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LETTER DATED 23 MARCH 1971 FROM THE PERMANENT REPRESENTATIVE
OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE
SECURITY COUNCIL

I have the honour to transmit herewith for the information of the members of the Security Council the text of the Opinion of the Law Officers of the Crown for England and Wales on the extent of the existing legal obligations of Her Majesty's Government, arising under the Simonstown Agreements of 1955. These Agreements, which were registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter, are still valid and remain in force. It will be noted that, contrary to the allegation in the memorandum transmitted with the letter dated 24 February 1971 from the Executive Secretary of the Organisation of African Unity (S/10132), the United Kingdom Government have certain legal obligations under the Agreements which are fully set out in the attached Opinion.

(Signed) O.T. CROWE



LEGAL OBLIGATIONS OF HER MAJESTY'S GOVERNMENT ARISING OUT OF THE SIMONSTOWN AGREEMENTS.

*Presented to Parliament by the Attorney General
by Command of Her Majesty
February 1971*

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**OPINION
OF THE LAW OFFICERS OF THE CROWN FOR ENGLAND
AND WALES**

**on the extent of the existing legal
obligations of Her Majesty's Government,
arising under the Simonstown Agreements, to
permit the export of arms to South Africa**

We have been requested to submit to Parliament our written Opinion as to whether and to what extent Her Majesty's Government has any existing legal obligation, arising from the Simonstown Agreements, to permit the export of arms to South Africa. This Opinion expresses the substance of the advice which we have tendered to Her Majesty's Government over the last six months. Facts and documents relevant to this question have been placed before us by the Government departments concerned. Our Opinion refers to certain communications which took place between Her Majesty's Government and the South African Government. These communications are set out in the numbered documents in the Annex* to which the footnote numbering in the Opinion refers.

* The text of the Annex is not reproduced in the present document; a copy of it in English may be consulted in the United Nations Secretariat, room 3502.

OPINION THE BACKGROUND

The Simonstown Agreements.

1. The documents commonly referred to as "The Simonstown Agreement" are the Agreement on defence of the sea routes round Southern Africa and the Agreement relating to the transfer of the Simonstown naval base. These Agreements are contained in exchanges of letters dated 30th June, 1955. They were published in Command Paper 9520 which was presented to Parliament in July, 1955. This Command Paper also included an exchange of letters setting out the terms of an understanding on the need for international discussions with regard to regional defence.* Any legal obligation upon Her Majesty's Government to permit the South African Government to purchase naval vessels or equipment in the United Kingdom derives from the Agreement on defence of the sea routes round Southern Africa (which is referred to hereafter as "The Sea Routes Agreement").

2. The purposes of the Sea Routes Agreement are stated in paragraph 1 as follows:—

"1. Recognising the importance of sea communications to the well-being of their respective countries in peace and to their common security in the event of aggression, the Governments of the Union of South Africa and of the United Kingdom enter into the following Agreement to ensure the safety, by the joint operations of their respective maritime forces, of the sea routes round Southern Africa."

3. The machinery established by the Sea Routes Agreement for carrying out its purposes included the designation of the Royal Naval Commander-in-Chief, South Atlantic, as Commander-in-Chief for purposes of planning and operational command in war (paragraph 5 of Sea Routes Agreement), the earmarking in peacetime of naval forces to be assigned to him in time of war or emergency likely to lead to war, and a joint maritime war planning committee containing representatives of the two Navies. The peacetime responsibilities of the Commander-in-Chief included "the organisation for and conduct of combined training" of the national units earmarked to his command in war "so as to ensure that they can operate as an effective and integrated force" and the authority of the Commander-in-Chief extended to the co-ordination of the combined training of these forces and the calling for reports "concerned with the state of readiness and efficiency" of these forces (paragraph 3 of Annex to Sea Routes Agreement). Exchanges of officers and ratings between the two Navies was envisaged (paragraph 14 of Sea Routes Agreement).

*When communicating this exchange to the United Nations under Article 102 of the United Nations Charter, Her Majesty's Government informed the United Nations that 'this document does not contain any substantive obligations but is registered in order to facilitate understanding of the other two agreements'.

