COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

STATUT INTERNATIONAL DU SUD-OUEST AFRICAIN

AVIS CONSULTATIF DU 11 JUILLET 1950

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

INTERNATIONAL STATUS OF SOUTH-WEST AFRICA

ADVISORY OPINION OF JULY 11th, 1950

ANNÉE 1950

SÉANCE PUBLIQUE TENUE LE 16 MAI 1950 A 11 HEURES

Présents : MM. BASDEVANT, *Président ;* GUERRERO, *Vice-Président ;* ALVAREZ, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, sir ARNOLD MCNAIR, M. KLAESTAD, BADAWI PACHA, MM. KRYLOV, READ, HSU MO, AZEVEDO, *juges ;* M. HAMBRO, *Greffier.*

Présents également :

M. Ivan KERNO, Secrétaire général adjoint, représentant du Secrétaire général des Nations Unies, assisté de :

M. Marc SCHREIBER,

M. B. SLOAN, du Département juridique des Nations Unies.

Les représentants des Gouvernements suivants :

République des Philippines : M. le juge José INGLES, de la délégation permanente des Philippines auprès des Nations Unies ;

Union sud-africaine : le Dr L. C. STEYN, K. C., conseiller juridique principal du département de la Justice, Prétoria,

assisté du Dr L. WESSELS, conseiller juridique au même département.

Le PRÉSIDENT, ouvrant l'audience, signale que la Cour se réunit pour entendre les exposés oraux qui seront présentés dans l'affaire relative au statut international du Sud-Ouest africain.

Par une résolution datée du 6 décembre 1949, l'Assemblée générale des Nations Unies a décidé de demander à la Cour un avis consultatif sur cette question. Il prie le GREFFIER de donner lecture de cette résolution.

Cette lecture faite, le PRÉSIDENT rappelle que la requête à fin d'avis a fait l'objet des notifications d'usage. Étant donné qu'elle touchait à l'interprétation d'un chapitre de la Charte (en l'espèce le chapitre XII), elle a été, conformément à l'article 66 du Statut, communiquée à tous les gouvernements des Membres des Nations Unies jugés susceptibles par la Cour de fournir des renseignements sur la question.

Le délai de la procédure écrite a été, par une ordonnance datée du 30 décembre 1949, fixé au lundi 20 mars 1950.

La Cour a reçu du Secrétaire général des Nations Unies la documentation que celui-ci était chargé de lui transmettre.

Elle a reçu, en outre, par ordre de dates, des observations écrites émanant des Gouvernements suivants : Égypte, Union sud-africaine, États-Unis d'Amérique, Inde et Pologne.

La Cour a décidé de tenir, à partir du 16 mai, c'est-à-dire aujourd'hui, des audiences au cours desquelles seraient entendus des exposés oraux.

YEAR 1950

PUBLIC SITTING HELD ON MAY 16th, 1950, AT 11 A.M.

Present : President BASDEVANT ; *Vice-President* GUERRERO ; *Judges* ALVAREZ, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir ARNOLD MCNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO ; *Registrar* HAMBRO.

Also present :

M. Ivan KERNO, Assistant Secretary-General, representing the Secretary-General of the United Nations, assisted by :

Mr. Marc SCHREIBER,

Mr. B. SLOAN, of the Legal Department of the United Nations.

The representatives of the following Governments :

Philippine Republic : Judge José INGLES, member of the permanent Delegation of the Philippine Republic to the United Nations ;

South-African Union : Dr. L. C. STEYN, K.C., Principal Legal Adviser of the Department of Justice, Pretoria,

assisted by Dr. L. WESSELS, Legal Adviser to the same Department.

The PRESIDENT, after declaring the sitting open, said that the Court had met to hear the oral statements which would be submitted in the case concerning the international status of South-West Africa.

By a Resolution dated December 6th, 1949, the General Assembly of the United Nations had decided to request the Court to give an advisory opinion on this subject. He asked the REGISTRAR to read the resolution in question.

When the resolution had been read, the PRESIDENT observed that the request for advisory opinion had been notified in the customary manner. As it was concerned with the interpretation of a chapter of the Charter (namely Chapter XII), it has been communicated, as prescribed in Article 66 of the Statute, to all the governments of the Members of the United Nations considered by the Court as likely to be able to furnish information on the question.

The time-limit for the written procedure was fixed for Monday, March 20th, 1950, by an Order dated December 30th, 1949.

