the number of judges to 13, and provided for operational purposes that the Court could be divided into two Chambers each with 7 members; in order to carry out their functions,

¹ The supreme administrative tribunal; cf. the French *Conseil d'Etat*.

the Chambers were supplemented by advocates appointed to sit for the hearing of certain actions. Because of the number and variety of his responsibilities, the President does not as a general rule sit in either of the Chambers except in plenary sessions.

Jurisdiction of the Supreme Court

The jurisdiction of the present Supreme Court is varied. Its most important functions include its powers as a court of cassation and its jurisdiction over the constitutionality of laws enacted by the Legislature. As a court of cassation it ensures uniformity of jurisprudence on both procedural and substantive questions, through appeals by way of cassation on procedural and substantive grounds which today are dealt with together and decided in a single judgment. It is clear that its decisions are not binding on the lower courts, as is the case in France when a decision is reversed twice.

Where an appeal by way of cassation on procedural grounds is allowed, for any of the reasons specified by law, and the result of the case is thereby affected, the judgment is quashed and the case is referred for decision to another court of equal rank with the court appealed from that has not declined jurisdiction on the grounds of its incompetence. The court may also set aside a decision of its own motion, without any appeal having been entered, on the same grounds as are specified in the law of procedure, where the Court deems necessary in order to ensure that justice is done.

Where appeal by way of cassation on substantive grounds, based on a misapplication of substantive law, is allowed, and the decision appealed against is thereby affected, the decision is quashed and the Court of Cassation substitutes its own decision, in which it settles the matter in issue through a correct application of the law. Such an appeal may only be against a final judgment of a court of second instance involving an amount of not less than 1000 escudos, the value of a case being determined by the judge of first instance before he delivers judgment. In the Chilean judicial system there are only two instances apart from the Supreme Court – the first and the second, consisting respectively of a one-man and a collegiate bench. In this way, the highest court of the nation ensures uniformity in the interpretation and application of the law, in regard to both procedure and substantive law.

As regards the application on the ground of unconstitutionality (*inaplicabilidad* in the Chilean Constitution) its purpose is – as it implies – to declare inapplicable or unconstitutional a legal provision that is inconsistent with a provision of the Constitution. But such an application may be made only in individual cases which have been brought before a court of the Republic, or which are on appeal to the Supreme Court itself in matters falling within its jurisdiction.

An application on grounds of unconstitutionality may be made

at any stage of a case without suspending the proceedings. When such an application is made to the Supreme Court notice of the application is given to the parties concerned and, regardless whether or not they make any response, the Procurator of the Supreme Court is heard.

It is consequently within the jurisdiction of the Supreme Court to defend the Constitution of the State if the Legislature, in the exercise of its law-making functions, exceeds its powers. It has been proposed, in connection with proposed constitutional reforms, that the application on grounds of unconstitutionality should be available on an issue of principle and not only in individual cases before the courts. This would spare the parties affected by the breach of a constitutional provision from being obliged to invoke it in each case being fought.

Under the Constitution, it is also within the jurisdiction of the Supreme Court to decide those conflicts of jurisdiction arising between political or administrative authorities and the courts of justice that do not fall to be decided by the Senate (article 86, para. 3).

The Organic Code of the Courts also entrusts certain other matters to the Supreme Court. In addition to the application on grounds of unconstitutionality, already mentioned above, which is heard by the full bench of the Supreme Court with at least 9 members sitting, it hears appeals from decisions relating to the indictment of Senators or Deputies. A member of parliament cannot be indicted without prior application to the appropriate Court of Appeal for a finding that grounds for prosecution exist. The Court of Appeal, by means of a duly motivated decision, determines whether or not there are grounds for prosecuting a Deputy or Senator; and any appeal from such decision is again heard by the full bench of the Supreme Court. The same procedure is followed in proceedings for removal from office of judges of the inferior or superior courts, which are heard in the first instance respectively by the Court of Appeal or by the President of the Supreme Court.

The full bench of the Supreme Court also has to decide on the administrative, disciplinary and economic issues assigned to it by law, and to advise the President of the Republic when its opinion is sought on any point, relating to the administration of justice, of which it does not otherwise have cognizance; it likewise decides other matters expressly referred to it by special legislation. All such matters have to be decided by the full bench.

Composition of the Supreme Court

At the present time the Supreme Court is divided into Chambers, each of 7 members, for the purpose of dealing with certain specified matters, in addition to appeals by way of cassation on

procedural or substantive grounds from decisions of the Courts of Appeal or from arbitration appeal tribunals. These Chambers also deal with questions relating to the admissibility or inadmissibility of appeals by way of cassation and of applications for the review of orders for the execution of judgments. They also act as a court of appeal in criminal prosecutions or civil proceedings brought against one or more judges or procurators of the Courts of Appeal with the object of establishing their liability for acts committed in the execution of their duty, and in cases relating to prize, extradition and other matters that have to be settled in accordance with international law.

The above-mentioned Chambers also have jurisdiction to hear complaints against members of the Courts of Appeal. Such complaints are designed to rectify any abuse or error of the judges in reaching a decision, which, by reason of the lack of malicious intent, does not amount to a punishable offence. In other words, such complaints are designed solely to ensure the proper conduct of judges. If the latter have exposed themselves to action it must be taken by the full court.

Each of the Chambers likewise has jurisdiction to hear appeals against decisions granting or refusing a writ of *amparo* in respect of persons who have been arrested or imprisoned without legal cause or justification. This petition in the nature of *habeas corpus* is provided for in the Constitution and governed by the Code of Penal Procedure. Today the Supreme Court is divided into two Chambers each of which deals for a month at a time with civil or criminal appeals by way of cassation, exchanging functions at the end of each month; the Chamber that deals with criminal matters also decides the interlocutory issues that are determined on the basis of the report of the examining judge alone.²

A third Chamber can also be established, if the President of the Court so decides, depending on the number of cases pending.

The Electoral Validation Tribunal

In addition to the specific tasks already mentioned, the Supreme Court plays a decisive role in the Electoral Validation Tribunal whose fundamental responsibility is to examine the elections held for President of the Republic, Senators and Deputies. In other words, the Validation Tribunal grants the appropriate certificates to enable the representatives of these two Powers of the State to assume office. The Validation Tribunal is composed of two Ministers of the Supreme Court, one member of the Court of Appeal of Santiago, the second most important court in the country, and two former Presidents or Vice Presidents of the Senate and the

² One judge of the Chamber is appointed examining judge to examine and report on interlocutory matters.

Chamber of Deputies respectively. The five members of the Validation Tribunal are chosen by lot from among the members of each of these institutions. The President is also chosen by lot from among the five members.

The judicial power consequently has a majority in the composition of the Electoral Validation Tribunal as emphasized by the fact that it includes two members of the Supreme Court, pronounces its decisions according to law and acts as a jury in the determination of facts.

The amendments made to the 1833 Constitution in 1925 with respect to the judicial power consisted in the introduction of the provision empowering the Supreme Court to declare any law unconstitutional, in the way already explained, and in the creation of the Electoral Validation Tribunal just mentioned.

Conclusion

Through the numerous remedies provided for in the procedural laws and in the Organic Code of the Courts, the Supreme Court of Justice has control over the whole juridical system of the nation, and acts as a sort of watchman to ensure that it carries out the lofty mission entrusted to it in a representative and republican democracy.

Since the early days of Chile's independence, the existence of the State under the Rule of Law has been based on the tradition of the free exercise of the judicial power without interference from any direction; and the Supreme Court has been able, from day to day, to keep this fundamental principle unscathed, by interpreting and applying the law without any other consideration than that of dispensing justice. Politics have never succeeded in interfering in judicial decisions. History is full of examples of cases in which the highest judges have shown the integrity which enhances their personality and their independence of judgment.

In Chile there is a general consciousness of the value of the law, as shown by the fact that the entire people holds the judiciary in virtually centennial respect and submits without effort to its dictates.

