LLB

PUBLIC INTERNATIONAL LAW
Suggested Solutions Pack

UNIVERSITY OF LONDON
JUNE EXAMINATIONS

1985–1990

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The questions used are taken from past University of London LLB (External) Degree examination papers and our thanks are extended to the University of London for the kind permission which has been given to us to use and publish the questions.

Caveat:

The answers given are not approved or sanctioned by the University of London and are entirely our responsibility.

They are not intended as 'Model Answers', but rather as Suggested Solutions.

The answers have two fundamental purposes, namely:

a) To provide a detailed example of a suggested solution to examination questions, and

b) To assist students with their research into the subject and to further their understanding and appreciation of the subject of Laws.

Note:

Please note that the solutions in this book were written in the year of the examination for each paper. They were appropriate solutions at the time of preparation, but students must note that certain caselaw and statutes may subsequently have changed.

INTRODUCTION

Why choose HLT publications

Holborn College has earned an International reputation over the past ten years for the outstanding quality of its teaching, Textbooks, Casebooks and Suggested Solutions to past examination papers set by the various examining bodies.

Our expertise is reflected in the outstanding results achieved by our students in the examinations conducted by the University of London, the Law Society, the Council of Legal Education and the Associated Examining Board.

The object of Suggested Solutions

The Suggested Solutions have been prepared by College lecturers experienced in teaching to this specific syllabus and are intended to be an example of a full answer to the problems posed by the examiner.

They are not 'model answers', for at this level there almost certainly is not just one answer to a problem, nor are the answers written to strict examination time limits.

The opportunity has been taken, where appropriate, to develop themes, suggest alternatives and set out additional material to an extent not possible by the examinee in the examination room.

We feel that in writing full opinion answers to the questions that we can assist you with your research into the subject and can further your understanding and appreciation of the law.

Notes on examination technique

Although the SUBSTANCE and SLANT of the answer changes according to the subject-matter of the question, the examining body and syllabus concerned, the TECHNIQUE of answering examination questions does *not* change.

You will not pass an examination if you do not know the substance of a course. You *may* pass if you do not know how to go about answering a question although this is doubtful. To do *well* and to guarantee success, however, it is necessary to learn the technique of answering problems properly. The following is a guide to acquiring that technique.

1 *Time*

All examinations permit only a limited time for papers to be completed. All papers require you to answer a certain number of questions in that time, and the questions, with some exceptions carry equal marks.

It follows from this that you should never spend a disproportionate amount of time on any question. When you have used up the amount of time allowed for any one question STOP and go on to the next question after an abrupt conclusion, if necessary. If you feel that you are running out of time, then complete your answer in *note form*. A useful way of ensuring that you do not over-run is to write down on a piece of scrap paper the time at which you should be starting each part of the paper. This can be done in the few minutes before the examination begins and it will help you to calm any nerves you may have.

2 *Reading the question*

It will not be often that you will be able to answer every question on an examination paper. Inevitably, there will be some areas in which you feel better prepared than others. You will prefer to answer the questions which deal with those areas, but you will never know how good the questions are *unless you read the whole examination paper.*

You should spend *at least* 10 MINUTES at the beginning of the examination reading the questions. Preferably, you should read them more than once. As you go through each question, make a brief note on the examination paper of any relevant cases and/or statutes that occur to you even if you think you may not answer that question: you may well be grateful for this note towards the end of the examination when you are tired and your memory begins to fail.

3 *Re-reading the answers*

Ideally, you should allow time to re-read your answers. This is rarely a pleasant process, but will ensure that you do not make any silly mistakes such as leaving out a 'not' when the negative is vital.

4 *The structure of the answer*

Almost all examination problems raise more than one legal issue that you are required to deal with. Your answer should:

i) *identify the issues raised by the question*

This is of crucial importance and gives shape to the whole answer. It indicates to the examiner that you appreciate what he is asking you about.

This is at least as important as actually answering the questions of law raised by that issue.

The issues should be identified in the first paragraph of the answer.

ii) *deal with those issues one by one as they arise in the course of the problem*

This, of course, is the substance of the answer and where study and revision pays off.

iii) *if the answer to an issue turns on a provision of a statute, CITE that provision briefly, but do not quote it from any statute you may be permitted to bring into the examination hall*

Having cited the provision, show how it is relevant to the question.

iv) *if there is no statute, or the meaning of the statute has been interpreted by the courts, CITE the relevant cases*

'Citing cases' does not mean writing down the nature of every case that happens to deal with the general topic with which you are concerned and then detailing all the facts you can think of.