The Court had received from the Secretary-General of the United Nations the documents which he had been requested to transmit to it.

In addition, the Court had received written statements from the following Governments, in order of dates: Egypt, Union of South Africa, United States of America, India and Poland.

The Court had decided to hold public sittings for the hearing of the oral statements, beginning with that day, May 16th.

Le Secrétaire général des Nations Unies s'est fait représenter par M. Ivan Kerno, Secrétaire général adjoint chargé du Département juridique, assisté du Dr Marc Schreiber, conseiller juridique au Secrétariat, ainsi que de M. Blaine Sloan. M. Kerno présentera un exposé oral.

Les Gouvernements de l'Union sud-africaine et des Philippines ont fait savoir qu'un exposé oral serait présenté en leur nom.

Les représentants qui ont été désignés dans cette affaire sont : pour l'Union sud-africaine : M. le Dr L. C. Steyn, K. C., conseiller juridique principal du département de la Justice à Prétoria, assisté par M. le Dr L. Wessels, conseiller juridique au même département ; pour les Philippines : M. le juge José Ingles, membre de la délégation permanente des Philippines auprès des Nations Unies.

Le Président constate la présence devant la Cour du représentant du Secrétaire général des Nations Unies et de ceux des États susmentionnés.

Il annonce qu'il donnera en premier lieu la parole à M. Kerno, représentant du Secrétaire général des Nations Unies, et ensuite aux représentants de la République des Philippines et à ceux de l'Union sud-africaine ; à cette occasion, il rappelle au représentant du Secrétaire général des Nations Unies que la Cour n'est pas saisie de questions de fait, et qu'il convient par conséquent que les orateurs se limitent dans leurs exposés à l'examen des questions d'ordre juridique.

M. Ivan KERNO présente l'exposé reproduit en annexe [1].

(L'audience, interrompue à 13 heures, est reprise à 16 heures.)

Le PRÉSIDENT donne la parole au représentant du Secrétaire général des Nations Unies.

M. Ivan KERNO reprend son exposé [2], dont la suite, interrompue par la clôture de l'audience, est renvoyée par le Président au mercredi 17 mai à 10 h. 30.

L'audience est levée à 18 h. 30.

Le Président de la Cour,
(*Signé*) BASDEVANT.

Le Greffier de la Cour,
(*Signé*) E. HAMBRO.

SÉANCE PUBLIQUE TENUE LE 17 MAI 1950, A 10 H. 30

Présents : [Voir séance du 16 mai.]

Le PRÉSIDENT, ouvrant l'audience, donne la parole au représentant du Secrétaire général des Nations Unies.

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[1] Voir pp. 160 *et sqq.*
[2] » » 176 » ».

The Secretary-General of the United Nations was represented by Dr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department, assisted by Dr. Marc Schreiber, Legal Adviser to the Secretariat, and by Mr. Blaine Sloan. Mr. Kerno would make an oral statement.

The Governments of the South-African Union and of the Philippine Republic had announced that an oral statement would be submitted on their behalf.

The representatives appointed in this case were: for the South-African Union: Dr. L. C. Steyn, K. C., Principal Legal Adviser of the Department of Justice, Pretoria, assisted by Dr. L. Wessels, Legal Adviser to the same Department; for the Philippine Republic: Judge José Ingles, member of the permanent Delegation of the Philippine Republic to the United Nations.

The President noted that the representative of the Secretary-General of the United Nations and the representatives of the above-mentioned States were present in Court.

He added that he would first call on Mr. Kerno, representative of the Secretary-General of the United Nations, and subsequently upon the representatives of the Philippine Republic and the South-African Union; he took this opportunity of reminding the representative of the Secretary-General of the United Nations that the Court was not dealing with questions of fact, and it was therefore desirable that speakers should confine their statements to the examination of legal questions.

Mr. Ivan KERNO presented the statement which is reproduced in the annex [1].

(The sitting was suspended at 1 p.m. and resumed 4 p.m.)

The PRESIDENT called on the Secretary-General of the United Nations.

Mr. Ivan KERNO continued his statement[2]. Before adjourning the stiting, the President stated that the Court would meet again on Wednesday, 17th May, at 10,30 a.m., when Mr. Kerno would resume his statement.

The Court rose at 6.30 p.m.

(*Signed*) BASDEVANT,
President.

(*Signed*) E. HAMBRO,
Registrar.

PUBLIC SITTING HELD ON MAY 17th, 1950, AT 10.30 A.M.

