INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

ADMISSIBILITY OF HEARINGS OF PETITIONERS BY THE COMMITTEE ON SOUTH WEST AFRICA

ADVISORY OPINION OF JUNE 1st, 1956

1956

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

ADMISSIBILITÉ DE L'AUDITION DE PÉTITIONNAIRES PAR LE COMITÉ DU SUD-OUEST AFRICAIN

AVIS CONSULTATIF DU 1er JUIN 1956

This Opinion should be cited as follows:

"Admissibility of hearings of petitioners by the Committee on South West Africa, Advisory Opinion of June 1st, 1956: I.C.J. Reports 1956, p. 23."

Le présent avis doit être cité comme suit:

«Admissibilité de l'audition de pétitionnaires par le Comité du Sud-Ouest africain, Avis consultatif du 1er juin 1956: C.I.J. Recueil 1956, p. 23.»

Sales number
N° de vente: 151

INTERNATIONAL COURT OF JUSTICE

1956
June 1st
General List:
No. 31

YEAR 1956

June 1st, 1956

ADMISSIBILITY OF HEARINGS OF PETITIONERS BY THE COMMITTEE ON SOUTH WEST AFRICA

Meaning of Question put to Court.—Grant of Oral Hearings to Petitioners: Decision by Committee on South West Africa or by General Assembly.

Interpretation of Opinion of 11 July 1950 as a whole, its general purport and meaning.

Conformity with Mandates System and Procedure of Council of League of Nations.—Competence of Council of League and of General Assembly of United Nations to regulate Supervision.

Excess of Supervision.—Conformity with Procedure of Mandates System.—Effectiveness of Supervision.—Absence of Co-operation of Mandatory.—Oral Hearings, bearing on Degree of Supervision.—Conformity "as far as possible" to Procedure under League of Nations.

ADVISORY OPINION

Present: *President* HACKWORTH; *Vice-President* BADAWI; *Judges* BASDEVANT, WINIARSKI, KLAESTAD, READ, HSU MO, ARMAND-UGON, KOJEVNIKOV, Sir Muhammad ZAFRULLA KHAN, Sir Hersch LAUTERPACHT, MORENO QUINTANA, CÓRDOVA; *Registrar* LÓPEZ OLIVÁN.

In the matter of the Admissibility of Hearings of Petitioners by the Committee on South West Africa,

THE COURT,

composed as above,

gives the following Advisory Opinion :

By a letter of December 19th, 1955, filed in the Registry on December 22nd, the Secretary-General of the United Nations informed the Court that, by a Resolution adopted on December 3rd, 1955, the General Assembly of the United Nations decided to request the Court to give an Advisory Opinion on the following question :

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

The Secretary-General enclosed with that letter a certified true copy of the Resolution which may be referred to as Resolution 942 A (X) and which is in the following terms :

> "*The General Assembly,*
>
> *Having been requested* by the Committee on South West Africa to decide whether or not the oral hearing of petitioners on matters relating to the Territory of South West Africa is admissible before that Committee (A/2913/Add.2),
>
> *Having instructed* the Committee, in General Assembly resolution 749 A (VIII) of 28 November, 1953, to examine petitions as far as possible in accordance with the procedure of the former Mandates System,
>
> *Requests* the International Court of Justice to give an advisory opinion on the following question :
>
> > 'Is it consistent with the advisory opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the Territory of South West Africa ?' "

In accordance with Article 66, paragraph 1, of the Statute, notice was given, on December 24th, 1955, to all States entitled to appear before the Court, of the letter of the Secretary-General of the United Nations and of the Resolution annexed thereto.

In pursuance of paragraph 2 of the same Article, the President of the Court having considered that the States Members of the

United Nations were likely to be able to furnish information on the questions referred to the Court, the Registrar notified these States, by letters of December 24th, 1955, that the Court would be prepared to receive written statements from them within a time-limit fixed by an Order of the same date at February 15th, 1956. The Governments of the United States of America and of the Republic of China availed themselves of this opportunity to submit written statements. The Government of India sent a letter stating that it did not consider it necessary to submit any written statement, in view of the fact that their views in the matter had already been indicated in the relevant records of the Tenth Session of the General Assembly of the United Nations.