You should cite *only* the most relevant cases - there may perhaps only be one. No more facts should be stated than are absolutely essential to establish the relevance of the case. If there is a relevant case, but you cannot remember its name, it is sufficient to refer to it as 'one decided case'.

v) *whenever a statute or case is cited, the title of statute or the name of the case should be underlined*

This makes the examiner's job much easier because he can see at a glance whether the relevant material has been dealt with, and it will make him more disposed in your favour.

vi) *having dealt with the relevant issues, summarise your conclusions in such a way that you answer the question*

A question will often say at the end simply 'Advise A', or B, or C, etc. The advice will usually turn on the individual answers to a number of issues. The point made here is that the final paragraph should pull those individual answers together *and actually give the advice required.* For example, it may begin something like: 'The effect of the answer to the issues raised by this question is that one's advice to A is that ...'

vii) *related to (vi), make sure at the end that you have answered the question*

For example, if the question says 'Advise A', make sure that is what your answer does. If you are required to advise more than one party, make sure that you have dealt with all the parties that you are required to and no more.

5 *Some general points*

You should always try to get the examiner on your side. One method has already been mentioned - the underlining of case names, etc. There are also other ways as well.

Always write as *neatly* as you can. This is more easily done with ink than with a ball-point.

Avoid the use of violently coloured ink eg turquoise; this makes a paper difficult to read.

Space out your answers sensibly: leave a line between paragraphs. You can always get more paper. At the same time, try not to use so much paper that your answer book looks too formidable to mark. This is a question of personal judgment.

NEVER put in irrelevant material simply to show that you are clever. Irrelevance is not a virtue and time spent on it is time lost for other, relevant, answers.

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UNIVERSITY OF LONDON

LLB EXAMINATION 1985

PART II

for External Students

PUBLIC INTERNATIONAL LAW

Wednesday, 12 June: 10.00 am to 1.00 pm

Answer *FOUR* of the following NINE questions

1 'The difficulty of formulating the rules of international law with precision is a necessary consequence of the kinds of evidence upon which we have to rely in order to establish them.' (Brierly).

Discuss.

2 Provincia, a colony of Metropolia, has proclaimed its independence. In a manifesto issued by the new Government of the United Kingdom of Provincia it is made clear that it is the Government's policy to disfranchise the minority Countie Tribe and resettle them in barren lands far from the centres of civilisation. As a result of the publication of the manifesto very few States have recognised either the new State or its government. The Foreign Minister has stated in the Legislative Council that 'recognition is irrelevant in the modern world and Provincia can quite easily survive without it'. Assess the legal accuracy of the Foreign Minister's statement, referring in your answer to recent changes in the British attitude to recognition.

3 'The history of the Namibian question might have been different if the practice of the International Court and of the political organs of the United Nations had not been based upon the Court's erroneous opinion of the status of the territory given in its 1950 Advisory Opinion'.

Discuss.

4 Badlad, an eighteen-year-old pupil at Strangeways Comprehensive School, in London, has earned a reputation as a sadistic bully of younger boys and has on two occasions assaulted members of the school staff. Badlad's father informed the Headmaster in writing two years ago that 'he's too big for me to handle now but I hope that a good caning at regular intervals will help to sort him out'. Badlad, on learning of his father's letter, consults you and asserts that caning is contrary to his moral, religious and philosophical convictions. He seeks your advice on the relevant substantive provisions of the European Convention on Human Rights 1950 and on the procedure to be followed in instituting proceedings under the Convention. Advise Badlad.

5 'The normal rules on acquisition of title to territory have no application in Antarctica or on the Moon and other celestial bodies.'

Discuss.

6 State A is a major naval power with a large merchant fleet, a broad, oil-rich Continental Shelf and a well-managed, 200-mile exclusive fishing zone. It imports eighty percent of the minerals required by its highly developed heavy industries. So far, State A has neither signed nor acceded to the United Nations Convention on the Law of the Sea 1982 but is now considering the possibility of acceding. Advise the Government of State A on what you consider to be the principal provisions of the Convention which would be relevant to State A's interests.