4. There are specific obligations relating to the purchase of vessels for the South African maritime forces in paragraphs 2 and 3 of the Sea Routes Agreement. These paragraphs are in the following terms :—

“2. The Union Government have approved a programme for the expansion of the South African Navy. The programme will be spread over a period of eight years from 1955 to 1963, and will involve the purchase of the following vessels, which will be added to the existing fleet :—

6 anti-submarine frigates

10 coastal minesweepers

4 seaward defence boats

3. The Union Government will place firm orders in the United Kingdom for the purchase of these vessels, costing some £18M. The British Admiralty agree to act as agents for the Union Government in this matter.”

Legal effect of the Sea Routes Agreement.

5. The Sea Routes Agreement is a treaty. It was intended to, and does, impose legal obligations upon each of the Governments who expressed their mutual agreement in the form of an exchange of letters.* The Agreement is still subsisting. It has not been terminated in accordance with the provisions of paragraph 17, which provides that it “will remain in force until such time as the two Governments decide otherwise by mutual agreement”. The subsequent statements of the two Governments (in, for example, documents 27 and 28) make it plain that each of them regards it as having continuing validity.

6. The Sea Routes Agreement gives rise to a number of obligations on the part of each of the signatory Governments. We are now concerned, however, with only one of these, that is to say the obligation of Her Majesty's Government in respect of the export of arms to South Africa. Although it was agreed‡ that the British Admiralty would “act as agents for the Union Government in this matter”, Her Majesty's Government undertook no obligation itself to supply any arms or equipment. But the Union Government expressly agreed to “place firm orders in the United Kingdom for the purchase of these vessels”.‡ This necessarily implies an obligation on the part of Her Majesty's Government to permit the export of any material purchased under the Agreement. Without this implication paragraphs 2 and 3 of the Agreement are empty of any meaning.

7. It is, therefore, plain that :

- (a) the Sea Routes Agreement laid certain obligations upon Her Majesty's Government ;

*A treaty, as defined in the Vienna Convention on the Law of Treaties (Cmnd 4140), is ‘an international’ agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation. (Article 2(1)(a)).

‡See paragraph 3 of the Sea Routes Agreement.

- (b) one of those obligations was to permit the export to the South African Government of certain arms and equipment to be purchased in the United Kingdom.

The question with which we are concerned in this Opinion is how far, and in respect of what arms and equipment, that obligation extends.

South African naval purchases.

8. The South African naval expansion programme referred to in paragraph 2 of the Sea Routes Agreement was stated to be 'spread over a period of eight years from 1955 to 1963'. In 1957 the Admiralty and the South African authorities agreed upon a scheme for procurement of the vessels to be purchased in the United Kingdom, in implementation of paragraphs 2 and 3 of the Agreement, which was phased over the years 1955 to 1965.

9. In pursuance of their obligations under paragraph 3 of the Sea Routes Agreement the South African Government purchased—

4 anti-submarine frigates

10 coastal minesweepers

4 seaward defence boats.

10. Two anti-submarine frigates were, by agreement between the two Governments, omitted from the supply programme drawn up by the Admiralty for implementing paragraph 3 of the Agreement and there is now no obligation on the South African Government to order, or Her Majesty's Government to permit the supply of, these vessels. One anti-submarine frigate purchased was an existing vessel from the Royal Navy. This vessel and the ten coastal minesweepers and four seaward defence boats, were delivered with their initial outfit of equipment, stores and base reserves. Her Majesty's Government's obligation in respect of the supply of these vessels and their initial equipment has therefore been discharged.

11. In addition to the anti-submarine frigate formerly in service with the Royal Navy the South African Government ordered three new anti-submarine frigates to be built in British yards. The design of these new anti-submarine frigates was basically the same as a class of vessel known as the Type 12 frigate, which was also constructed for the Royal Navy and is known as the Rothesay class. These vessels were ordered from the shipyards in 1956-1957. Their names and the dates when they were laid down, launched and completed are as follows :—

	Laid down	Launched	Completed
President Kruger	6. 4.59.	20.10.60.	1.10.62.
President Steyn	20. 5.60.	23.11.61.	25. 4.63.
President Pretorius	21.11.60.	28. 9.62.	4. 3.64.

These three ships were delivered to the South African Government after completion.

THE QUESTIONS.

12. The following three questions thus arise :—

- (a) whether Her Majesty's Government remains under any obligation to permit the supply of the initial equipment for the three anti-submarine frigates that were built in the United Kingdom and supplied in accordance with the Sea Routes Agreement ;
- (b) whether Her Majesty's Government is under any obligation to permit the supply of replacement or additional equipment for all the vessels supplied in accordance with the Sea Routes Agreement ;
- (c) whether the Sea Routes Agreement imposed a wider, general and continuing obligation upon Her Majesty's Government to permit the supply of any further arms that might in the future be requested by the South African Government for the purposes of the Sea Routes Agreement.

