NO. 1966

BEFORE AN

ARBITRAL TRIBUNAL

UNDER THE AUSPICES OF THE

INTERNATIONAL COURT OF JUSTICE

THE UNITED NATIONS,

Petitioner

V.

STATE OF AFRANIA,

Respondent

A P R I L 1966

MEMORIAL FOR PETITIONER

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JURISDICTION

The parties have agreed to submit to the jurisdiction of this arbitral tribunal, governed by the rules of the International Court of Justice.

QUESTIONS PRESENTED

I

Whether Afrania was still a colony of Europa at the time United Nations peace-keeping forces entered the territory.

II

Whether the situation in Afrania constituted a "threat to the peace" within the meaning of Article 39 of the Charter of the United Nations.

III

Whether Afrania has standing to bring a claim for death of the premier.

UNITED NATIONS CHARTER PROVISIONS INVOLVED

Art. 2

¶ 6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

¶ 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Art. 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Art. 105, ¶ 1

The organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purpose.

STATUTE INVOLVED

STAT. INT'L CT. JUST. art. 38, ¶ 1

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions . . .

(b) international custom . . .

(c) the general principles of law recognized by civilized nations;

(d) . . . judicial decisions and the teachings of the most highly qualified publicists. . . .

STATEMENT

On February 1, 1964, Afrania, a colony of Europa, declared independence, and the colonial legislature elected the leader of the majority party premier of Afrania. Europa denounced this action and asked for a meeting of the Security Council of the United Nations, where certain witnesses testified there was a possibility of armed revolt in Afrania with assistance from neighboring countries sympathetic to the Afranian Negroes (Tr. 1).

Representatives of the Afranian government stated that they considered this a domestic affair and would interpret any attempted entry into Afrania by United Nations' forces as aggression (Tr. 2).

Europa said it would recognize the independence of Afrania if certain political rights were guaranteed (Tr. 2). The Security Council finally decided to send an observation team to Afrania, but its entry was refused by Afranian authorities. A second resolution by the Security Council ordered in a "peace force" to prevent hostilities between the antagonists (Tr. 2). The Secretary-General also went to Afrania to negotiate with the premier, but while these

negotiations were being conducted the Afranian leader was arrested by a major of the United Nations' forces and during the resulting melee was shot and killed by a soldier belonging to the detachment. Such action was contrary to the express orders given the major (Tr. 3).

After this, the negotiations were completed and the political rights of the Negro majority were guaranteed. The Security Council then passed a resolution that called for the withdrawal of the United Nations' forces (Tr. 3).

While the forces were being withdrawn, Afrania seized equipment of the United Nations worth $500,000. When negotiations concerning the seizure became deadlocked, Afrania and the United Nations agreed to arbitration of the dispute (Tr. 4). The United Nations claimed (1) the equipment had been illegally seized and should be returned, or (2) the United Nations should be compensated for the equipment. Afrania claimed (1) the seizure was legal, or (2) it was entitled to the equipment for damages due to the wrongful killing of the Afranian premier (Tr. 4).

SUMMARY OF ARGUMENT

I

When the peace-keeping force of the United Nations entered Afrania the colony had not perfected its claim to independence and was still under the sovereign power of Europa. Neither did Afrania attain independence by the time of the event resulting in the premier's death.

The peace force was legally in Afrania through the invitation of the sovereign Europa, and therefore Afrania had no power or right to confiscate United Nations' equipment. United Nations equipment in Afrania was immune from seizure under Article 105 of the Charter.

II

The United Nations was also legally in Afrania because the situation there constituted a threat to the peace.

Afrania's seizure of United Nations equipment cannot be justified as self-defense or reprisal.

III

Afrania lacks standing to bring a claim for the premier's death because he was a European national.

Afrania failed to establish the required basis for recovery on behalf of a proper claimant and cannot bring a claim for state injury.

International law clearly prohibits awarding punitive damages to Afrania.

ARGUMENT

I

THE SEIZURE OF UNITED NATIONS PROPERTY WAS ILLEGAL BECAUSE AFRANIA HAD NOT PERFECTED ITS CLAIM TO STATEHOOD AND THE FORCES WERE SENT TO AFRANIA BY INVITATION OF EUROPA.

A. Afrania was still under the sovereign power of Europa at the time United Nations peace-keeping forces entered the territory.

The critical prerequisites of statehood are customarily given as (1) a people, (2) a territory, (3) a government, and (4) capacity to conduct foreign relations, BRIERLY, THE LAW OF NATIONS 137 (6th ed. 1963). Several international legal publicists support the "constitutive"

theory of recognition that statehood does not come into existence until such country has been recognized by other states.

> A State is, and becomes, an International Person through recognition only and exclusively. . . . Recognition is of special importance in those cases where a new State tries to establish itself by breaking off from an existing State in the course of a revolution [emphasis supplied].