7 State A and State B are neighbouring States and traditional enemies. Until 1980 State A was the victim of innumerable armed incursions from State B, which wished to assist a terrorist group in State A, the Grey Wolves, to overthrow the government of State A. In 1980 State A became a nuclear power and State B has been careful ever since to ensure that no further incursions into State A are mounted from State B territory. The government of State B is believed, however, to be providing financial support to the Grey Wolves and regularly publishes statements threatening to invade State A and to execute the members of the government of State A. Earlier this year, the Foreign Minister of

State A learned from normally reliable sources that State B will be in a position to manufacture nuclear weapons in about one year's time. He is now proposing to organise a 'lightning strike' against a nuclear research institute in State B where all of State B's weapons research is conducted and where the nuclear weapons will be manufactured. The Foreign Minister requests your advice on the legality of his proposal. Advise the Foreign Minister. Assuming that the Foreign Minister decides not to implement his proposal and State B does manufacture nuclear weapons, at what stage, if any, in an escalating situation apparently leading to a serious threat of nuclear war may State A make use of its nuclear weapons in self-defence?

8 a) Distinguish between, and examine the scope of, the contentious and advisory jurisdictions of the International Court of Justice (ICJ).

b) The government of State A intends to make a declaration under the 'optical clause' of the ICJ's Statute. Referring to international judicial practice and examples of optical clause declarations with which you are familiar, advise the Foreign Minister of State A on the points to be borne in mind in drafting the declaration.

9 'The Vienna Convention on Diplomatic Relations 1961 is badly in need of review and revision.'

Discuss.

QUESTION 1

General Comment

A rather difficult essay question concerning the sources and evidence of international law. Unless students are absolutely sure that they have sufficient knowledge and material to answer the specific question raised without wandering from the point, questions of this nature are best avoided.

Skeleton Answer

1 Introduction: article 38 of the Statute of the International Court of Justice; distinction between the sources and evidences of international law.

2 Treaties: constituent elements and law determining agencies of treaties.

3 Custom: constituent elements and law determining agencies of custom.

4 General principles of law: constituent elements and law determining agencies of general principles of law recognised by civilised nations.

5 Evidence of custom and general principles: subjective nature - difficult to prove; North Sea Continental Shelf cases.

6 The fault of States for the difficulty of formulating the rules of international law.

Suggested Solution

The distinction made between the sources and evidences of international law is apparent from the wording of article 38(1) of the Statute of the International Court of Justice which is generally regarded as being a complete statement of the sources or law creating processes of international law (1). This general acceptance is based on the fact that the sources listed in article 38(1)(a)(b)(c) viz: international conventions, international custom and the general principles of law recognised by civilised nations, are expressed to be the basis on which the Court shall decide disputes in accordance with international law. By way of contrast, article 38(1)(d) in providing that 'judicial decisions and teachings of the most highly qualified publicists of the various nations' are to be 'subsidiary means for the determination of rules of law', implies that there are not only other subsidiary means for such determination but also that there are principal means for the determination of the rules of law. An international law is largely unwritten, being primarily dependent for the creation of its rules upon the uncertainties and vicissitudes of State practice; it is probably true to say that the evidences of the existence of a particular rule are more important than its sources.

Such law determining agencies or evidences of public international law, must by definition be those evidences or agencies which supply the substance of the rule to which law creating processes give the force and nature of law. Dealing with the law creating processes in turn, the constituent elements of treaties are agreement and acceptance as law. The law determining agencies or evidences in the case of international conventions are laid down in the Vienna Convention on the Law of Treaties. Articles 31 and 32 provide that in interpreting the terms of the treaty recourse may be had to the ordinary meaning of the terms of the treaty, the treaty text, preamble and annexes, and any subsequent practice or agreements or relevant rules of international law relating to the treaty in question.

In addition, in certain circumstances recourse may be had to the preparatory work and circumstances of the treaty. Therefore as far as treaties are concerned all the above sources of evidence are law determining agencies.

In the case of custom the constituent elements are general State practice and acceptance of that practice as law. The law determining agencies or evidence in the case of custom must therefore include all matters which evidence general practice on the part of States and State acceptance of any particular practice as law. The evidences of custom are particularly numerous and according to Brownlie (2) include: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, executive decisions and practices, comments by governments on drafts produced by the International Law Commission, State legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practices of international organs, the resolutions relating to legal questions in the United Nations General Assembly.