Interpretation of Treaties.

13. The answers to these questions depend upon the proper interpretation of the treaty obligations of Her Majesty's Government under the Sea Routes Agreement. The rules of international law for the interpretation of treaties have recently been declared in the Vienna Convention on the Law of Treaties.† The two most important rules for the present purpose can be conveniently quoted from paragraphs 1 and 3 of Article 31 of that Convention, as follows :

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

* * * * *

3. There shall be taken into account together with the context :

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions ;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation ;
- (c) any relevant rules of international law applicable in the relations between the parties."

Role of the Admiralty.

14. Before considering the questions referred to in paragraph 12 above, it is necessary to clarify the position of the Admiralty in connection with the transactions which took place between the two Governments over the construction and equipment of the three anti-submarine frigates.

15. Under paragraph 3 of the Sea Routes Agreement it was agreed that the British Admiralty would act as agents for the South African Government

†Cmd. 4140.

in the placing of orders in the United Kingdom. The Admiralty (later Ministry of Defence) was, however, also the department of Government which dealt generally with the South African Government with respect to the implementation of the obligations of both parties connected with the supply of the vessels. Although the Admiralty was "the agent" of the South African Government in the placing of orders, it is, in our opinion, impossible to distinguish the Admiralty from Her Majesty's Government for the purpose of the series of transactions with the South African Government which are discussed below.

16. At the time when the three frigates were ordered the concept of helicopters as an integral part of the equipment of frigates on anti-submarine activities was already envisaged. The capability of an anti-submarine frigate to carry a helicopter widely extends the effective capacity of the vessel in her anti-submarine role. But systems to put this into effect were still being developed. In 1958 the Admiralty adopted a system known as "MATCH"** for equipping frigates with helicopters. This could be done either as part of the initial construction or by conversion. Conversion systems had to be worked out for each class of ship and the system for the Type 12 frigates was still being developed in the period 1960-1965. The "MATCH" system was adapted to Westland Wasp helicopters and a vessel equipped with it could not readily carry helicopters of another design.

**Medium-Range Anti-Submarine Torpedo Carrying Helicopters.

WESTLAND WASP HELICOPTERS

The Conversion of the Frigates.

17. The South African authorities were informed by the Admiralty of the system which was under consideration for converting Royal Naval ships of the Type 12 class to carry helicopters. By a letter dated 5th September, 1961,⁽¹⁾ (over a year before the completion of the first of the three frigates), the South African authorities wrote to the Admiralty :—

“It has now been approved in principle for these ships to be converted on similar lines to R.N. ships of the same class and for them to be fitted with a helicopter platform and hangar. It is further intended that this conversion should be carried out at the S.A.N. Dockyard, Simonstown”.

This was followed by a letter of 28th December, 1961,⁽³⁾ asking the Admiralty to make available to the South African Navy, in order to carry out conversion of South African frigates to carry helicopters, drawings reflecting the possible Wasp helicopter conversion of a Rothesay class frigate. The Admiralty thereupon provided drawings showing preliminary arrangements for making fittings for the South African anti-submarine frigates then still under construction.⁽⁴⁾

18. In July, 1962, the South African authorities sought further information⁽⁵⁾ from the Admiralty in connection with the equipment of the three anti-submarine frigates for the operation of Wasp helicopters, and made enquiries about the possibility of converting one of the anti-submarine frigates during construction in the United Kingdom. They decided not to proceed with this when they were informed by the Admiralty that full information about the conversion system for Type 12 frigates would not be available for about twelve months, and that completion of the helicopter arrangements on the frigate concerned would seriously delay the vessel.⁽⁷⁾

19. During 1962 and 1963 there were further exchanges between the South African authorities and the Admiralty about the details of the design arrangements for converting Type 12 frigates to carry helicopters. The South African Government paid the Admiralty for the cost of some of the design work involved.⁽⁸⁻¹⁷⁾ In July, 1964, the official “MATCH” handbook was made available to the South African authorities by the Admiralty.⁽¹⁸⁾

20. Notwithstanding the announcement of the arms embargo on 17th November, 1964, (see paragraph 22 below) the particulars to assist with conversion of the frigates which is being carried out by the South African Government in South Africa have continued to be made available to the South African authorities by Her Majesty's Government. Indeed details of all modifications carried into this class of frigate have been and continue to be provided to the South African Navy.