To make this awareness still more vivid, there is the over-riding authority given to the Supreme Court by article 86 of the national Constitution, one of the pillars of the people's faith in the judicial function and which has been in the successive texts of the Constitution since the year 1823: "The Supreme Court exercises directive, disciplinary and economic supervision over all the tribunals of the Nation in accordance with the law determining its organisation and attributes."

No court of the Republic can escape its attentive and ever-alert vigilance.

DIGEST OF JUDICIAL DECISIONS

by

SUPERIOR COURTS OF DIFFERENT COUNTRIES

on

ASPECTS OF THE RULE OF LAW

Compiled and Annotated

by

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Police Tribunal of Cannes, France**EQUAL RIGHTS OF THOSE IN SAME TRADE****MINISTERE PUBLIC v. ELIANE LANDRIN**

Mayor empowered to make orders prohibiting exercise of migratory occupations or trades in certain parts of the city during certain periods provided such orders are made in the interests of peace, order and the smooth movement of traffic - he cannot however impose prohibitions of an absolute character without limitation on place and time - when the prohibition on the exercise of a migratory trade is properly imposed, mayor cannot, in derogation of the prohibition, give to an individual special authorization to exercise his trade in prohibited place or during prohibited time - such special authorization violates principle of equality of all citizens before the law and is consequently illegal - it also renders the general order invalid.

Delivered on January 24, 1966.

The accused, Eliane Landrin, was charged with having on May 15, May 22 and June 22, 1965 exercised a migratory trade or profession, to wit, that of street photography, in a prohibited area of the city in violation of an order made by the Mayor of Cannes. The evidence showed that Mlle. Landrin took photographs of passers-by for a fee in a prohibited area, but there was no evidence that she was a nuisance to the public or obstructed them in any way.

The order of prohibition had no particular conditions attached to it and did not oblige persons exercising migratory professions or trades to obtain preliminary authorization. The accused's advocate brought to the notice of the Tribunal that another street photographer, M. Teboull, had been granted an individual authorization by the Mayor of Cannes to exercise his profession in the prohibited area notwithstanding the order of prohibition under which Mlle. Landrin was charged. The said M. Teboull was prosecuted for having violated the municipal order in question but was discharged on the ground that he had been authorized by the Mayor of Cannes to exercise his profession on the beach and promenade of the area known as 'la Croisette'.

Inasmuch as persons exercising the same trade had been exempted from the operations of the order by special authorization and thereby advantages were conferred on them which were denied to others exercising the same profession for no good reason, the Police Tribunal of Cannes declared the mayoral order invalid and of no force or avail in law. The Tribunal held that such special authorization in derogation of the general order violated the fundamental principle of the equality of all citizens before the law.

Editor's Note:

This judgment also lays down that a mayor cannot impose prohibitions of an absolute character without limitation on time and place on persons exercising

migratory occupations or trades following a judgment of the Conseil d'État delivered on June 22nd 1951. See in re Daudignac. Rec. 362 (D. 1951, 589 Concl. Crazier, note 1. C.)

Supreme Court of the United States of America

EQUALITY OF OPPORTUNITY IN EDUCATION

ROGERS ET AL. v. PAUL ET AL.

(382 U.S. 198)

Equality of educational opportunity – assignment of petitioners to Negro high school on basis of race is constitutionally prohibited – pending finalization of plans for the immediate desegregation of high schools, petitioners allowed immediate transfer to white high school with more extensive curriculum from which they were excluded because of race.

Per curiam

Decided on December 6, 1965.

In this case, filed several years ago, the plaintiffs, two Negro students, prayed for the desegregation of pupils and faculties in the Fort Smith, Arkansas, high schools.

The courts below refused to order respondents to transfer petitioners or to order immediate desegregation of the high schools and it was also held that petitioners had no standing to challenge racial faculty allocations. Since one of the students had graduated during the pendency of the suit and the other had reached the 12th grade, two other Negro students, one in the 10th grade and the other in the 11th grade, moved the Federal Supreme Court to be added as plaintiffs.

The Court granted the motion to add parties and held:

1. The assignment of the petitioners to a Negro high school on the basis of race is constitutionally prohibited, because the petitioners are prevented from taking courses offered only at another school limited to white students. Pending immediate desegregation of the high schools according to a general plan, petitioners and those similarly situated shall be allowed immediate transfer to the high school from which they were excluded because of race and which has the more extensive curriculum.
 2. Under two theories, the first of which plainly applies, students not yet in desegregated grades would have standing to challenge racial faculty allocation. Such allocation (a) of itself denies them equality of educational opportunity, and (b) renders inadequate an otherwise constitutional pupil desegregation plan soon to be applied to their grades.
-

High Court of West Pakistan**FREEDOM OF ASSEMBLY AND ASSOCIATION****NAWABZADA NASRULLAH KHAN v. THE DISTRICT MAGISTRATE,
LAHORE AND THE GOVERNMENT OF WEST PAKISTAN**

(Pakistan Legal Decisions, 1965 W. P. Lahore p. 642)

Constitution of Pakistan guarantees fundamental rights of assembly and association – Section 8 of the West Pakistan Maintenance of Public Order Ordinance, insofar as it purports to empower a magistrate to direct police officers to enter a place where a meeting is being held and to record proceedings, is ultra vires the Constitution and therefore void – such intrusion of police officers is a material interference with the right of the citizen to assemble and discuss things freely.

Before The Full Bench of the High Court

Delivered on July 18, 1965.

On January 19, 1964 an association known as "The West Pakistan National Democratic Front" was formed with the primary object of achieving the democratization of the Constitution. The Front set up a Council which met on February 8 at Fane Road, Lahore and adjourned its proceedings to the following day when it met in room No. 1, "Pipals", Lahore, the residence of a member of the Front. When the meeting was proceeding, two inspectors of police appeared and presented an order made by the District Magistrate, Lahore, authorizing them to enter the place of the meeting and record its proceedings.

The order purported to have been made in the exercise of powers conferred on the District Magistrate by Section 8 of the West Pakistan Maintenance of Public Order Ordinance, 1960, which reads as follows:

8(1) The District Magistrate may, by order in writing, depute one or more police officers not below the rank of head constables, or other persons to attend any public meeting for the purpose of causing a report to be made of the proceedings.

(2) Any such order shall operate as a direction to the person responsible for the convening or conduct of the meeting to admit free of charge the persons so deputed.

For the purposes of this Section a public meeting has been defined as: Any meeting which is open to the public or to any class or portion of the public, and a meeting may be a public meeting notwithstanding that it is held in a private place and notwithstanding that admission thereto is restricted by a ticket or otherwise.

The petitioner objected to the attendance of the police officers on the ground that no public meeting was being held and that the meeting was

strictly private as only members of the central executive of the Front could participate in it. The police officers thereupon voluntarily withdrew themselves from the room.

A case was subsequently filed against those who participated at the meeting for their refusal to obey the order of the District Magistrate. A writ petition was then filed by the petitioner challenging the validity of the order of the District Magistrate on the grounds, *inter alia*, that Section 8 of the West Pakistan Maintenance of Public Order Ordinance under which the order was made was *ultra vires* as it violated the fundamental rights of assembly and association guaranteed by the Constitution of Pakistan. It was also contended that the section infringed the provisions of the Constitution ensuring equal protection of the law to all citizens of the State.

The Full Bench of the High Court gave judgment for the petitioner holding that Section 8 of the West Pakistan Maintenance of Public Order Ordinance was *ultra vires* the fundamental rights guaranteed by the Constitution. The Full Bench also held that, inasmuch as admission to the meeting was restricted, the meeting in question was a private one.