The Secretary-General of the United Nations later transmitted to the Court the documents likely to throw light upon the question, together with an Introductory Note.

The written statements submitted to the Court were communicated to all States which had been notified on December 24th, 1955 in accordance with paragraph 2 of Article 66 of the Statute. These States were also informed that the Court would be prepared to hear oral statements on March 15th, 1956. This date was later changed to March 22nd, 1956, and a public hearing was held on that date when the Court heard the Rt. Hon. Sir Reginald Manningham-Buller, Q.C., M.P., Attorney-General, representing the Government of the United Kingdom of Great Britain and Northern Ireland.

* * *

It is necessary at the outset to indicate the Court's understanding of the question submitted for its opinion. The Court understands that the expression "grant oral hearings to petitioners" relates to persons who have submitted written petitions to the Committee on South West Africa in conformity with its Rules of Procedure.

A question arises as to whether the request for the Court's Opinion relates to the authority of the Committee on South West Africa to grant oral hearings in its own right or only under prior authorization of the General Assembly.

The General Assembly having accepted the Court's Advisory Opinion of 11 July 1950, proceeded to establish, by Resolution 749 A (VIII), referred to in the request for the Opinion of the Court contained in Resolution 942 A (X), a subsidiary organ which, *inter alia*, was to "examine ... such information and documentation as may be available in respect of the Territory of South West Africa", to "examine ... reports and petitions which may be submitted to the Committee or to the Secretary-General", and to "transmit to the General Assembly a report concerning conditions in the Territory...". This organ is the Committee on South West Africa referred to in the question submitted to the Court for its

opinion. Its functions are analogous to those of the Permanent Mandates Commission established by the Council of the League of Nations, pursuant to paragraph 9 of Article 22 of the Covenant.

It appears from Resolution 749 A (VIII) that the Mandatory was refusing to assist in the implementation of the Advisory Opinion of the Court and to co-operate with the United Nations concerning the submission of reports and the transmission of petitions in accordance with the procedure of the Mandates System. As the Mandatory continued in its refusal to co-operate, the Committee found itself handicapped in the examination of petitions. It lacked both the Mandatory's comments on the petitions and the supplementary information which the Mandatory might have been expected to supply to the Committee directly or through its accredited representative. These were the circumstances prevailing at the time that the Committee requested the General Assembly to decide whether or not the oral hearing of petitioners by the Committee would be admissible.

Before deciding whether the Committee should or should not be authorized to grant oral hearings, the General Assembly deemed it advisable to obtain the Opinion of the Court on the question whether the grant of oral hearings by the Committee on South West Africa would be consistent with the Advisory Opinion of the Court of 11 July 1950.

It was in these circumstances that the question was submitted to the Court. While the question in terms refers to the grant of oral hearings by the Committee, the Court interprets it as meaning: whether it is legally open to the General Assembly to authorize the Committee to grant oral hearings to petitioners. The Court must therefore deal with the broader question as to whether it would be consistent with its previous Opinion of 11 July 1950 for the General Assembly to authorize the Committee on South West Africa to grant oral hearings to petitioners.

* * *

The meaning of the question having been thus defined, the Court will proceed to its examination.

In the operative part of the Advisory Opinion of 11 July 1950, the Court stated:

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

Accordingly, the obligations of the Mandatory continue unimpaired with this difference, that the supervisory functions exercised by the Council of the League of Nations are now to be exercised by the United Nations. The organ of the United Nations exercising these supervisory functions, that is, the General Assembly, is legally qualified to carry out an effective and adequate supervision of the administration of the Mandated Territory, as was the Council of the League.

In determining the question whether in these circumstances it would be consistent with the Opinion of the Court of 11 July 1950 for the Committee on South West Africa to grant oral hearings to petitioners, the Court must have regard to the whole of its previous Opinion and its general purport and meaning.