21. After completion (between 1962 and 1964), the three anti-submarine frigates constructed in the United Kingdom were delivered to the South African Government. Commencing in January, 1968, conversion of the frigates proceeded. The conversion of one has been completed; the conversion of another commenced in 1969 and has probably been finished; and the conversion of the third frigate commenced subsequently.

The arms embargo.

22. In November, 1964, Her Majesty's Government announced their decision to impose an embargo on the export of arms to South Africa. This announcement was made by the Prime Minister, Mr. Wilson, in a statement in Parliament on 17th November, 1964.* In the statement announcing the embargo Mr. Wilson said that "outstanding commitments by the Ministry of Defence will be fulfilled", and, in answer to a question about the Simons-town Agreement, added "Nothing I have said in any way involves a breach of the Agreement. Moreover . . . the Agreement is not capable of unilateral denunciation".

South African reaction.

23. The South African authorities sought clarification of the full implications of the statements announcing the embargo. They presented an aide memoire dated 21st December, 1964⁽²⁰⁾ to Her Majesty's Government. In this document the South African Government asked Her Majesty's Government to clarify its attitude towards the supply of various descriptions of equipment, and they sought confirmation that:

"the above mentioned categories of equipment are in fact regarded by the Government of the United Kingdom as being covered by 'commitments by the Ministry of Defence'".

The equipment listed in the note included the following:—

"Westland Wasp Helicopters.

Replacement of Westland Wasp Helicopters which may be written off strength as a result of accidents or wear and tear, or augmentation in numbers to meet S.A. naval requirements".

It will be noted that this enquiry did not refer to or specify any particular number of helicopters but referred generally to replacement or augmentation.

24. Her Majesty's Government replied to this note by three separate communications:

- (1) An aide memoire dated 15th February, 1965,⁽²¹⁾ informed the South African Government that Her Majesty's Government were "prepared in principle to supply" the spare parts for certain aircraft and for Westland Wasp helicopters; and that Her Majesty's Government were not yet in a position to give an answer about the replacement or augmentation in numbers of Westland Wasp helicopters.

*Hansard Vol. 702 Cols 199 to 208.

- (2) A letter dated 9th March, 1965, from Sir Geoffrey Harrison, (a senior official of the Foreign Office, in the absence and on behalf of the Minister of State for Foreign Affairs, Lord Chalfont) to the South African Ambassador⁽²²⁾ contained the following passage :—

“I am writing to let you know that Her Majesty’s Government will be prepared to supply additional Wasp helicopters to meet South African naval requirements. In reaching this decision, Her Majesty’s Government have taken account of the fact that these specialised aircraft are integral parts of a complete anti-submarine weapons system supplied to South Africa under the Simonstown Agreement”.

- (3) A letter from Her Majesty’s Government dated 31st May, 1965⁽²³⁾ informed the South African Government that Her Majesty’s Government would be willing to consider the replacement of certain aircraft and “Westland Wasp helicopters which are lost in accidents or through mechanical defect in the light of the circumstances in each case”. It also said that “Her Majesty’s Government would not, however, be able to allow the supply of replacements for these types of aircraft written off as a result of normal wear and tear”. We comment on this letter (and in particular on the distinction between helicopters lost in accidents or through mechanical defects and helicopters written off as a result of normal wear and tear) in paragraph 54.

The 1967 request.

25. In January, 1967, Her Majesty’s Government received a list of defence equipment in respect of which the South African Government sought to place orders in the United Kingdom. This document included the following enquiry relating to helicopters :—

“Wasp helicopters. Originally six Wasp helicopters (of which two have been written off) and recently a further four, net total 8, have been acquired. 12 AS helicopters are required. Will the additional four be supplied during the period 1971/1973?”

26. The South African fleet existing when the Simonstown Agreements were made in 1955 included two former Royal Navy destroyers, which had been purchased in 1950 and 1952. Between 1962 and 1966 the South African Government converted these destroyers to carry Wasp helicopters with the assistance of plans and instructions supplied by Her Majesty’s Government. Six Wasp helicopters were supplied for these vessels before 1964. Four further Wasp helicopters were supplied in 1966. These are the helicopters referred to in the South African Government’s enquiry quoted in the previous paragraph.