In the course of a lengthy judgment the Full Bench made the following observations: "Fundamental right No. 6 ensures that every citizen shall have the right to assemble peacefully and without arms, subject to any reasonable restrictions imposed by law in the interest of public order. In a way this right is cognate to the right of movement by which, subject to any reasonable restriction imposed by law in the public interest, every citizen has the right to move freely and go anywhere he likes and also to the right of freedom of speech and expression inherent in the citizens of Pakistan, so that people can go to and assemble at a place and speak freely subject to the reasonable restrictions imposed by law in the interest of the security of Pakistan, public order etc. In *U.S. vs. Cruikshank*, (1876) 92 U.S. 542, it was remarked that 'the very idea of government republican in form implies a right on the part of its citizens to meet peaceably for consultation in respect of public affairs and to petition for redress of grievances.' But absolute and unrestricted individual rights do not exist in any modern state and there is no such thing as absolute and uncontrolled liberty. The collective interests of society, peace and security of the State and the maintenance of public order are of vital importance in any organized society. Fundamental rights have no real meaning if the State itself is in danger and disorganized. If the State is in danger the liberties of the subjects are themselves in danger. It is for these reasons of State that an equilibrium has to be maintained between the two contending interests at stake: one, the individual liberties and the positive rights of the citizen which are declared by the Constitution to be fundamental, and the other, the need to impose social control and reasonable limitations on the enjoyment of those rights in the interest of the collective good of society. For example, in this case the freedom of assembly is guaranteed by the Constitution to the petitioner.

"Like every other citizen he has the right to assemble peaceably and without arms. But at the same time this right is not without its limitations imposed by the Constitution. The right is subordinate 'to any reasonable restriction imposed by law in the interest of public order'. It is here that this Court is very often called upon to hold the balance between the contending interests as its sacred duty and to adjudicate upon the reasonableness of the

restrictions imposed by law which entrenched upon the right, and, in case the Court finds that the Legislature in promulgating the law has transgressed the reasonable limits envisaged by the Constitution, it will not hesitate to strike it down as *ultra vires*.

"Section 8 of the Ordinance, reproduced *in extenso* in the earlier part of this judgment, is couched in the widest possible terms. It authorizes the District Magistrate to depute one or more police officers, not below the rank of head constable, or any other person to attend any public meeting for the purpose of causing a report to be made of the proceedings. His powers in this behalf are without any restrictions or control imposed by the law. However, it was argued that the District Magistrate under Section 8 of the Ordinance has no power to interfere in any of the proceedings of the public meeting, his nominees being expected to merely sit and take notes of the proceedings at the meeting and do nothing more.

"This, it is contended, does not in any manner go to curtail the freedom of the people to assemble according as they may like and, therefore, Section 8 does not constitute an infringement of any of the fundamental rights. This argument is devoid of any force. It does amount to a material interference with the enjoyment of the right of the citizen to assemble and discuss things freely if an outsider, much less a police officer, is deputed to keep a record of the proceedings of the meeting. It is open to the District Magistrate, under Section 8 of the Ordinance, to depute any person to attend the meeting and for that matter there is nothing in this law to prevent him even deputing political rivals to attend the meetings of their adversaries. Indeed, the very fact the proceedings of a meeting are being watched under the orders of the District Magistrate is bound to deter people from assembling and discussing things freely; many of them may not even like to attend such a meeting. The powers conferred on the District Magistrate in this behalf are likely to act as a deterrent to the public to assemble together and may even stifle the meeting altogether. In this manner they materially infringe upon the fundamental rights of assembly and association protected by the Constitution."

Constitutional Court of Hessen in the Federal Republic of Germany

FREEDOM OF CONSCIENCE

HOFFMANN v. HESSEN

(P. St. 388)

(Neue Juristische Wochenschrift, 1966 No.1/2 p. 31)

Freedom of belief and conscience are guaranteed by the Constitution of Hessen – the Constitution also provides that no one may be compelled to participate in a religious activity – freedom of conscience and belief includes freedom to express one's beliefs as well as freedom to be silent in regard to them.

Decided on October 27, 1965.

The applicant, an infant suing by his parents, was a pupil at a primary school run by the respondent, one of the States of the Federal Republic of Germany.

It was the practice in the applicant's school for the day's work to begin with prayer. Non-Christians had the choice of remaining in the classroom without joining in prayer or of entering the classroom after prayers were over.

The applicant, who came of a family without religious beliefs, alleged that this practice infringed his rights under Article 9 of the Constitution of Hessen, which protects freedom of belief and conscience and Article 48 (II) which provides that no one may be compelled to participate in a religious activity.

It was held:

1. That freedom of conscience and belief which, as protected by Article 9, includes freedom to express one's beliefs, also includes freedom to be silent as regards them (negative freedom of expression).
2. The practice of holding school prayers in effect compelled a non-Christian, if he wished to be true to his beliefs, to proclaim them by remaining outside the classroom, for mere silent attendance was a form of participation which infringed the applicant's negative freedom of expression.

The Court, *inter alia*, made the following observations on freedom of conscience and belief: "Freedom of belief, a fundamental right that by its very nature exists before the State and is above the positive law, is one of the oldest fundamental rights. It belongs to those human rights that have their roots in the natural law and are therefore not created by the positive law but merely reproduced by it. Freedom of belief can also consist in the lack of any belief or in an anti-religious belief. It therefore covers not only religions but also philosophies of life, including a-religious and anti-religious philosophies such as atheism, materialism, monism, scepticism and Pantheism."

The fundamental right to freedom of belief only acquires substance through the right to manifest one's belief, i.e. through the freedom of religious and philosophical expression, the freedom to say what one believes or does not believe, a freedom that is implicit in Article 9 of the Constitution of Hessen as emanating from freedom of belief and conscience.

The right to be silent is an absolute one admitting of no exceptions. Since it does not affect the rights of others, it is not and cannot be subjected to limitations. The State is as a matter of principle forbidden to interfere in the sphere of religious freedom. Any attempt to induce a declaration of religious or philosophical belief by other than purely spiritual means is absolutely and unreservedly forbidden. Any use of compulsion with the object of inducing such a declaration is illegal. The guaranteed freedom to be silent can be exercised not only against the State but also against other persons.

The holding of classroom prayers in practice puts a strong degree of pressure upon a child to attend, in that his failure to do so marks him out as different and lays him open to the risk of being discriminated against.

The very essence of the applicant's right to be silent as to his beliefs is infringed if he has to suffer compulsion.

**The Judicial Committee of the Privy Council
(On appeal from the Court of Appeal of Malta)**

FREEDOM TO PROPAGATE AND CIRCULATE IDEAS

OLIVIER AND ANOTHER v. BUTTIGIEG

Section 14 (1) of the Malta (Constitution) Order in Council, 1961, guarantees the freedom of expression, the freedom to hold opinions, and the freedom to impart ideas without interference – freedom to impart ideas includes freedom to propagate and circulate those ideas.

*Before Lord Morris of Borth-y-Gest, Lord Pearce and Lord Pearson
Decided on April 19, 1966.*

Section 14 (1) of the Malta (Constitution) Order in Council, 1961, runs thus:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference and freedom from interference with his correspondence.

The "Voice of Malta", of which the respondent was the editor, was a paper published by the Malta Labour Party. On May 26, 1961, the Archbishop of Malta, in a circular addressed to the clergy of Malta, condemned the "Voice of Malta" and indicated that no one, without committing a mortal sin, could print, write, sell, buy, distribute or read the newspaper.

Some time after, the Minister of Health caused a circular to be issued addressed to all employees of the Medical and Health Department, which included the following paragraph: "The entry into various hospitals and branches of the department of newspapers which are condemned by the church authorities, and the wearing of badges of political parties are strictly forbidden."

The respondent thereupon filed action in the First Hall Civil Court, Malta, against the appellants, who were the Minister of Health and the Chief Government Medical Officer, praying for a declaration that the circular in question had contravened his constitutional rights. The declaration having been granted, the appellant appealed against the judgment and order to the Court of Appeal of Malta.

The appeal having been dismissed on January 10, 1964, they appealed against the dismissal to the Judicial Committee of the Privy Council.

Lord Morris of Borth-y-Gest, delivering the judgment of the Privy Council, in examining the question whether the respondent was hindered in the enjoyment of his freedom to impart ideas and information without interference, said that the steps taken by the editor of a newspaper to impart ideas and information included the expression of ideas and information followed by printing, publication and circulation.

Though the "Voice of Malta" had been in disfavour with the church authorities, there was no suggestion that its publication offended against the provision of any law. Its publication was therefore permissible and legitimate.