In that Opinion the Court, having concluded that South West Africa is a territory under the international Mandate and that the Mandatory continues to have the obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate, as well as the obligation to transmit reports and petitions and to submit to the supervision of the General Assembly, made it clear that the obligations of the Mandatory were those which obtained under the Mandates System. These obligations could not be extended beyond those to which the Mandatory had been subject by virtue of the provisions of Article 22 of the Covenant and of the Mandate for South West Africa under the Mandates System. The Court stated, therefore, that the degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates System. Following its finding regarding the substitution of the General Assembly of the United Nations for the Council of the League of Nations in the exercise of supervision, the Court stated that the degree of supervision should conform as far as possible to the procedure followed by the Council of the League of Nations in that respect. The Court observed that these considerations were particularly applicable to annual reports and petitions.

At the same time the Court stated that "the effective performance of the sacred trust of civilization by the Mandatory Powers required that the administration of mandated territories should be subject to international supervision" and said: "The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System."

In discussing the effect of Article 80 (1) of the Charter, preserving the rights of States and peoples under existing international agreements, the Court observed: "The purpose must have been

to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ."

The general purport and meaning of the Opinion of the Court of 11 July 1950 is that the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory.

Accordingly, in interpreting any particular sentences in the Opinion of the Court of 11 July 1950, it is not permissible, in the absence of express words to the contrary, to attribute to them a meaning which would not be in conformity with this paramount purpose or with the operative part of that Opinion.

* * *

Before proceeding further, it is necessary to refer briefly to the way in which the question of the grant of oral hearings to petitioners was dealt with during the regime of the League of Nations. The Permanent Mandates Commission had under consideration at various meetings the question of the grant of oral hearings to petitioners, both at the request of petitioners and on its own initiative. The Commission felt that in some cases oral hearings would be useful, if not indispensable, in determining whether petitions were well-founded or not. In 1926, the Commission laid the matter before the Council, but refrained from making a definite recommendation on the subject. The Council, in turn, decided that, before taking action, it should consult the Mandatory Powers. After obtaining the views of those Powers, all of whom were opposed to the grant of oral hearings on various grounds, the Council, by Resolution of March 7, 1927, decided that there was no occasion to modify the procedure theretofore followed by the Commission in regard to the question. In his Report to the Council, the Rapporteur stated that, if in any particular case the circumstances should show that it was impossible for all the necessary information to be secured by the usual means, the Council could "decide on such exceptional procedure as might seem appropriate and necessary in the particular circumstances". By its Resolution, the Council directed that copies of the Resolution, of the Report of the Rapporteur and of the replies of the Mandatory Powers, should be transmitted to the Permanent Mandates Commission. It is clear that oral hearings were not granted to petitioners by the Permanent Mandates Commission at any time during the regime of the League of Nations.

The right of petition was introduced into the Mandates System by the Council of the League on January 31st, 1923, and certain rules relating to the matter were prescribed. This was an innovation designed to render the supervisory function of the Council more effective. The Council having established the right of petition, and regulated the manner of its exercise, was, in the opinion of the Court, competent to authorize the Permanent Mandates Commission to grant oral hearings to petitioners, had it seen fit to do so.

* * *

It has been contended that the Court, in its Opinion of 11 July 1950, intended to express the view that the Mandates System and the degree of supervision to be exercised by the General Assembly in respect of the Territory of South West Africa must be deemed to have been crystallized, so that, though the General Assembly replaced the Council of the League as the supervisory organ in respect of the Mandate, it could not, in the exercise of its supervisory functions, do anything which the Council had not actually done, even if it had authority to do it. The Court does not consider that its Opinion of 11 July 1950 supports this position.

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

The Court having determined that the General Assembly had replaced the Council of the League as the supervisory organ, it was proper for it to point out that the General Assembly could not enlarge its authority but must confine itself to the exercise of such authority as the Mandates System had conferred upon the supervisory organ. The Court was not called upon to determine whether the General Assembly could or could not exercise powers which the Council of the League had possessed but for the exercise of which no occasion had arisen.