QUESTION 1 (continued)

The constituent elements in respect of general principles of law recognised by civilised nations are their generality and their recognition by civilised nations. The evidences of these general principles of necessity reflect the uncertainties of the law. Indeed, in order to establish a particular rule as a 'general principle of law recognised by civilised nations' it may be necessary to indulge in a comparative survey of various legal, even moral, systems before the principles can be accepted.

In the cases of customary law and the general principles of law recognised by civilised nations, in particular, the very nature of their constituent elements requires that it is only by examination of the practice of States that the necessary evidence for any determination can be obtained. For instance, it would be impossible to say whether there is a general practice sufficient to give rise to custom without such examination. However, it must be acknowledged that matters such as acceptance of law (opinio juris) and recognition by civilised nations are necessarily subjective and therefore, as with all subjective matters, difficult if not impossible to prove. This problem was, apparently, in the minds of Judge ad-hoc Sorenson and Judge Tanaka when they delivered their dissenting opinions in the *North Sea Continental Shelf cases* (3). Tanaka in commenting on the delicacy and difficulty involved in identifying rules of custom, remarked that so far as 'opinio juris sive necessitatis is concerned, it is extremely difficult to get evidence of its existence in concrete cases ... to seek evidence as to the subjective motives for each example of State practice ... is something which is impossible of achievement'. Sorenson echoed this in his opinion when he stated that 'it is practically impossible for one government to produce conclusive evidence of the motives which have prompted the action and policy of the other government'. Certainly, care is needed in assessing the significance of a State's acts or pronouncements. As Brierly says, 'States, like individuals, often put forward contentions for the purpose of supporting a particular case which do not necessarily represent their settled or impartial opinion'.

Brierly is therefore probably correct in his assertion that the 'difficulty of formulating the rules of international law with precision is a necessary consequence of the kinds of evidence upon which we have to rely in order to establish them'. But much of this difficulty is the fault of states themselves and in particular their attitude towards international law. This uncertainty suits those States who wish to control the development and curtail the activities of international law so as to protect their activities from outside judicial interference. It is the States themselves who are to blame for failing to reach the standard of candour which would permit an accurate assessment of the subjective motives necessary to evidence State practice. For many states, it is not enough that international law should be largely unenforceable; it must be unascertainable as well.

References

1) See Parry, *The Sources and Evidence of International Law (1965)*
2) Brownlie, *Principles of Public International Law*
3) North Sea Continental Shelf cases: *Federal Republic of Germany* v *Denmark*; *Federal Republic of Germany* v *The Netherlands*. ICJ Reports 1969 p3.

QUESTION 2

General Comment

A relatively simple problem concerning the recognition of States and Governments in international law and its effects. In considering the legal accuracy of the Foreign Minister's statement students should consider the constitutive and the declaratory theories of recognition and State practice with regard to recognition, in particular the adoption of the Estrada doctrine by the United Kingdom in 1980. The effects of recognition in municipal law should also be considered.

Skeleton Answer

1 Introduction: the meaning of recognition; the constitutive theory and the declaratory theory of recognition.

2 United Kingdom practice with regard to recognition; abandonment of expressly recognising revolutionary Governments.

3 The accuracy of the Foreign Minister's statement; effects of recognition in international and municipal law.

Suggested Solution

Provincia is a colony which has exercised its right of self-determination and proclaimed its independence from Metropolia, the Colonial Power. Following the United Nations General Assembly Declarations on the Granting of Independence to Colonial Territories and Peoples, many international jurists see self-determination as a legal right, at least in the colonial context. Therefore it may be expected that many States will recognise Provincia as a State and also recognise its new Government as the de facto, if not the de jure, Government of Provincia. However, the treatment of the minority Countie Tribe by the new regime has attracted international criticism and, as a result, very few States have recognised either the new State of Provincia or its Government.

Recognition is the willingness to deal with the new State as a member of the international community, or with the new Government as the representative of the State. It is a matter of intention and may be express or implied. There is a profound doctrinal controversy regarding the legal effects of recognition. On the one hand proponents of the constitutive theory argue that a State or Government does not exist for the purposes of international law until it is recognised by the international community. On the other hand proponents of the declaratory theory advocate that the existence of a State or Government is a question of fact and recognition therefore serves no legal effect being merely an acknowledgement of that fact.