Lord Morris of Borth-y-Gest also observed: "The public was free to buy it. Yet the employees of the Medical and Health Department were strictly enjoined that they must not have a copy of it in their possession while on government premises. In their leisure time while on government premises they could read other newspapers but not the condemned ones."

"If it seemed surprising that a Government Minister should direct State employees that they must not have an Opposition newspaper in their possession while on government premises, it was fair to remember that the reason which inspired the prohibition was not that the prohibited newspapers supported the Opposition party, but rather that they had been condemned by the church authorities. That condemnation, however, as the church circular showed, was in part attributed to the political complexion of the newspapers."

The Judicial Committee of the Privy Council held that freedom of expression included the freedom to impart and circulate ideas and information "without interference". It took the view that the strict prohibition imposed by the ministerial circular amounted to a hindrance of the respondent in the enjoyment of that freedom, for, though the respondent was not prevented from imparting ideas and information, the inevitable consequence of what was done was that he was "hindered" and there was therefore "interference" with his freedom. Indeed, the Privy Council found it difficult to avoid the conclusion that the very purpose and intention of the prohibition was to cause hindrance.

Supreme Court of the United States

RIGHT TO EQUAL PROTECTION OF THE LAW

EVANS ET AL. v. NEWTON ET AL.
(382 U.S. 296)

Land left to city in trust as park for white people – a park is a public place – therefore even if private individuals function as trustees they become agencies or instrumentalities of the State and subject to the equal protection requirements of the Fourteenth Amendment.

The majority judgment of the Court was delivered by Mr. Justice Douglas. Decided on January 17, 1966.

Some land was willed in trust to the Mayor and City Council of Macon, Georgia, as a park for white people, to be controlled by a white board of trustees. The City Council ultimately desegregated the park, whereupon the individual trustees brought this suit in a State Court in Georgia praying for the city's removal as trustee and the appointment of private trustees to enforce the racial limitations of the will. The city, which had alleged that it could not legally enforce segregation, asked to resign as trustee after the intervention of Negro citizens who claimed that the racial limitations violated

the federal law. The Georgia Court accepted the city's resignation as trustee and appointed three new trustees. In an appeal by the Negro intervenors the Georgia Supreme Court held that the testator had a right to leave his property to a limited class and that charitable trusts are subject to the supervision of an equity court, which could appoint new trustees to avoid failure of the trust.

The Negro intervenors thereupon appealed to the Federal Supreme Court which held that:

1. Where private individuals or groups exercise powers or carry on functions governmental in nature, they become agencies or instrumentalities of the State and subject to the Fourteenth Amendment.
2. Where the tradition of municipal control and maintenance had been perpetuated for many years, the mere substitution of individual trustees cannot transfer the park from the public to the private sector and thereby divest it of its public character.
3. The services rendered by a park are municipal in nature and, under the circumstances of this case, the park is subject to the equal protection requirements of the Fourteenth Amendment.

Federal Court of Malaysia

RIGHT TO EQUAL PROTECTION OF THE LAW

KHAW KAI-BOH v. STRAITS ECHO PRESS AND ANOTHER

(K.L. - Civil Suit No. 1430 of 1965)

Fundamental and civil rights - right of every person to equal protection of the law - persons in all walks of life may confidently expect equal justice from an independent Judiciary obliged to maintain the Rule of Law - responsibilities of a free press in a democratic society.

Before Ong Hock Thye F.J.
Decided on February 9, 1966.

The defendants in this case published a statement in their newspaper which was alleged to be libellous of the plaintiff. The next day they published an apology and, beyond the necessary formal step of entering appearance, they took no further action to justify or defend themselves. An order was then made for the discontinuance of the action in the course of which the Court made the following observations:

“The defendants published an apology the day after the statement complained of appeared in their paper, and, beyond the necessary formal step of entering appearance to the writ, the defendants have taken no further step in attempting to justify or defend what is indefensible. A free press in a democratic society has certain responsibilities. The conduct of the defendants

plainly shows their awareness of such responsibilities. Today's proceedings are the culmination of an *amende honorable* and I must give due credit to the defendants for doing what is just and proper.

"This case points a moral - that persons in all walks of life may confidently expect equal justice from an independent Judiciary, pledged to maintain the Rule of Law. Every person in the land, from the humblest to the most exalted, has a right to expect the same protection by the courts of his fundamental and civil rights. He is entitled to no less, he can claim no more. The plaintiff is a Cabinet Minister and he has shown his faith in the Judiciary by seeking redress for a wrong through the ordinary process of a court of law. I now make an order for discontinuance of this action."

Supreme Court of the United States of America

RIGHT TO EQUAL PROTECTION OF THE LAW

ROGERS ET AL. v. PAUL ET AL.

(See p. 283 above)

Supreme Court of the United States of America

RIGHT TO POLITICAL AND ASSOCIATIONAL PRIVACY

DeGREGORY v. ATTORNEY-GENERAL OF NEW HAMPSHIRE

(383 U.S. p. 825)

The First Amendment protects the right to political and associational privacy - that privacy cannot be breached in the absence of a compelling state interest - unconstitutional to compel disclosure of a person's political and associational past in an investigation of historical rather than of current interest.

Opinion of the Court by Mr. Justice Douglas, announced by Mr. Justice Brennan.

Decided on April 4, 1966.

The respondent, who was the Attorney-General of New Hampshire, made an investigation under a statute which authorized him to investigate whenever he had reasonable information relating to "subversive" activities designed to overthrow the constitutional form of the Government of the State of New Hampshire. The appellant, who was questioned by the respondent, stated in answer to questions relating to the period since 1957 that he did not indulge in subversive activities and had no knowledge of current subversion. Without asserting the privilege against self-incrimination, he refused to answer questions about earlier periods which the respondent asked him on the basis

of a 1955 report connecting him with the communist party until up to 10 years before the investigation. The Trial Court found the appellant guilty of contempt in that he refused to answer these questions and the State Supreme Court confirmed the conviction. He then appealed to the Supreme Court of the United States. The Supreme Court held that the staleness of the basis for the investigations and the subject-matter, which was of historical rather than of current interest, made indefensible the compelled disclosure of the appellant's political and associational past. The First Amendment protected the right to political and associational privacy which could not be breached except for reasons of compelling State interest.

It was further held that there was no evidence of any communist movement in New Hampshire or of any danger of sedition in the State and that there was thus no "nexus" between the appellant and subversive activities in the State.

Supreme Court of the Philippines

RIGHTS OF PUBLIC SERVANTS

HERNANDEZ v. VILLEGAS

(G.R. No. L-17287)

The Constitution of the Philippines provides that no officer or employee in the Civil Service shall be removed or suspended except for cause – this provision admits of no exception.

Decided on June 30, 1965.

Villegas, a lawyer and civil service eligible, was appointed Director for Security of the Bureau of Customs in November, 1955. In 1956, he was sent to the U.S.A. to study enforcement techniques and customs practices. On his return in June 1957, he was temporarily detailed to the Arrastre Service and in his stead Keefe was designated Director for Security. While in his temporary post in the Arrastre Service, he continued receiving his former salary. On January 1958, Secretary Hernandez proposed to the President his permanent appointment as Arrastre Superintendent, stating that the same involved a change of designation and status from Director for Security which was confidential in nature to Arrastre Superintendent, a classified position. Keefe's appointment as Director of Security was likewise proposed. On January 14, 1958 Secretary Hernandez was advised that his proposals were approved. It appeared, however, that Villegas did not know of the same until February 28. On March 5, 1958 he served notice on Commissioner Caparas that he was resuming the duties and functions of his former office and also wrote to the Auditor General, Secretary Hernandez, Commissioner Caparas, the Budget Commissioner and the Civil Service Commissioner asking them to disapprove the appointment of Keefe. When all these failed, he brought an action for *quo warranto*. Judgment was given in his favour and

he was also held entitled to collect back pay. This decision was subsequently affirmed by the Court of Appeals. Secretary Hernandez then appealed to the Supreme Court of the Philippines against the decision of the Court of Appeals.