The Court held that the obligations of the Mandatory under the Mandate continued unimpaired, and that the supervisory functions in respect of the Mandate were exercisable by the United Nations, the General Assembly replacing in this respect the Council of the League. It followed that the General Assembly in carrying out its

supervisory functions had the same authority as the Council. The scope of that authority could not be narrowed by the fact that the Assembly had replaced the Council as the supervisory organ.

Reliance has been placed upon the following sentence in the Court's Opinion of 1950:

> "The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations."

It has been suggested that the grant of oral hearings by the Committee on South West Africa to petitioners would involve an excess in the degree of supervision to be exercised by the General Assembly and that the sentence should be interpreted as intended to restrict the activity of the General Assembly to measures which had actually been applied by the League of Nations. On these grounds it has been contended that the grant of oral hearings by the Committee would not be consistent with the Court's Opinion of 1950.

The Court will deal first with the suggestion that the grant of oral hearings to petitioners would, in fact, add to the obligations of the Mandatory and thus lay upon it a heavier burden than it was subject to under the Mandates System. The Court is unable to accept this suggestion. The Committee on South West Africa at present receives petitions from the inhabitants of the Mandated Territory and proceeds to examine them without the benefit of the comments of the Mandatory or of the assistance of its accredited representative during the course of the examination. In many cases, the material available to the Committee from the petitions or from other sources may be sufficient to enable the Committee to form an opinion on the merits of the petitions. In other cases the Committee may not be able to come to a decision on the material available to it. If the Committee cannot have recourse to any further information for the purpose of testing whether a petition is or is not well-founded, it may lead in certain cases to acceptance of statements in the petitions without further test. Oral hearings in such cases might enable the Committee to submit its advice to the General Assembly with greater confidence. If as the result of the grant of oral hearings to petitioners in certain cases the Committee is put in a better position to judge the merits of petitions, this cannot be presumed to add to the burden of the Mandatory. It is in the interest of the Mandatory, as well as of the proper working of the Mandates System, that the exercise of supervision by the General Assembly should be based upon material which has been tested as far as possible, rather than upon material which has not been subjected to proper scrutiny either by or on behalf of the Mandatory, or by the Committee itself.

The Court will deal next with the suggestion that the statement "the degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System" should be interpreted as intended to restrict the activity of the General Assembly to measures which had actually been applied by the League of Nations. This could not have been the intention of the Court. Neither the Covenant of the League, nor the Mandate for South West Africa, nor the Charter of the United Nations, contains any provision which could justify such a restriction. That it cannot have been the intention of the Court to impose on the General Assembly a rigid limitation on its supervisory function is evidenced by the second part of the same sentence, according to which the degree of supervision "should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations". With regard to this statement, the Court said in its Opinion of 1955:

> "When the Court stated in its previous Opinion that in exercising its supervisory functions the General Assembly should conform 'as far as possible to the procedure followed in this respect by the Council of the League of Nations', it was indicating that in the nature of things the General Assembly, operating under an instrument different from that which governed the Council of the League of Nations, would not be able to follow precisely the same procedures as were followed by the Council. Consequently, the expression 'as far as possible' was designed to allow for adjustments and modifications necessitated by legal or practical considerations."

* * *

The Court notes that, under the compulsion of practical considerations arising out of the lack of co-operation by the Mandatory, the Comittee on South West Africa provided by Rule XXVI of its Rules of Procedure an alternative procedure for the receipt and treatment of petitions. This Rule became necessary because the Mandatory had refused to transmit to the General Assembly petitions by the inhabitants of the Territory, thus rendering inoperative provisions in the Rules concerning petitions and directly affecting the ability of the General Assembly to exercise an effective supervision. This Rule enabled the Committee on South West Africa to receive and deal with petitions notwithstanding that they had not been transmitted by the Mandatory and involved a departure in this respect from the procedure prescribed by the Council of the League.

The particular question which has been submitted to the Court arose out of a situation in which the Mandatory has maintained its refusal to assist in giving effect to the Opinion of 11 July 1950, and to co-operate with the United Nations by the submission of

reports, and by the transmission of petitions in conformity with the procedure of the Mandates System. This sort of situation was provided for by the statement in the Court's Opinion of 1950 that the degree of supervision to be exercised by the General Assembly "should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations".