Generally, prior to 1980, the United Kingdom practice on recognition of both States and Governments accorded broadly with the declaratory theory. The United Kingdom accepted the duty to recognise entities which fulfilled the factual requirements of statehood or Government. The normal criteria employed by the United Kingdom Government for the recognition of a new State are the traditional legal criteria of statehood in international law viz: a permanent population, a defined territory and a government. So far as new Governments were concerned the criteria employed for the recognition of a new regime were that it should enjoy, with a reasonable prospect of permanency, the obedience of the mass of the population, and have effective control over much the greater part of the territory of the State concerned. However, notwithstanding this purported 'face the facts' approach there have been exceptions where the United Kingdom has refused to recognise certain States and Governments even though there is little doubt of their de facto status. For example, the United Kingdom did not recognise the German Democratic Republic until February 1973, and de facto recognition of the Heng Samrin Government of Cambodia was refused in 1979 despite it being in control of the greater part of the territory of Cambodia.

Britain's attitude towards new States and Governments may sometimes therefore seem to be more in line with the constitutive theory of recognition practised by the United States. The United States regards recognition as a political decision and openly uses recognition or the withholding of recognition as a diplomatic weapon in the conduct of international relations. However, the United States Government was prepared to engage in quasi-diplomatic relations with unrecognised States and Governments when it was in the United States' interest to do so, as can be seen from their relationship with the Peoples Republic of China before 1979.

QUESTION 2 (continued)

But if non-recognition can be an expression of disapproval of a new Government then it can be argued that recognition may be interpreted as implying approval of the new Government, even in cases such as the Kadar Government established in Hungary after the uprising, where no such approval was intended. To avoid such misunderstandings some States adopt the policy of never recognising Governments, but instead grant or withhold recognition only in respect of other States. This doctrine, developed from the Estrada doctrine which originated in Mexico, has now been adopted by several other States including the United Kingdom and the United States. The United Kingdom has since 1980 (1) abandoned the practice of expressly recognising revolutionary Governments. In future cases where a new regime comes to power unconstitutionally the question whether it qualifies to be treated as a Government will be left to be inferred from the nature of the dealings, if any, which the United Kingdom Government may have with it, and in particular whether the United Kingdom Government is dealing with it on a normal government to government basis. This, it is hoped, will remove those problems inherent in the previous practice of express recognition.

The accuracy of the Foreign Minister of Provincia's statement that 'recognition is irrelevant in the modern world and Provincia can quite easily survive without it', is therefore debatable. It seems to reflect the declaratory theory that recognition is a mere formality serving no legal purpose. Accordingly States and Governments exist as a matter of fact and granting recognition is merely an acknowledgement of that fact. The theory has certainly attracted judicial support. For instance, as regards the recognition of States the declaratory theory was accepted by the tribunal in *Deutsche Continental Gas Gesellschaft* v *Polish State* (1929-30) (2), and as regards the recognition of Governments, by the arbitrator in the *Tinoco Arbitration between Great Britain and Costa Rica* (1923) (3). It is certainly true that today several States and Governments do survive despite the prima facie 'non recognition' of certain other States.

But if the constitutive theory is adopted by States in respect of Provincia, Provincia despite possessing all the attributes and qualifications of international personality may be denied recognition as a State. So far as these States are concerned Provincia will therefore be without rights and obligations under international law. This recognition of Provincia may have more than mere theoretical implications, because the granting of recognition plays an important role in municipal law. For example, so far as the United Kingdom is concerned, generally the English courts will not recognise a foreign state unless the Foreign Office certifies that it has been recognised by the British Government. An unrecognised State cannot claim sovereign immunity (4) and can therefore be sued in the English courts whether it consents or not. An unrecognised State, however, cannot sue in an English court and is not recognised for purposes of conflict of laws (5). Similarly an unrecognised Government is not entitled to sovereign immunity (6) and cannot sue in an English court (7). The Government's laws will also not be applied in the English courts (8) and it will not be entitled to any property of the State which it claims to govern (9).

It may well be, therefore, that notwithstanding general acceptance of the declaratory theory States may withhold recognition of the new State of Provincia in protest at its manifesto and likewise recognition may be denied its Government as an expression of disapproval of its action. While Provincia and its Government may, like several other States and Governments, survive without such recognition, this will not necessarily be as irrelevant as the Foreign Minister makes out and will perhaps have severe repercussions for Provincia and its Government on both the international and municipal planes.