1 OPPENHEIM, INTERNATIONAL LAW §§ 71, 72 (Lauterpacht ed. 1955).

Judge Lauterpacht has said recognition is an "indispensable function" for statehood. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 51 (1947); ACCORD, HERVEY, LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW 7 (1928); Kelsen, Recognition in International Law, 35 AM. J. INT'L L. 605, 609 (1941). There is no evidence that any country recognized Afrania and under the constitutive theory, Europa would still be the sovereign.

The "declaratory" theory of recognition holds that once the requirements of statehood are met, there is a state, and lack of recognition is not determinative. But even under the declaratory theory, the fact that no country has

recognized Afrania is virtually conclusive evidence that it has not perfected its claim to statehood. Brierly says there must be "reasonable probability of permanence" before such status can be legally perfected. BRIERLY, THE LAW OF NATIONS 137 (6th ed. 1963). The facts must evidence that the government can sustain itself. CHEN, THE INTERNATIONAL LAW OF RECOGNITION 57 (1951) ("habitual obedience of the bulk of the population"); RESTATEMENT (SECOND), Foreign Relations Law of the United States § 100 (1965) ("requirements will continue to be satisfied"); Thormodsgard & Moore, Recognition in International Law, 12 ST. LOUIS L. REV. 108, 109 (1927) ("supreme civil authority of reasonable stability"). The record is replete with serious questions about the ability of the white minority to sustain itself as a viable government.

The United Nations Security Council conducted exhaustive hearings on the Afranian question compiling evidence from all interested parties to the dispute (Tr. 1). The second resolution of the Security Council called for Afrania not to perfect its claim to independence (Tr. 2). This is evidence that the major powers of the world, plus

others who heard the evidence, unanimously viewed Afrania as still under the sovereignty of Europa.

While it appears that Europa was willing to conditionally recognize the independence of Afrania if it would guarantee political equality to the Negro majority, to say that such offer was admitting statehood of Afrania is to ignore the traditional lines of communication between the sovereign and its colony. It is evident from the practice of imperial powers in the past that the granting of independence is often the subject of protracted negotiations. It was no admission of Afranian statehood when Europa called a Security Council meeting to find a consensus for the settlement of the volatile situation. As long as there was a struggle between the sovereign and the colony, international law would not permit Afrania to perfect statehood. As Chen writes,

> The continuation of the struggle is a bar to recognition . . . because it is an obstacle to the actual existence of the new state.

CHEN, THE INTERNATIONAL LAW OF RECOGNITION 60 (1951).

Petitioner thus submits to this tribunal that under either theory of recognition, Afrania was still a colony of Europa at the time United Nations forces entered the territory pursuant to a request by Europa and authorization from the Security Council.

B. The United Nations forces were legally in Afrania by invitation of the sovereign, Europa.

The invitation from one sovereign for troops of another to function within its territory is itself an exercise of sovereign discretionary power.

Abundant precedent exists for sending United Nations peace forces into troubled areas at the invitation of the sovereign government. The 1961 United Nations action in the Congo provides the closest analogy to the present peace force sent into Afrania. The United Nations was asked in by the recognized sovereign government to help restore order and quell an attempt at an illegal declaration of independence by a minority government in the province of Katanga. The United Nations peace force entered Katanga against the wishes of the provincial government, and eventually confirmed the central Congolese government's

sovereignty. Although the Katanga secession lasted for over two years, no country ever recognized or treated it as an independent state, and in retrospect it is clear that it never had fulfilled the requisites of statehood. BOWETT, UNITED NATIONS FORCES 271 (1964).

Confiscation is by definition a sovereign act and can be exercised only by states recognized as such under international law. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 40, 44 (1959). Therefore, Afrania had no basis for confiscation arising from the entry of peace forces into territory of which Europa was still sovereign.

C. United Nations equipment in the colony of Afrania was immune from seizure under Art. 105 of the Charter.

Since the United Nations peace force in the colony of Afrania was within territory over which its member-state Europa was sovereign, the equipment of the peace force was immune from confiscation under Article 105 of the United Nations Charter, which reads:

> The Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purpose.

The immunities granted to the peace force, its property, funds and assets "derive from the immunities of the United Nations itself." The peace force, like the Organization itself, is based on the need of independence from local authority in order to perform its international functions. ROSNER, THE UNITED NATIONS EMERGENCY FORCE 143 (1963); AHLUWALIA, THE LEGAL STATUS, PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS 66 (1964).

II

THE UNITED NATIONS PEACE FORCE WAS LEGALLY IN AFRANIA BECAUSE THE SITUATION CONSTITUTED A "THREAT TO THE PEACE."