The Supreme Court held, affirming the decision of the Court of Appeals, that there were no circumstances to show that the confidence reposed in Villegas had been lost, and that he was entitled to continue in his confidential office as Director for Security as long as the confidence in him endured. There was no cause therefore for his transfer to another position and he was entitled to resume the duties and functions of his former office and to collect back pay. The Court also observed that the constitutional provision that "no officer or employee in the Civil Service shall be removed or suspended except for cause" recognized no exception.

Supreme Court of Ireland

RIGHT OF RECOURSE TO THE COURTS

MACAULEY v. THE MINISTER FOR POSTS AND TELEGRAPHS

(1964 No. 400P)

The Irish Constitution guarantees personal rights of citizens - these rights extend to all personal rights which flow from the Christian and democratic nature of the State - they include the right of recourse to the Courts which cannot be fettered - The Ministers and Secretaries Act, 1924, is therefore repugnant to the Constitution insofar as it requires the fiat of the Attorney-General to be obtained before proceedings in Court can be instituted against a Minister of State.

Before Kenny J.

Delivered on February 14, 1966.

Article 40, Section 3 of the Irish Constitution reads as follows:

3(1) The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

3(2) The State shall, in particular by its laws, protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

It was common ground that this guarantee applied to all laws passed by the Oireachtas (Irish Parliament) since the foundation of the State in 1922.

Section 2, sub-section 1 of the Ministers and Secretaries Act, 1924 provided that a Minister or a Head of a Department of State "may sue and (subject to the fiat of the Attorney-General having been in each case first granted) be sued under his style or name aforesaid."

This was a case filed by the plaintiff, Macauley, against the Minister of Posts and Telegraphs for a judicial declaration that the Minister was under an obligation to provide him with a proper, reasonably efficient and effective telephone service in terms of the agreement for telephone service which he had signed. The respondent argued that the action was not maintainable inasmuch as the plaintiff had failed to obtain the fiat of the Attorney-General as required by Section 2, sub-section 1 of the Ministers and Secretaries Act.

It was argued for the petitioner that the requirement of a fiat for an action against a Minister of State was a denial of or an unnecessary interference with the right of the citizen to have recourse to the Courts to vindicate his rights. Stress was laid on the Preamble to the Irish Constitution by which the People of Ireland stated that they sought "to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured."

The Court in its judgment made the following observations in regard to the fiat of the Attorney-General: "I have already said that the Attorney-General is free to grant or withhold his fiat for proceedings against a Minister of State for any reason and, if he decides to withhold it, no proceedings to review his decision can successfully be brought in the Courts. It is thus possible that the Attorney-General could refuse his fiat for a claim which would succeed. The main feature of the fiat is that proceedings against a Minister of State cannot be brought unless it is granted: it is not a power to the Attorney-General to apply to the Courts to have an action against a Minister of State cannot be brought unless it is granted; it is not a power of the Attorney-General to give or withhold a right to have recourse to the Courts to assert or vindicate a claim."

Having made these observations, the Court proceeded to consider whether the citizen's right to have recourse to the Courts to assure and vindicate a legal right is one of his personal rights contemplated by Article 40, Section 3(1) of the Constitution. The Court held that the guarantee in that Section of Article 40 is not limited to the rights mentioned in the Constitution, but extends to other personal rights of the citizen which flow from the Christian and democratic nature of the State. There are many such personal rights which are not even mentioned in Article 40, such as the right to free movement within the State and the right to marry, to which the general guarantee must extend. The use of the words "in particular" in Article 40(3) (2) clearly indicates that the personal rights mentioned in 3(1) are not exhaustive. The right to have recourse to the High Court to defend and vindicate a legal right must be considered one of the personal rights of the citizen included in the general guarantee in Article 40, Section 3 and the attempt to exclude this right is unlawful and inoperative.

On this reasoning it was held that Section 2, sub-Section 1 of the Ministers and Secretaries Act, 1924, was repugnant to the Constitution insofar as it required the fiat of the Attorney-General to be obtained before proceedings in the High Court can be validly instituted against a Minister of State.

Supreme Court of the United States of America**RIGHT TO VOTE****HARPER v. VIRGINIA BOARD OF ELECTIONS**

(383 U.S. p. 663)

Virginia law conditioning right to vote on the payment of a poll tax – void as it violates the equal protection clause of the Fourteenth Amendment – lines which determine who may vote should not be drawn so as to cause invidious discrimination – fee payments or wealth as well as race, creed or colour are unrelated to the citizen's ability to participate intelligently in the electoral process – classifications impinging on fundamental rights and liberties such as the franchise must be closely scrutinized.

Opinion of the Court delivered by Mr. Justice Douglas.

Decided on March 24, 1966.

The appellants, who were Virginia residents, brought this action in the District Court for the Western District of Virginia to have the Virginia poll tax declared unconstitutional on the ground that it violated the equal protection clause of the Fourteenth Amendment by making the affluence of the voter or payment of a fee an electoral standard. The District Court dismissed the action whereupon the appellants appealed to the Federal Supreme Court. The Federal Supreme Court allowed the appeal and held that the conditioning of the right to vote on the payment of a fee or tax violated the equal protection clause of the Fourteenth Amendment.

The findings of the Federal Supreme Court can be summarized as follows:

1. Once the franchise is granted to the electorate, lines which determine who may vote may not be drawn so as to cause invidious discrimination. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavoured.
 2. Fee payments or wealth, like race, creed, or colour, are unrelated to the citizen's ability to participate intelligently in the electoral process.
 3. The interest of the State, when it comes to registration of voters, is limited to the fixing of standards related to the applicant's qualifications as a voter.
 4. Classifications which might impinge on fundamental rights and liberties – such as the franchise – must be closely scrutinized.
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Federal Supreme Court of Malaysia

COURT'S DUTY TO STATE GROUNDS OF DECISION

HASHIM AND ANOTHER v. PUBLIC PROSECUTOR

(1966 1 Malayan Law Journal, p. 229)

Appellants convicted of offences under the Prevention of Corruption Act, 1961 – President of trial court in his grounds of judgment merely stated that the story of the appellants had cast no doubt on the prosecution's story and that he was convinced beyond doubt that appellants were guilty – failure to state findings of fact – convictions quashed as grounds of decision insufficient.

Before Ong Hock Thye F.J.

Decided on January 5, 1966.

In this case the two appellants were charged before a Sessions Court in Selangor. In his grounds of judgment the President of the Sessions Court gave no reasons for his decision beyond stating that the story of these appellants "had cast no doubt on the prosecution's story" and that he was convinced beyond reasonable doubt that there was a conspiracy between the two accused to cheat the Government of the Federation.

The appellants appealed against their convictions and sentences. The appeal was allowed, the convictions and sentences were set aside and a re-trial ordered.

In delivering his judgment, Mr. Justice Ong Hock Thye observed "Of neither appellant was there any finding by the President that they knew or must have known that the work was never carried out. It is not enough for him to state in general terms that he thought they were guilty."

Mr. Justice Ong Hock Thye referred in his judgment to two earlier decisions of the Supreme Court which emphasized the importance of a reasoned judgment on the facts and the law and the duty of a judge to state his findings of fact.

In the first of these decisions¹ Ismail Khan J. said:

The trial Court is under a statutory obligation under section 308 of the Criminal Procedure Code to transmit to the appellate court the grounds of decision, which convey to my mind a reasoned judgment on the facts and the law, not merely the conclusion arrived at. The advantage of a 'speaking' judgment needs no emphasis.

The second decision² was a decision of Mr. Justice Ong Hock Thye himself in which he observed:

¹ *Balasingham v. Public Prosecutor* (1959) M.L.J., 193, 194.

² *Augustine v. Public Prosecutor* (1964) M.L.J. 7.

I do not consider the simple *ipse dixit* of the magistrate sufficient to constitute proper grounds of judgment. It is not enough to use the words of Shelley, 'I cannot argue, I can only feel,' as the foundation of a judgment. Except in the most straightforward type of cases, where the facts clearly establish all the necessary ingredients of an offence, it is the duty of the magistrate to state at least what were his findings of fact.