References

1) Statements by the Foreign Secretary, Hansard HL Vol 408 Cols 1121-1122, 28 April 1980.
2) 5 AD 11 at p 15 (1939)
3) IRIAA 369
4) See *Duff Development Company* v *Government of Kelantan* [1924] AC 797
5) See *Carl Zeiss Stiftung* v *Rayner and Keeler Ltd* [1967] 1 AC 853
6) See *The Arantzazu Mendi* [1939] AC 256
7) See *City of Berne* v *Bank of England* (1804) 9 Ves 347
8) See *Luther* v *Sagor* [1921] 1 KB 456
9) See *Haile Selassie* v *Cable and Wireless Ltd (No 2)* (1939) ICL 182

QUESTION 3

General Comment

A difficult question concerning Namibia (South West Africa). The question is best tackled by tracing the history of the Namibia question from the Great War to the present day, concentrating particularly on the Opinion of the International Court of Justice in the *International Status of South West Africa case* (1950). Students should then examine the consequences for the territory of the termination of the mandate by the General Assembly in 1966, and use this to illustrate the fact that no matter what the Opinion of the Court regarding the status of the territory was in 1950, the history of the Namibia question would probably have been much the same.

Skeleton Answer

1 Introduction: history of the mandate.

2 Advisory Opinion of the International Court of Justice in the International Status of South West Africa case (1950).

3 Activities of the International Court and the United Nations with regard to the Namibia question since 1950: South West Africa cases, 1962 and 1966; General Assembly Resolution 2145 (xxi); Security Council Resolution 276 (1970); 1970 Advisory Opinion; establishment of the Council for Namibia.

4 Was the 1950 Opinion as to the Status of the territory erroneous? Have the ICJ or the UN had any significant influence upon the Namibia question? The consideration of international politics and the Namibia question.

Suggested Solution

After the Great War, the League of Nations' solution to the problem of the overseas colonial possessions of the defeated Central Powers of Germany and Turkey was to place them under mandate. Under the mandate system the German territory of South West Africa, now known as Namibia, was placed under the mandate of the Union of South Africa. The mandatories were given powers by administration and responsibilities which varied according to the category of mandate. South West Africa was a category 'C' mandate, that is one of the least developed, inhabited by peoples not yet able to stand by themselves. Under the mandate their well being and development formed 'a sacred trust of civilisation', entrusted to the Union of South Africa. In no case was sovereignty transferred to the mandatory.

When the League of Nations was replaced by the United Nations after the Second World War the mandate system was replaced by a Trusteeship system under Chapter XII of the Charter of the United Nations. All the former mandated territories were placed under the new system by their mandatories, except South West Africa. In 1950, following South Africa's refusal to place South West Africa under the Trusteeship system, the United Nation's General Assembly asked the International Court of Justice for an advisory opinion on the status of the territory following the demise of the League of Nations. In the *International Status of South West Africa case* (1950) (1) the court advised that South West Africa is a territory under the international mandate assumed by the Union of South Africa on 17 December 1920, and 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. The court further held that the provisions of Chapter XII of the Charter was 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, but, that the provisions of Chapter XII do not impose on the Union of South Africa a legal obligation to place the territory under the Trusteeship system. Finally, the Court unanimously advised 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 with the consent of the United Nations.

On the basis of this opinion the United Nations assumed the supervisory functions that had previously been exercised by the League of Nations. South Africa denied its competence to do so and refused to co-operate. In 1962 (2) and 1966 (3) Ethiopia and Liberia brought cases against South Africa under the mandate before the International Court of Justice, claiming that the introduction of apartheid into the territory and South Africa's failure to promote the welfare of its inhabitants violated its obligations under the mandate. The court rejected

QUESTION 3 (continued)

the claims on the basis that the applicant States had no legal right or interest in them, as those were obligations vis-a-vis the League alone, which only the League could enforce.

In 1966 the General Assembly by resolution (4) declared that South Africa had failed to fulfil its obligation in respect of the mandate and decided that the mandate conferred upon South Africa is terminated and that South Africa has no other right to administer the territory and that henceforth South West Africa comes under the direct responsibility of the United Nations. Following this decision the Security Council called upon South Africa to withdraw from the territory. When South Africa failed to do so the Security Council adopted Resolution 278 (1970) which, while repeating the General Assembly Resolutions, also declared inter alia that the continued presence of the South African authorities in Namibia is illegal and that all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the mandate are illegal and invalid.