A. The United Nations Charter and its role in customary international law support the action of the United Nations peace force in Afrania.

The findings by a unanimous Security Council that the situation in Afrania constituted a threat to the peace provided a second but independently sufficient legal basis for the entry of the peace force into Afrania. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 66 (1963). As was written on the Congo action,

> Apart from the request for troops made by the Congolese government, the existence of a threat to the peace in the Congo empowered in the U.N. to send troops under Art. 39 of the Charter . . . the threat to the peace having been found and measures having been decided upon according to the Charter, the right of the U.N. to act is clear.

LARSON, THE UNITED NATIONS 34 (1963). Jessup writes, "A colonial revolution is now legally as well as practically a matter of concern to the whole international community. JESSUP, A MODERN LAW OF NATIONS 53 (1948); RAJAN, THE U.N. AND DOMESTIC JURISDICTION. Accord, MOSKOWITZ, HUMAN RIGHTS AND WORLD ORDER 88 (1959); see, KENNAN, REALITIES OF AMERICAN FOREIGN POLICY 17 (1954). There are many legal scholars who now believe the Charter has become part of customary international law and should be applied by the International Court of Justice under Article 38 of its statute. WEISSBERG, THE INTERNATIONAL STATUS OF THE UNITED NATIONS 208, 209 (1961); 1 OPPENHEIM, INTERNATIONAL LAW § 522(a), THOMAS & THOMAS, INTERNATIONAL TREATIES 28 (1951). The International Court of Justice has also indicated the Charter is part of the customary law and would have effect on nonmembers. Reparations for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. Rep. 174, 185.

Article 2, ¶ 6 of the Charter calls for compliance with its provisions by nonmember states. Petitioner does not concede that Afrania was an independent state, but even if it is so found, its violation of international law in producing a situation threatening international peace and security as well as disregarding fundamental human rights, gave the United Nations the legal right to dispatch a peace force to the territory. Falk, The Authority of the United Nations to Control Non-Members, 19 RUTGERS L. REV. 591 (1965). This arbitral tribunal in applying customary international law should find that Afrania was subject to the provisions of the United Nations Charter and as such, could not be heard to complain of the entry by United Nations peace forces.

B. Afrania's seizure of United Nations equipment cannot be justified as self-defense or reprisal.

International law recognizes the right of a state to resort to force in self-defense, but only in instances of imminent or actual danger to the state's security. Furthermore, this exceptional right can "be exercised only if

the end cannot be otherwise obtained." JESSUP, A MODERN LAW OF NATIONS 269 (1958).

Afrania faced no imminent or actual danger to its security, as at no time did United Nations peace forces attempt to subjugate Afrania. It was there solely to prevent a breach of the peace, and such role simply cannot be contorted into an "imminent threat to the state's [sic] security." If the peace force ever threatened the security of Afrania, and we believe it did not, it surely was not during the process of withdrawal from the colony. It was only at this point that Afrania seized equipment belonging to petitioner.

The classical definition of self-defense in international law came in The Caroline (United States v. Britain), 2 Moore's Dig. 409, 3 INT. ARB. 2419 (1837), holding that to justify use of force against person or property in self-defense there must be a necessity which is "instant, overwhelming, leaving no choice of means and no moment for deliberation." This same test was used in the Nuremberg Tribunals, more than 100 years later. Judicial Decisions, 41 AM. J. INT'L L. 205 (1947).

When a state justifies action in terms of self defense, the burden of proof rests with the party making the claim. Brownlie, The Use of Force in Self Defense, 37 BRIT. Yb. INT'L L. 208 (1961).

Reprisals, also a form of self-help, are subject to even more prerequisites and qualifications. Legitimate reprisals must meet three conditions: (1) a prior illegal act--we have shown the United Nations presence in Afrania was legal and Afrania not entitled to damages for premier's death; (2) a prior request for redress which has been refused--Afrania ignored established means of redress through diplomatic negotiation or arbitral tribunal; and (3) a proportionate response--seizure of a half million dollars of equipment used to prevent a breach of the peace is an unreasonable exercise of a power which Afrania did not even possess. Naulilaa Incident (Portugal v. Germany), 8 Rec. des décis. des trib. arb. mixtes 409, 2 U.N. REP. INT'L ARB. AWARDS 1012 (1928). "Reprisals are admissible only after negotiations have been conducted in vain for the purpose of obtaining reparations from the delinquent state." 2 OPPENHEIM, INTERNATIONAL LAW § 41 (7th ed. Lauterpacht 1952).

Respondent thus is unable to justify seizure of United Nations equipment or to establish a claim in damages for death of the premier.

C. The United Nations is not liable for the death of the premier.

There is no precedent for holding the United Nations liable against its wishes for acts committed by nationals of a member state. While the international personality of the United Nations was affirmed in the Reparations case, supra, that opinion firmly stated, "that is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State."