Supreme Court of Malaysia

INDEPENDENCE OF THE JUDICIARY

KHAW KAI-BOH v. STRAITS ECHO PRESS AND ANOTHER

(See p. 290 above)

Supreme Court of India

FREEDOM OF PRESS TO PUBLISH COURT PROCEEDINGS

IN RE MIRAJKAR AND OTHERS

Openness and publicity fundamental to the administration of justice – it is the very soul of justice itself – yet Court has power within narrow well-defined exceptions to withdraw a trial from the public gaze if satisfied that that was the only way of meeting the ends of justice – Courts, however, have no power under any circumstances to ban publication of proceedings after a trial is over.

Before Special Bench of the Supreme Court. Judgment of Gajendragadkar C.J. and Sarkar, Wanchoo, Shah, Madholkar, Bachawat, Sikri and Ramaswami JJ., Hidayatullah J. dissenting.

Delivered on March 11, 1966.

The nine-member Special Bench of the Supreme Court, which heard the petitions of Blitz-reporter Mirajkar and of three others, under Article 32 of the Constitution, challenging the oral order of Mr. Justice Tarkunde of the Bombay High Court, banning the publication of the evidence of witness Bhaichand Goda in the Blitz-Thackersey libel suit, delivered judgment upholding the order of the Bombay High Court. In doing so, however, the Special Bench, in five separate judgments, dealt with important problems relating to the freedom of the Press.

The majority held that openness and publicity was fundamental for the public administration of justice and the very soul of justice itself. But within narrow, well-defined exceptions, the High Court had power to withdraw a trial from public gaze either wholly or partially if it felt satisfied that that was the only way of doing justice and the ends of justice would otherwise be defeated.

But there was no power in the Courts to ban publication of proceedings after the trial was over.

Mr. Justice Hidayatullah, in his dissenting judgment, expressed the view that the order of the Bombay High Court violated the fundamental right of freedom of expression of the petitioner and the Court was not only under a duty but also under an obligation to enforce the fundamental rights of citizens.

Supreme Court of Malaysia

**RESPONSIBILITIES OF THE PRESS IN A
DEMOCRATIC SOCIETY**

KHAW KAI-BOH v. STRAITS ECHO PRESS AND OTHERS

(See p. 290 above)

Supreme Court of Israel

FACTORS TO BE CONSIDERED IN PASSING SENTENCE

NISSIM OZER AND NISSIM LEV v. ATTORNEY-GENERAL

(Reported in 19 Piskei Din IV, p. 31)

Petitioners convicted and sentenced to certain terms of imprisonment – when passing sentence attention of Court not drawn to the fact that they had been detained for several weeks before sentence – application requesting Court to amend sentence by taking into account the period of detention – Court has no inherent power to vary a sentence previously given – however, it is a desirable principle that the Courts should always take into account periods of prior detention in passing sentence – legislature should consider amendment to the law to give effect to this principle.

Judgment of the Court delivered by Agranat J., President of the Court.

Decided on November 30, 1965.

The petitioners were convicted and sentenced to certain terms of imprisonment. When the Court of Appeal passed the sentences its attention was not drawn to the fact the petitioners were in fact detained for several weeks before they were sentenced by the Court of first instance.

Some time later, while the petitioners were serving their sentences in prison, they brought these applications requesting the Court of Appeal to order that the said period of detention be taken into account for the purposes of their terms of imprisonment.

Section 12 of Penal Law Revision (Modes of Punishment) Law, 5714-1954 provides as follows:

Where a person has been sentenced to imprisonment, the period of imprisonment shall, unless the Court otherwise directs, be reckoned from the date of the sentence. . . .

The Courts of Israel ordinarily take into account the fact that the convict was detained prior to the passing of the sentence, and normally such period is deducted. This matter is and should be mentioned by a Court when passing sentence – provided, of course, that it is aware of the fact that the convict was actually detained as aforesaid.

The question that arose in this case was whether the Court was competent to order an amendment of the sentence as requested. Since it was *functus officio*, was such a power part of its inherent jurisdiction? This question was answered in the negative, and the applications were dismissed.

Agranat J., the President of the Court, in delivering the judgment of the Court, said: "In my opinion the fact that we are here concerned with the criminal law and that, if we do not recognize the inherent jurisdiction of this Court to amend, after delivering its judgment, an error therein of this kind, the result will be to deprive the convict of his freedom for an additional specified period and cause him unjustifiably additional suffering – all this cannot affect the significance and validity of the said rule, that the inherent jurisdiction of the Court does not include the power to vary substantially a sentence previously given, namely to impose a sentence different to that which the Court intended to impose at the time it gave the judgment.

Cohn J. at the end of his concurring judgment added the following observation: "To my mind the legislature will be well advised to consider this problem, and to make such amendments as it may deem fit, in order that the Court will be able to do justice in the most effective and comprehensive way."

Supreme Court of India

OPENNESS AND PUBLICITY IN TRIALS

IN RE MIRAJKAR AND OTHERS

(See pages 297-298 above)

Supreme Court of India

RIGHT TO COUNSEL

IN RE THE MADHYA BHARAT PANCHAYAT ACT, 1949

(Criminal Appeal No. 20 of 1965)

Section 63 of the Madhya Bharat Panchayat Act, 1949 provides that no legal practitioner shall appear for

a party in proceedings before the Panchayat – this provision is void in that it violates Article 22 (1) of the Indian Constitution which guarantees to an accused person the right to be defended by counsel of his choice.

Section 63 of the Madhya Bharat Panchayat Act provides that no legal practitioner shall appear on behalf of or shall plead for or defend any party in any dispute, case or proceeding before the Nyaya Panchayat.

The validity of this Section was challenged in the Supreme Court on the ground that it violated Article 22 (1) of the Indian Constitution which runs thus:

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

The Supreme Court held that the Section in question violated Article 22 (1) of the Constitution and was void to the extent that it denied any arrested person the right to be defended by a legal practitioner of his choice in any trial in respect of the crime for which he was arrested.

The Supreme Court also made the following further observations:

“Most of the safeguards embodied in Clauses (1) and (2) of Article 22 are to be found in the Criminal Procedure Code. But the Constitution makes the fundamental change that the rights guaranteed by Clauses (1) and (2) of Article 22 are no longer at the mercy of the Legislature. No Legislature can enact a law which is repugnant to the Constitution. A pre-Constitution law which is inconsistent with Article 22 is, to the extent of such inconsistency, void.”

Editor's Note:

A Nyaya Panchayat is a village tribunal composed of residents of the village who are generally elected by their fellow villagers. It is invested with jurisdiction to hear minor civil and criminal cases arising in the village.

Supreme Court of the United States of America

RIGHT TO FAIR TRIAL

PATE v. ROBINSON

(383 U.S. p. 375)

Evidence at trial raised sufficient doubt as to accused's competence to stand trial – claim by accused's counsel that he was insane – no hearing on mental capacity to stand trial – nevertheless it was

the duty of Court to afford him a hearing on that issue - failure to do so deprived him of due process of law under Fourteenth Amendment.

Opinion of the Court delivered by Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Black dissenting.

Decided on March 7, 1966.