27. With regard to the enquiry of January, 1967, by the South African Government referred to in paragraph 25, the Prime Minister, Mr. Wilson, informed Parliament on 14th December, 1967, as follows :—

“The South African Government have indicated an interest in buying certain items of mainly naval equipment. No reply has as yet been sent.

Our policy on these matters remains as I stated it to the House on 17th November, 1964".*

It was on 17th November, 1964, that Mr. Wilson had stated that outstanding commitments by the Ministry of Defence would be fulfilled.

The Exchanges of 1969/70.

28. The conversion of the first of the three anti-submarine frigates so as to enable her to carry Wasp helicopters had begun in January, 1968. But on 12th December, 1969, the South African Ambassador was informed that if the manufacturers of Westland Wasp helicopters applied for an export licence to sell this equipment to South Africa, a licence would be refused by Her Majesty's Government.

29. Following this, the South African Government delivered an aide memoire dated 3rd February, 1970⁽²⁶⁾. In this aide memoire the South African Government referred to the letter of 9th March, 1965,⁽²²⁾ and sought clarification of the statement made to their Ambassador which, the aide memoire alleged, was contrary to the assurance contained in the letter of 1965; the aide memoire went on to enquire whether the letter and spirit of the Simonstown Agreement had any meaning for the United Kingdom.

30. Her Majesty's Government replied to this communication by an aide memoire on the 5th March, 1970.⁽²⁷⁾ In this document Her Majesty's Government confirmed that they attached importance to the Simonstown Agreement and regarded it as still in force, but informed the South African Government that Her Majesty's Government were unable to agree to license the supply of further Wasp helicopters to South Africa and that any assurances contained in the letter of 9th March, 1965, had been met by the supply thereafter of four additional Wasp helicopters.

31. The South African Government replied to Her Majesty's Government's note in an aide memoire dated 20th May, 1970⁽²⁸⁾. They referred to the unwillingness of Her Majesty's Government to honour their obligations under the Simonstown Agreement and rejected the arguments advanced by Her Majesty's Government as unacceptable.

Legal considerations.

32. It is in the context of the matters narrated in the previous paragraphs that we have to consider the first of the questions posed in paragraph 12 above, namely whether Her Majesty's Government remain under any obligation to permit the supply of initial equipment for the three anti-submarine frigates built in the United Kingdom and supplied in accordance with the Sea Routes Agreement. It will be apparent that in practical terms this is confined to the question of whether Her Majesty's Government is under any obligation to permit the supply of any further Wasp helicopters.

*Hansard Vol. 756 col. 628.

33. There are, in our opinion, four factors that are relevant to a conclusion on this question :—

- (1) The principle that the Sea Routes Agreement must be interpreted “in the light of its object and purpose” ;
- (2) The nature of the right conferred upon the South African Government in respect of the supply of vessels under the Sea Routes Agreement ;
- (3) The subsequent practice of the parties in their application of the Sea Routes Agreement ;
- (4) The principle that the parties must perform in good faith their obligations under the Sea Routes Agreement.

34. The object of the Sea Routes Agreement (paragraph 1) is “to ensure the safety by the joint operations of their respective maritime forces, of the sea routes round Southern Africa”. To this end, paragraph 2 of the Sea Routes Agreement provides for the expansion of the South African Navy so that there should be available efficient forces in a state of readiness for the fulfilment of that purpose. This plainly indicates the intention of the parties that the vessels to be provided under the Agreement (including the anti-submarine frigates) should be as apt as possible for that purpose.

35. The nature of the right conferred (by paragraphs 2 and 3 of the Sea Routes Agreement) upon the South African Government to order vessels must also be interpreted in good faith in accordance with the ordinary meaning of the words. So interpreted, these paragraphs, in our opinion, entitled the South African Government to purchase anti-submarine frigates of any type or design which they thought best. The South African Government’s right of choice extended moreover to the equipment of the ships. The only restriction upon the South African Government’s right to choose in this way was that vessels should fall within the broad descriptions set out in the Agreement. Apart from this the South African Government retained the freedom of a sovereign Government to decide upon the armament of its fleet.