In 1970, following South Africa's non-compliance with this Resolution, the Security Council requested an advisory opinion as to the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (5). The Court in its opinion confirmed that the continued presence of South Africa in Namibia was illegal and that South Africa should withdraw from the territory immediately. The Court also held that State Members of the United Nations are under an obligation to refrain from acts or dealings with the Government of South Africa implying recognition of the legality of or lending support or assistance to South Africa's presence in the territory. Since this opinion of the Court South Africa did agree in 1978 to the principle of independence for Namibia and negotiations are slowly progressing.

In 1967, after terminating the mandate, the General Assembly established the United Nations Council for Namibia to administer the territory and prepare it for independence. The Council, which is responsible to the Assembly, is assisted by a Commissioner for Namibia who is an international civil servant responsible to the Council. The Council, being refused admission to Namibia, established its headquarters in New York with a regional office in Zambia. The Council, being issues identity and travel documents and represents Namibian interests on the international plane. While it is clear that the territory is entitled to the right of self determination and political independence, and that legally the Mandate has been withdrawn, the present de jure status of the territory is probably best described as an entity under the control of the United Nations. In practice, however, its status continues to be that of a South African satellite state.

It is highly presumptuous and probably inaccurate to describe the advisory opinion of the International Court of Justice in the *International Status of South West Africa case* (1950) as erroneous. Whether the state of affairs in Namibia would in any case have been different had the Court given a different opinion as to the status of South West Africa in 1950 is highly unlikely, for, while the history of the question would, of course, have been altered, the end result is likely to have been much the same as the position is today, with the United Nations calling for self-determination and South Africa refusing to de-colonise the territory except on its own terms.

In any event, arguments based upon the 1950 Advisory Opinion are now of necessity stale. They have been overtaken by events and ceased to have any real practical importance following General Assembly Resolution 2143 (xxi) (1966), which terminated the mandate of South Africa in respect of Namibia, and received the approval of the International Court of Justice in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970). Therefore the question whether the mandate had survived the demise of the League of Nations or whether the United Nations had taken over the League's supervisory role in respect of the mandated territories is largely devoid of any practical relevance today, and the starting point must now be the Court's 1970 Advisory Opinion and not that of 1950.

Events since the termination of the mandate in 1966, and in particular since the Court's 1970 Advisory Opinion, have shown that matters regarding the status of Namibia would probably not have been much different had the International Court of Justice in 1950 advised that the mandate was terminated, thereby bringing South West Africa within the United Nations Trusteeship system, and had South Africa refused to co-operate. The fact is that the International Court of Justice and the political organs of the United Nations have had little significant influence upon the de facto position of the territory, largely because the legal options open to the international community have always been restricted by considerations of international politics. Faced with South Africa's intransigence, probably the only means of ensuring South Africa's compliance with the various

QUESTION 3 (continued)

resolutions of the Security Council and Opinions of the Court, short of armed force, would be the imposition of sanctions by the Security Council under its enforcement measures contained in article 41 of the Charter.

However, a draft resolution before the Security Council in 1981 requesting a mandatory arms embargo on South Africa was vetoed by France, the United Kingdom and the United States and these States have continuously opposed sanctions, claiming that they are ineffective. Faced with the vested interest of these three Permanent Members of the Security Council in the continuation of a pro-Western, anti-Communist Government in South Africa, no matter what Opinion had been given by the Court in 1950, the position would have been the same as it has been following the 1970 Advisory Opinion. Any action on the part of the United Nations organs, the effect of which would be to destabilise South Africa, would attract their veto. That was as true in 1950 as it is today.

References

1) International Status of South West Africa case ICJ Rep 1950 p 118.
2) South West Africa cases, Preliminary Objections ICJ Rep 1962 p 319.
3) South West Africa cases ICJ Rep 1966 p6.
4) General Assembly Resolution 2145 (xxi) 27 October 1966 GAOR 21st Sess. Suppl 16 p2 (Adopted by 114 votes to two (Portugal, South Africa), with three abstentions (France, Malawi and the United Kingdom).
5) Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970). Advisory Opinion ICJ Reports 1971 p16.