The accused was convicted in 1959 of murdering his common-law wife and given a life sentence. It was conceded at the trial that he had shot and killed her, but counsel claimed that accused was insane at the time of the incident and was also not competent to stand trial. It was uncontradicted that the accused had a long history of disturbed behaviour, had been confined as a psychopathic patient, and had committed acts of violence including the killing of his infant son and an attempted suicide. Four defence witnesses testified that accused was insane. The trial court declined to permit medical testimony as to accused's sanity to be led in rebuttal, deeming sufficient a stipulation that a doctor would testify that when accused was examined a few months before trial he understood the nature of the charges and was capable of co-operating with his counsel. The trial court's rejection of contentions as to the accused's sanity was challenged on appeal as a deprivation of due process of law under the Fourteenth Amendment. The State Supreme Court affirmed the conviction on the grounds that no hearing on mental capacity to stand trial had been requested and that the evidence was insufficient to require the trial court to conduct a sanity hearing *ex mero motu* or to raise a "reasonable doubt" as to accused's sanity at the time of the homicide. The Federal Supreme Court reversed the judgment and remitted the case to the District Court for a limited hearing as to the sanity of accused at the time of the homicide and as to whether he was constitutionally entitled to a hearing upon his competence to stand trial. The Court held:

1. The evidence raised a sufficient doubt as to the accused's competence to stand trial so that he was deprived of due process of law under the Fourteenth Amendment by the trial court's failure to afford him a hearing on that issue.
 2. The conviction of a legally incompetent defendant violates due process.
 3. The record shows that the accused did not waive the defence of incompetence to stand trial.
 4. In view of evidence raising a doubt on the competence issue, the Court was required to impanel a jury and conduct a sanity hearing and could not rely in lieu thereof on accused's demeanour at the trial or on the stipulated medical testimony.
 5. In view of the difficulty of retrospectively determining the issue of an accused's competence to stand trial (particularly where, as here, the time lapse is over six years), a hearing limited to that issue will not suffice; the accused must therefore be discharged unless the State gives him a new trial within a reasonable time.
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Supreme Court of Cyprus

RIGHT TO FAIR TRIAL WITHIN REASONABLE TIME**NICOLA v. CHRISTOFI AND ANOTHER**

(1965 - 9, Judgments of the Supreme Court of Cyprus, pp. 1048-1065
at pp. 1064 and 1065 - Civil Appeal No. 4,500)

Article 30, paragraph 2 of the Constitution of Cyprus grants the citizen the constitutional right to a fair trial within a reasonable time - piecemeal hearing of a case increases cost of litigation - piecemeal hearing of cases and delays in the delivery of reserved judgments by trial Courts should be deprecated - adjournments should, as far as possible, be avoided, except in unusual circumstances - once a trial has begun it should proceed continuously where possible until its conclusion.

Before Vassiliades, Munir, Josephides, JJ.

Decided on September 30, 1965.

This was a civil appeal from a judgment of the District Court of Nicosia. The case is interesting in view of the observations made by the Supreme Court regarding adjournments of cases and delays in litigation. It is not necessary to refer to the particular facts of the case. The case was in fact not a lengthy one and the course which the hearing took is interesting.

On April 2, 1963, the hearing was begun at 12 noon and continued in the afternoon until 5 p.m. It was then adjourned to April 18, 1963, but at 11.20 a.m. on that day the trial Judge made a note that he was feeling unwell and he then adjourned the case, which was part-heard, until after the summer vacation, that is for 6½ months, to November 4, 1963. The hearing was resumed on that day at 3 p.m. and continued for two hours and forty minutes. It was adjourned to November 11, 1963 when it was again taken up in the afternoon at 2.50 p.m. and concluded. The typed note of all the evidence and addresses in the case is thirteen pages (1½ space) in all.

In deciding the question of costs in this case, the trial Judge said: "Now, as to costs involved between plaintiff and defendants, which are quite high and enhanced as the case was heard piecemeal due to the very heavy list of actions and applications with which this Court is daily burdened . . ." It is very regrettable that the trial Judge admits in his judgment that the piecemeal hearing of the case increased the cost of litigation. In a judgment delivered by the High Court some time prior to the hearing of this case by the trial Judge, observations were made by the High Court deprecating the piecemeal hearing of a case and the delays in the delivery of reserved judgments by trial Courts. Furthermore, the view was expressed that adjournments should, as far as possible, be avoided, except in unusual circumstances, and that once a trial was begun it should proceed continuously day in and day out, where possible, until its conclusion. (*Tsiartas and another v. Yiapana*, Civil Appeal No. 4352, dated July 10, 1962).

These observations of the High Court are based on the provisions of Article 30, paragraph 2 of the Constitution regarding the constitutional right of a citizen to a fair trial within a reasonable time. It cannot be too highly stressed that trial Courts should comply with these constitutional provisions with meticulous care.

Supreme Court of Cyprus

RIGHT TO FAIR TRIAL WITHIN REASONABLE TIME

NICOLAOU v. POLICE

(1965 - 9, Judgments of the Supreme Court of Cyprijs, pp. 1042-1044 - Criminal Appeal No. 2788)

Article 30, paragraph 2 of the Constitution of Cyprus - observations made in Nicola v. Christofi reported above relating to delays in civil matters apply with still greater force in criminal cases.

Before Vassiliades, Triantafyllides, Josephides, JJ.

Decided on September 30, 1965.

The accused was charged with dangerous driving and causing death by want of precaution. He was convicted and appealed to the Supreme Court against his conviction and sentence. The appeal was allowed on the merits and the conviction and sentence were set aside.

In the course of the judgment the Court made the following observations: "We may, perhaps, take the opportunity to repeat what we have just said in the judgment in Civil Appeal (No. 4500) just delivered. We think that what was stated in that case regarding delays in civil matters applies with still more strength in criminal cases. My brother, Mr. Justice Josephides, draws attention to the fact that this charge was filed six months after the motor-car accident had occurred and was tried 15 months later. A very unsatisfactory state of affairs indeed. We need not say more, except that we hope that we shall have no cause to make such observations in future."

Supreme Court of the United States of America

RIGHT TO SPEEDY TRIAL

UNITED STATES v. EWELL ET AL.

(383 U.S. 116)

Right to a speedy trial depends upon all the circumstances of the case including the effect upon the rights of the accused and the rights of society – passage of 19 months between original arrests and the hearings – delay due to the earlier convictions having been vacated for faulty indictments – in the circumstances there has been no violation of the Sixth Amendment's guarantee of a speedy trial.

Opinion of the Court delivered by Mr. Justice White.

Decided on February 23, 1966.

The accused were indicted on December 14, 1962 for selling narcotics without the requisite form. They pleaded guilty and were sentenced to the minimum statutory terms, one for five years and the other, as a second offender, for ten years. In view of a judgment in an unrelated case delivered on July 17, 1963 which held that an indictment that does not give the alleged purchaser's name is defective, the accused moved to have their convictions vacated. Their motions to vacate their convictions were filed on November 6, 1963, and January 28, 1964, and were granted by the District Court on January 13 and April 13, 1964, respectively. They were immediately re-arrested on new complaints and re-indicted on March 26 and June 15, 1964. The indictments charged them with the same sales originally alleged but named the purchasers. On July 13 and July 30, 1964, the District Court granted their motions to dismiss the indictments on the ground that they had been denied their Sixth Amendment rights to a speedy trial, while rejecting their double jeopardy argument. The Government appealed to the Supreme Court, which held that:

1. The mere passage of 19 months between the original arrests and the hearings on the later indictments is not *ipso facto* a violation of the Sixth Amendment's guarantee of a speedy trial.
 2. The right to a speedy trial depends upon all the circumstances of the case, including the effect upon the rights of the accused and the rights of society.
 3. Since the only important interval of time occurred as a result of the Seventh Circuit's decision in an unrelated case, the substantial interval between the original and subsequent indictments does not of itself violate the Sixth Amendment's guarantee.
 4. Appellees' invocation of the Double Jeopardy Clause was properly rejected by the trial Court.
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Queen's Bench Division, England

RIGHT OF UNARRESTED PERSON TO SILENCE WHEN
QUESTIONED BY POLICE

RICE v. CONNOLLY

Refusal to answer a police officer's questions - does not amount to wilfully obstructing the officer in the execution of his duty - though every citizen has a moral and social duty to assist the police, there is no legal duty to do so - the English Common Law recognizes the right of the individual to refuse to answer questions put by persons in authority and to refuse to accompany persons in authority to any particular place when not under arrest.

Before Lord Parker (Lord Chief Justice), Marshall and James JJ.

Decided on May 3, 1966.

On a night when there had been a number of breaking-in offences around Oxford Street, Grimsby, a constable saw a man (Rice - the appellant) behaving suspiciously, looking into shop windows, turning into a side street on seeing the constable and then back onto the high street. The constable stopped the appellant and asked him where he was going, but the appellant ignored him. He repeated the question and asked for his name and address. The appellant said: "Give me a good reason why I should." He was then allowed to walk away, but when he stopped to light his pipe, a cut was noticed on his finger. The constable again asked him for his name and address and the appellant gave his surname and the name of the road where he lived.