36. The subsequent practice of the parties in applying the Sea Routes Agreement is apparent from what we have set out in paragraphs 17 to 31 above. It is clear from the dealings between the Admiralty and the South African authorities, that both parties were interpreting their obligations in such a way as would enable the South African Government to obtain anti-submarine frigates from the United Kingdom (including, if they so desired, equipment of the latest design) which would be most effective for carrying out the purposes of the Sea Routes Agreement. This is why the South African Government was made aware by the Admiralty, not later than 1961, of the systems which were then under consideration for converting Royal Naval ships of the Type 12 class to carry helicopters. This is why, in light of this information, the South African Government in the same year made plain their intention that the Type 12 Frigates on order for them should be fitted with the “MATCH” system, either by conversion or as part of the original construction. The adoption by the South African Government of the “MATCH” system would necessarily have involved the equipment of their

three anti-submarine frigates with Wasp helicopters. Her Majesty's Government not only acquiesced at the time in the foregoing proposals of the South African Government, but have continued, without interruption, to assist them by supplying technical information relating to the "MATCH" conversion system.

37. These transactions must be considered alongside the other factors referred to in paragraph 33 above. In particular they must be considered in the light of the obligation of Her Majesty's Government to act in good faith and in light of the object and purpose of the Agreement. In our opinion, the effect of these transactions was that the South African Government elected to purchase anti-submarine frigates whose armaments would include Wasp helicopters. Her Majesty's Government accepted that the obligation on their part to permit the supply of the vessels and equipment extended to helicopters as integral parts of the anti-submarine equipment of the frigates, when the "MATCH" system had been installed.

38. It is to be noted that the statement in the letter of 9th March, 1965,⁽²²⁾ that Her Majesty's Government would be prepared to supply Wasp helicopters to meet South African naval requirements is in unequivocal terms. This contrasts with the terms of the two other communications relating to the supply of equipment, which indicated merely willingness to "consider requests" made by the South African Government for the supply of equipment. Moreover, the express acknowledgment in the letter of 9th March, 1965,⁽²²⁾ that the Wasp helicopters are "integral parts of a complete anti-submarine weapons system supplied to South Africa under the Simonstown Agreement" plainly suggests that Her Majesty's Government in 1965 acknowledged that the Wasp helicopters were required to complete the essential equipment of the three anti-submarine frigates. It is difficult to explain the reference to "the Simonstown Agreement" except upon the basis of an acceptance by Her Majesty's Government of an obligation deriving from the Sea Routes Agreement.

39. We cannot accept the argument put forward in Her Majesty's Government's aide memoire of 5th March, 1970⁽²⁷⁾ that any assurances contained in the letter of 9th March, 1965⁽²²⁾ were met by the supply thereafter of four additional Wasp helicopters. When these four helicopters were supplied to the South African Navy in 1966, none of the three anti-submarine frigates supplied in pursuance of the Sea Routes Agreement had been converted to carry helicopters. In fact there were, at the time of supply of the four helicopters, two South African Navy ships from which the helicopters could operate. These were, of course, the two ex-Royal Navy destroyers that had been supplied prior to the making of the Sea Routes Agreement. These four helicopters could not have been regarded at that time as "an integral part" of equipment of the three new anti-submarine frigates, since it was not until about three years later that any of those ships were capable of carrying helicopters. Four helicopters would, in any case, have been insufficient to provide the initial equipment of the three anti-submarine frigates. In order to maintain this part of a frigate's armament as effective, reserves are essential. If the establishment standards of the Royal Navy were applied a total of eleven helicopters would be required to provide the initial equipment (together with reserves) for these three frigates.

Conclusions.

40. Our conclusions on the question whether Her Majesty's Government remains under any obligation to permit the supply of the initial equipment of the three anti-submarine frigates may be summarized as follows :

1. Her Majesty's Government has at all material times been under an obligation to permit the South African Government to obtain three anti-submarine frigates from this country.
2. This obligation included an obligation to permit the South African Government to obtain frigates that were designed and equipped in the way which the South African Government considered most effective for carrying out the purposes of the Sea Routes Agreement.
3. Her Majesty's Government have acknowledged and confirmed (by the letter of 9th March, 1965⁽²²⁾) that their obligation to permit the supply of the anti-submarine frigates and their equipment extended to the supply of the Wasp helicopters, as integral parts of the complete anti-submarine weapons system.
4. The supply of the four additional Wasp helicopters in 1966 did not discharge these obligations.
5. Her Majesty's Government thus remains under a continuing obligation to permit the export from the United Kingdom of a sufficient number of helicopters to equip the three anti-submarine frigates supplied under the Sea Routes Agreement with their initial complement of Wasp helicopters (together with reserves) if these are requested by the South African Government.

REPLACEMENTS AND ADDITIONAL EQUIPMENT

The issues.