The ultimate legal responsibility for United Nations soldiers rests with the Member state providing the national contingent and not with the United Nations. Draper, The Legal Limitations Upon the Employment of Weapons by U.N. Force in the Congo., 12 INT'L L.Q. 407 (1963).

The United Nations has voluntarily in the past paid claims growing out of other peacekeeping operations, but it is most significant that these were based on status of forces agreements with the host country, and there was no

status of forces agreement between the United Nations and Afrania. Indeed, had there been a status of forces agreement at all, it would have been between the U.N. and the sovereign Europa.

In the only other instance on record of an attempt to press a claim against the United Nations apart from a status of forces agreement the United Nations consistently denied liability. The incident in question involved a shooting of ambulance personnel during the Congo crisis, and the Secretary-General's exchange with the head of the International Red Cross made clear the position of United Nations non-liability for the Ethiopian nationals concerned.

However, even should the tribunal find that claims may be brought against the United Nations without its consent, there is no liability in this case under general rules of international responsibility. To be attributable, such conduct must be within actual or apparent authority. RESTATEMENT (SECOND) § 169, supra. There was no actual authority, because the major knew he was acting contrary to orders. There was no apparent authority, because the premier knew that the orders of the force were to take no

positive action against the government of Afrania or its representatives.

III

AFRANIA IS UNABLE TO BRING A COUNTERCLAIM FOR THE DEATH OF THE PREMIER.

A. Afrania lacks standing to bring a claim or counterclaim for the death of the premier.

It is well established in international law that an international claim for damages must be national in origin. Nottebohm Case, [1955] I.C.J. Rep. 4; NOTE, 42 HARV. L. REV. 930, 933 (1929). "The injury must have been committed against one who was a national of the claimant state at the date of injury and until the date of settlement." I WHITEMAN, DAMAGES IN INTERNATIONAL LAW 109 (1937); Cacharo (United States v. Germany), Mixed Claims Commission (1926); Mann, The Effect of Change of Sovereignty On Nationality, 5 MODERN L. REV. 218, 222 (1942).

Even assuming Afrania is now a state, it obviously was not at the time of the killing of the premier when the claim for damages arose. Both the colonial premier and his immediate heirs were nationals of Europa when the death occurred.

> It is well settled that the right to protect is confined to nationals of the protecting state. A break in the national ownership of a claim, as by a change in the nationality of the claimant, defeats the claim.

5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 802 (1943); Perché (United States v. France), 3 Moore, INT'L ARB. 2401 (1898); Administrative Decision No. V (United States v. Germany), Mixed Claims Commission (1924). This principle precludes Afrania's argument that it is entitled to damages for the killing of the premier, because it patently lacks standing to bring the claim.

B. Afrania has failed to establish any basis for recovery.

Individuals are unable to bring a claim against a state in any international proceeding, and the only means of recovery, if there be grounds for one, is for the State of which the injured party is a national to assert the right. It is an accepted rule of international law, however, that in such a case the damages awarded to the State are measured not by any insult or "injury" suffered by the State but entirely on the basis of the loss to the individual claimant whom it represents. BORCHARD, DIPLOMATIC PROTECTION OF

CITIZENS ABROAD 357 (1915). Afrania has failed to establish at any time that it is seeking compensation for the death of the premier on behalf of any individual entitled to recover for that loss. The record shows that the only basis for recovery ever put forward by Afrania is "in satisfaction of Afrania's right to damages" (Tr. 3).

In the Matilde Milian (Italy v. Venezuela), Ralston's Report (1904), the tribunal disallowed Italy's claim, assuming that since Italy could produce no citizen-claimant her claim was merely for a national insult. Afrania's claim must fail because of the same fatal defect.

C. Afrania is in any case precluded from recovering punitive damages.

Finally, Afrania has sought to have the tribunal inflict punitive as well as compensatory damages upon the United Nations in an attempt to bolster its untenable position. This effort contradicts a long line of precedent and theory in international law. Punitive damages in the context of an international tribunal are seen as political rather than legal in nature and "repugnant to the fundamental principles of international law." The Lusitania Cases

(United States v. Germany), Mixed Claims Commission (1923), 1103; 1 WHITEMAN, DAMAGES IN INTERNATIONAL LAW 717 (1937).

Punitive damages are awarded neither to states nor to states representing individual claimants before international tribunals. Therefore, Afrania has failed to establish a right of recovery, either compensatory or punitive, on any basis.

CONCLUSION

For the reasons set forth above, petitioner respectfully submits that the Arbitral Tribunal should find that the seizure of its equipment by Afrania was illegal, and it should be returned; or, in the alternative, that Afrania be ordered to pay compensation for its value plus interest.

Respectfully submitted

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