The constable asked him to come to a police box so that he could make a complete identification. The appellant said: "If you want me, you will have to arrest me" and the constable did so on the ground that he had obstructed him in the execution of his duty.

The appellant was charged with wilfully obstructing a police officer in the execution of his duty and was convicted. He appealed against the conviction to the Recorder of Grimsby who dismissed his appeal. The Recorder was however satisfied on the facts that there were never any grounds for suspecting the appellant of being guilty of any of the breaking-in offences.

From this dismissal he appealed in turn to the Queen's Bench Divisional Court.

The Divisional Court allowed the appeal, holding that a person who refused to answer a police officer's questions was not guilty of 'wilfully' obstructing the officer in the execution of his duty because there is a common law right to refuse to answer questions of persons in authority.

Lord Chief Justice Parker, in the course of his judgment, said that under the statute creating the offence (Section 51 (3) of the Police Act, 1964) the prosecution had to prove that there was an obstruction of a police officer. It was clear that obstruction meant the doing of any act which made it more difficult for a policeman to carry out his duty. It was also clear that it was

part of a police officer's duty to take all steps which appeared to him necessary for keeping the peace, preventing crime, and protecting property from criminal injury.

There was no exhaustive definition of a constable's duties, but they included those at least, and further a duty to detect crime and bring offenders to justice. It was clear that the appellant in the present case was making it more difficult for the police to carry out their duty and that the police at the time were acting in the execution of their duty.

The only remaining ingredient on which the case revolved was whether there was a wilful obstruction. 'Wilfully' meant not only intentionally but also something done without lawful excuse. Accordingly, the sole question was whether the appellant had a lawful excuse for refusing to answer. In his view, his Lordship said, he had. It was clear that, though every citizen had a moral or social duty to assist the police, there was no legal duty to that effect, and the whole basis of the common law was the right of the individual to refuse to answer questions put by persons in authority and to refuse to accompany persons in authority to any particular place short of being arrested.

It was undoubtedly obstruction to tell a cock-and-bull story to the police and put them off by false information. But there was all the difference in the world between deliberately telling a false story and preserving silence and refusing to answer.

Accordingly, it had not been shown that the appellant's refusal to answer or to go to the police box was an obstruction without lawful excuse.

Federal Court of Switzerland

SECREC Y ATTACHING TO ACCUSED'S DISCLOSURES TO LAWYER

ADVOCATE X v. THE CANTONAL TRIBUNAL OF GRISONS

(Journal des Tribunaux, Lausanne, partie Droit fédéral,
No. 10, May 30, 1966, p. 295)

Secrecy which an advocate owes to his client enjoys the protection of the Constitution and of the Civil Code – an advocate cannot be compelled to give evidence on facts relating to an offence divulged to him by his client – the only exception is when the safeguarding of higher interests renders disclosure by the advocate absolutely essential – but even on a balance of interests the advocate cannot be compelled to give evidence on confidential disclosures where the client has availed himself of an accused's right to refuse to testify.

Judgment of the Public Law Chamber of the Federal Court of Switzerland.

Decided on July 7, 1965.

On July 28, 1963 Maria A., who had not yet attained the age of 15, gave birth to a daughter whose paternity she attributed to Rudolf B. A paternity case was filed and the expert evidence on blood groups eliminated the possibility that B. was the father. When the results of the blood tests were made known to Maria A., she had said that during the relevant period she had had sexual relations with two other men but she was not prepared to divulge their names. Afterwards a letter from Maria A. to her mother had been discovered where she had admitted having had sexual relations with her two brothers. "The letter continued: "Monsieur X (her advocate) had said that the story regarding her relations with her two brothers must not be divulged but must be kept secret even from the *Procureur général*. We shall say nothing about it but shall keep it as a secret." In an enquiry against the two brothers, Erwin and Paul A., they denied having had sexual relations with their sister. Maria A. and her advocate X were summoned as witnesses in this enquiry, but relying on Article 90 of the Code of Criminal Procedure of Grisons, they refused to say whether she had had intercourse during the relevant period with her brothers or whether she had made any statements to her advocate in this connection.

Article 90, paragraphs 1 to 3, of the Code of Criminal Procedure of the Canton of Grisons runs thus:

The relations of the accused by blood, by adoption and by marriage in the descending or ascending line, his spouse or his fiancé, his collaterals and the collaterals of his parents and grand-parents, and their spouses can refuse to testify.

The witness can refuse to reply to questions which expose him or one of his relations coming within the above relationships to a criminal prosecution.

Priests, doctors, advocates and notaries can refuse to disclose facts which have been confided to them in the exercise of their functions or their professions. When an offence has been committed, the Cantonal Tribunal must decide at the request of the *Ministère public* after taking into account all the circumstances whether the doctor, advocate or notary will have to testify.

The *Ministère public*, relying on Article 90, para. 3, requested the Cantonal Tribunal to relieve advocate X of his obligation to maintain secrecy and to make him testify. By its order of March 16, 1965 the Cantonal Tribunal granted the request. The ground for the request was that the offence involved was one of a grave character and that the offenders could not be permitted to go unpunished in the interests of society.

Advocate X appealed to the Cantonal Tribunal against the order, but his appeal was rejected. He then appealed to the Federal Court which allowed the appeal and quashed the order appealed against.

In the course of its judgment, the Public Law Chamber of the Federal Court made the following observations: "In the present circumstances, it must be further borne in mind that article 90, paras. 1 and 2 of the Code of Criminal Procedure of Grisons gives the appellant's client the right to refuse to reveal whether her brothers have had sexual relations with her. She has made use of this right. To compel the appellant to testify as to the confidential

communications made to him by his client on this subject would amount to a denial of the latter's right to refuse to testify, for the investigating authorities would necessarily learn, through the mouth of her lawyer, facts which, relying upon his discretion, she revealed to him in connection with the paternity proceedings, but was not prepared to reveal in criminal proceedings. Further, the client's confidence in the discretion of her lawyer would be profoundly shattered. The broader repercussions of such a decision would be no less serious. If the lawyer were compelled to betray even those facts confided to him relating to which his client has the absolute right to refuse to testify, he could no longer hope to enjoy his client's confidence. The fulfilment of the duties which are imposed upon a lawyer in the interests of justice would be rendered difficult and his position would be compromised as a result. In circumstances such as these, it is necessary to accept, as a lesser evil, the fact that the recognition of the lawyer's right to silence must give rise to greater difficulties in the search for truth. Moreover, the state of the record does not show that it is impossible to prove the facts in issue on other evidence.

"The Cantonal Tribunal has failed to take these considerations into account. Being required by article 90, paragraph 3, to balance the relevant interests, it has infringed a principle contained in paragraphs 1 and 2 of that same article. In this way, it has introduced an inconsistency into the law and seriously contravened the spirit of the provisions. Its decision is thus not merely erroneous, but even arbitrary."

Editor's Note:

In the last Digest (*Journal* Volume VII, No. 1 - Summer 1966) there appeared at p. 138 an Editor's Note that no references had been given to local reports in respect of some of the Indian judgments reported in that Volume as these judgments had not yet been reported in Indian law journals or reports at the time of printing. The Indian judgments in question have since been reported locally and the references are as follows:

Equality of Sexes: Bombay Labour Union v. Franchises (Private) Ltd. (Digest pp. 137-138) - AIR (All Indian Reporter) June 1966, p. 942.

Fundamental Rights during Emergency: Sadanandan v. The State of Kerala (Digest pp. 146-147) - 1966 Kerala Law Times. p. 504 and 1966 (1) S.C.W.R. p. 870; State of Bihar v. Rambalak Singh (Digest pp. 147-149) - AIR (September 1966) p. 1441; State of Maharashtra v. Sangzivi (Digest pp. 149-150) - AIR (March 1966) p. 424.

Rights of an Employee: Salem Erode Electricity Distribution Co. v. The Workmen (Digest pp. 150-151) - AIR (May 1966) p. 808.

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