41. We turn now to the second question posed in paragraph 12 of this Opinion, namely whether Her Majesty's Government is under any obligation to permit the supply of replacement or additional equipment for all the vessels supplied in accordance with the Sea Routes Agreement.

42. The Sea Routes Agreement is, as we have observed, an agreement of indefinite duration, remaining in force until such time as the two Governments decide otherwise by mutual agreement. The Agreement provides for situations of peace and of war. In our opinion it was within the contemplation of the parties when the Agreement was concluded in 1955 that the arrangements for mutual defence of the sea routes were to be of long duration.

43. If the ships supplied are to carry out the purposes and intentions in the Agreement in joint operations, the efficiency of ships for war must be maintained. The armament, stores and base reserves for the ships or a part thereof would necessarily become worn out, lost or expended during the period during which the parties expected the Agreement to continue. If the ships were to be kept efficient this equipment would need to be replaced. The equipment of the vessels is of United Kingdom design and manufacture.

Unless the ships are to be re-fitted with equipment from another country, their efficiency could only be maintained by the provision from United Kingdom suppliers of the necessary replacements. To deny the export of such supplies from this country would lead over a period of time to a serious reduction in the efficiency of the ships, and would detract from the ability of the ships to combine with the ships of the Royal Navy in training or operations.

44. As is apparent from the facts narrated in paragraphs 23 to 31 above the attitude of Her Majesty's Government to the supply of replacement parts necessary to maintain the South African Navy's ability to carry out its role under the Sea Routes Agreement was questioned by the South African Government following the imposition of the arms embargo by Her Majesty's Government in 1964. On 10th December, 1964, the South African Government enquired about "the application of the embargo to routine demands for replacement parts for the South African Navy". The Ministry of Defence replied on 17th December, 1964⁽¹⁹⁾. This letter included the following :— "It is not the Government's intention to withhold replacement parts that are necessary to maintain the South African Navy's ability to carry out its role in the defence of the sea routes round Southern Africa in accordance with the Simonstown Agreement".

45. By the aide memoire of 21st December 1964,⁽²⁰⁾ the South African Government sought to know the attitude of Her Majesty's Government towards the supply of "spares and equipment for ships now in service or subsequently acquired". Her Majesty's Government replied on 15th February, 1965,⁽²¹⁾ that it had already replied to the South African Government on this matter. There is no reference to the precise document in which this reply had been given but we assume that it refers to the letter of 17th December, 1964,⁽¹⁹⁾.

46. On 18th June, 1965, the South African Government delivered another aide memoire to the Foreign Office⁽²⁴⁾, seeking to know whether Her Majesty's Government would be prepared to supply the equipment and stores listed. The list included naval equipment and stores, some of which was stated to be "for modernisation of S.A. Navy Ships" and were items of new equipment. Other items related to equipment already supplied.

47. In reply, by letter dated 31st August, 1965,⁽²⁵⁾ Her Majesty's Government stated :

1. As regards the naval items, that it "would be willing to supply, in the quantities necessary for peacetime consumption and practice", certain of those items (which were listed).
2. That certain equipment, which included some of the new equipment described in the South African communication as being "for modernisation of S.A. Navy ships", can be "supplied in unrestricted quantities".
3. That Her Majesty's Government could not agree to supply the Seacat missile system.

The decisions conveyed by the letter were stated to accord with the general principles outlined in the letter of 17th December, 1964⁽¹⁹⁾.

Legal considerations.

48. It is in the context of these facts that we have to consider the extent of Her Majesty's Government's obligation to permit the supply of replacement or additional equipment for all the vessels supplied in accordance with the Sea Routes Agreement.

49. The Agreement contains no express terms relating to the supply of such equipment. But Her Majesty's Government's obligations have to be decided in light of the object and purpose of the Agreement, which has to be interpreted in good faith. One must also have regard to the subsequent practice of the parties in the application of the Agreement.

50. All these factors point, in our opinion, to one conclusion, which is also the one that accords with commonsense. In the context of the Sea Routes Agreement and of the circumstances which we have outlined, a Government which is obliged to permit the supply of complex equipment must thereafter be regarded as not merely willing but obliged, to the best of its ability, to permit the supply of any further components that proves necessary to keep the original equipment in operation. The letter of 31st August, 1965,⁽²⁵⁾ confirms that this was the view of Her Majesty's Government at that time.

Conclusions.