* * *

The Court holds that it would not be inconsistent with its Opinion of 11 July 1950 for the General Assembly to authorize a procedure for the grant of oral hearings by the Committee on South West Africa to petitioners who had already submitted written petitions : provided that the General Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the Mandated Territory.

For these reasons,

THE COURT IS OF OPINION,

by eight votes to five,

that the grant of oral hearings to petitioners by the Committee on South West Africa would be consistent with the Advisory Opinion of the Court of 11 July 1950.

Done in English and French, the English text being authoratitive, at The Peace Palace, The Hague, this first day of June, one thousand nine hundred and fifty-six, in two copies, one of which will be placed in the Archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) GREEN H. HACKWORTH,
President.

(Signed) J. LÓPEZ OLIVÁN,
Registrar.

Judge WINIARSKI, while voting in favour of the Opinion of the Court, makes the following declaration :

I regret that I am unable to accept the whole of the reasoning on which the Court has based its reply. In particular I think that as the Opinion of 1950 was not based on the idea of the United Nations as a successor in title of the League of Nations, the question of a devolution of the powers of the Council of the League of Nations to the General Assembly does not arise. I am in agreement with the minority opinion in considering that the whole structure of the Opinion of 1950 was founded on the objective elements of the situation which arose as a result of the disappearance of the League of Nations, and that that Opinion found in the General Assembly the organ qualified to exercise those functions which could not be allowed to go by default.

I also believe that the maintenance of the previously existing situation constitutes the dominant theme of the Opinion and that the decisive test is to be found in what was formerly done, and I therefore think that any enquiry as to the extent of the powers of the Council and of the General Assembly respectively is pointless. The powers of the supervisory organ, which are determined by the continuing obligations of the mandatory Power, are at the same time duties, and it is quite natural that, conscious of its responsibilities, the General Assembly should have put to the Court the question relating thereto.

I agree with the Court in considering that, though drafted in absolute terms, the question is to be understood as relating to the actual situation existing and I hesitate to reply to it as though this situation were normal, that is to say, as if the Mandatory were discharging its undertakings as it did under the regime of the League of Nations ; the *raison d'être* of the question cannot be ignored. If then, in these circumstances, the General Assembly, in order to secure further information, grants a hearing to a petitioner, its decision cannot be held to be irregular. If, on the same basis, it should authorize the Committee, which is its organ, to grant a hearing in a particular case in its stead, I should be unable to regard such a decision, which is one for the Assembly, as conflicting with the Opinion of 1950 ; if, in the same circumstances, it deemed it necessary to authorize the Committee to undertake such hearings, that, while not in accordance with the former practice, would be justified if warranted by imperative considerations and if kept within reasonable limits and governed by the rule of good faith.

Judge KOJEVNIKOV, while voting in favour of the Opinion of the Court, makes the following declaration :

While accepting the operative clause of the Advisory Opinion, I am unable to concur in certain respects with the reasoning, in

particular with that part which would attribute to the Opinion a limited and conditional character, for I am of opinion that petitions may be in writing or oral, or both in writing and oral, that hearings granted to petitioners by the Committee on South West Africa are consistent with the Advisory Opinion of the Court of July 11th, 1950, and that the presentation even of oral petitions is one of the indefeasible rights of the population of the Territory of South West Africa, rights which accrue from the Covenant of the League of Nations, and still more from the Charter of the United Nations, in conformity with which this Territory should be included in the Trusteeship System of the United Nations.

Judge Sir Hersch LAUTERPACHT, availing himself of the right conferred on him by Articles 57 and 68 of the Statute, appends to the Opinion of the Court a statement of his separate Opinion.

Vice-President BADAWI and Judges BASDEVANT, HSU MO, ARMAND-UGON and MORENO QUINTANA, availing themselves of the right conferred on them by Articles 57 and 68 of the Statute, append to the Opinion of the Court the joint statement of their dissenting Opinion, to which is attached a declaration by Vice-President Badawi.

(Initialled) G. H. H.

(Initialled) J. L. O.