51. We conclude, therefore, that the Sea Routes Agreement should be interpreted as implying an obligation on the part of Her Majesty's Government, if so requested by the South African Government, to permit the supply of replacements of the initial equipment and stores and base reserves for the vessels supplied from the United Kingdom, and of any other equipment, which is necessary to keep these vessels efficient for the purpose of carrying out the objects of the Agreement. This would include replacement of such a number of helicopters as are necessary to arm and provide a reasonable establishment of reserves for the frigates.

52. In the letter of 31st May 1965⁽²³⁾, Her Majesty's Government stated that they would "be willing to consider" the replacement of Wasp helicopters "which are lost in accidents or through mechanical defect", but would not be able to allow replacements for helicopters "written off as a result of normal wear and tear". The logic of this distinction is not apparent; but in any event this statement cannot be reconciled with the implied obligation referred to in paragraph 51. Assuming that the South African Government makes a request in good faith for the supply of a Wasp helicopter to make good a deficiency in the complement of an anti-submarine frigate, there is an obligation on Her Majesty's Government to permit the export of the helicopter if this is necessary to keep the vessel efficient for the purpose of carrying out the objects of the Agreement.

GENERAL OBLIGATIONS

53. There is finally the question whether the Sea Routes Agreement imposed a general and continuing legal obligation upon Her Majesty's Government to permit the supply of any further arms that might in the future be requested by the South African Government for the purpose of the Sea Routes Agreement.

54. The only express obligation in relation to the supply of arms or equipment that is imposed upon Her Majesty's Government by the Sea Routes Agreement is spelt out in paragraphs 2 and 3 of the Agreement. That is, of course, confined to the naval vessels there set out. Any further legal obligation on the part of Her Majesty's Government to permit the supply of additional vessels or equipment can only arise if such an obligation could be implied as a term of the Sea Routes Agreement.

55. There remains therefore only the question of an implied term. The principle to be applied in considering this question is that a term should only be implied in a treaty when it is necessary to do so in order to give effect to the intention of the parties. Applying this principle it is necessary to reach the conclusion, in the light of the treaty itself and other surrounding circumstances, that the parties must have intended to contract on the basis of the inclusion in the treaty of a provision whose effect can be stated with reasonable precision.

56. In support of the suggestion that a meaningful term can be implied, it can be argued that the treaty does provide for joint operations, joint command structure and for an integrated naval force provided by both States. Moreover, at the time of the Agreement the United Kingdom was a major supplier of arms to South Africa.

57. On the other hand the Agreement does not require the South African Government to maintain its maritime forces at any specified level nor with any specified type of armaments, nor does it impose any obligation on the South African Government to place future orders for naval equipment in the United Kingdom. So far as the provisions made in the Agreement were concerned, both parties retained their freedom to act as they thought best in determining the size, armament and sources of supply of their fleet. The undertakings in paragraphs 2 and 3 of the Agreement contained only limited obligations to purchase and supply arms.

58. In face of these conflicting arguments one must face the final question. If any term of the kind now under consideration is to be implied, how is such a term to be defined? It is here that the suggestion of any general and continuing obligation appears to run into difficulty. To what kind of quantity of equipment would any implied term extend? Over what period? And in what circumstances? We do not think it possible to formulate with any certainty the substance of a term relating to the supply of further arms which the two Governments must have intended at the time when the Sea Routes Agreement was concluded.

The whole concept of such a general and continuing obligation is, moreover, inconsistent with the precision with which the original obligations in respect of the supply of vessels is spelt out in the Sea Routes Agreement.

Conclusions.

59. In our opinion it would not be reasonable, in these circumstances, to impute to the parties an intention to include a term in the Sea Routes Agreement which would place any general and continuing legal obligation on Her Majesty's Government to permit the supply of arms to the South African Government.

SUMMARY OF CONCLUSIONS

60. We therefore advise that the extent of Her Majesty's Government's existing legal obligations to permit the export of arms to South Africa, arising from the Simonstown Agreements, is to permit, if requested by the South African Government, the supply of the following arms for the South African maritime forces :—

- (1) such number of Westland Wasp helicopters as is necessary to equip the three anti-submarine frigates supplied under the Sea Routes Agreement with their initial complement (together with reserves) of Westland Wasp helicopters ;
- (2) such replacements of the initial equipment and stores and base reserves for all the vessels supplied under the Sea Routes Agreement, and such other equipment for these vessels, as is necessary to keep the vessels efficient for the purpose of carrying out the objects of the Agreement.

PETER RAWLINSON.

GEOFFREY HOWE.