Present: [See sitting of May 16th.]

The PRESIDENT declared the sitting open and called on the representative of the Secretary-General of the United Nations.

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[1] See pp. 160 *et sqq.*

[2] " " 176 " ".

M. Ivan KERNO reprend la suite de son exposé [1].

(L'audience, interrompue à 13 heures, est reprise à 16 heures.)

Le PRÉSIDENT donne la parole au représentant du Secrétaire général.

M. Ivan KERNO reprend son exposé oral, qu'il achève [2].

Le PRÉSIDENT remercie le représentant du Secrétaire général des renseignements qu'il a fournis à la Cour et demande au représentant des Philippines s'il désire prendre la parole immédiatement.

M. le juge INGLES se déclare disposé à commencer son exposé lors de l'audience suivante.

L'audience est levée à 18 heures.

[*Signatures.*]

SÉANCE PUBLIQUE TENUE LE 19 MAI 1950 A 10 HEURES

Présents : [Voir séance du 16 mai.]

Le PRÉSIDENT, après avoir déclaré la séance ouverte, invite le représentant du Gouvernement des Philippines à présenter son exposé oral.

L'exposé du juge INGLES est reproduit en annexe [3].

Avant de clore la séance, le PRÉSIDENT annonce que la Cour se réunira de nouveau samedi 20 mai 1950, à 10 heures, pour entendre la suite de l'exposé du juge Ingles.

L'audience est levée à 1 h. 5.

[*Signatures.*]

SÉANCE PUBLIQUE TENUE LE 20 MAI 1950, A 10 HEURES

Présents : [Voir séance du 16 mai.]

Le PRÉSIDENT, après avoir déclaré la séance ouverte, invite le représentant du Gouvernement des Philippines à continuer son exposé.

La fin de l'exposé du juge INGLES est reproduite en annexe [4].

Le PRÉSIDENT, constatant que le représentant du Gouvernement des Philippines en a terminé avec son exposé, invite le représentant de l'Union sud-africaine à prendre la parole.

L'exposé du Dr L. C. STEYN, K. C., est reproduit en annexe [5].

Avant de clore la séance, le PRÉSIDENT annonce que la Cour se réunira de nouveau le lundi 22 mai, à 10 h. 30, pour entendre la suite de l'exposé du Dr Steyn.

L'audience est levée à 1 h. 5.

[*Signatures.*]

[1] Voir pp. 198 *et sqq.*
[2] » » 223 » » .
[3] » » 239 » » .
[4] » » 259 » » .
[5] » » 273 » » .

Mr. Ivan KERNO continued his oral statement [1].

(The sitting was suspended at 1 p.m. and resumed at 4 p.m.)

The PRESIDENT called on the representative of the Secretary-General.

Mr. Ivan KERNO continued and concluded his oral statement [2].

The PRESIDENT thanked the representative of the Secretary-General for the information that he had given to the Court, and asked the representative of the Philippine Republic if he wished to speak at once.

Judge INGLES said he would be ready to begin his statement at the next sitting.

The Court rose at 6 p.m.

[Signatures.]

PUBLIC SITTING HELD ON MAY 19th, 1950, AT 10 A.M.

Present: [See sitting of May 16th.]

The PRESIDENT, after declaring the sitting open, called upon the representative of the Philippine Government to present his statement.

Judge José INGLES' statement is reproduced in the annex [3].

Before closing the sitting, the PRESIDENT stated that the Court would meet again on Saturday, May 20th, 1950, at 10 a.m., when Judge Ingles would resume his statement.

The Court rose at 1.05 p.m.

[Signatures.]

PUBLIC SITTING HELD ON MAY 20th, 1950, AT 10 A.M.

Present: [See sitting of May 16th.]

The PRESIDENT, after declaring the sitting open, called upon the representative of the Philippine Government to continue his statement.

The conclusion of Judge INGLES' statement is given in the annex [4].

The PRESIDENT, taking note that the representative of the Government of the Philippines had completed his statement, asked the representative of the Union of South Africa to speak.

The statement of Dr. L. C. STEYN, K.C., is given in the annex [5].

Before adjourning the sitting, the PRESIDENT stated that the Court would meet again on Monday, May 22nd, at 10.30 a.m., when Dr. Steyn would resume his statement.

The Court rose at 1.05 p.m.

[Signatures.]

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[1] See pp. 198 *et sqq.*
[2] ,, ,, 223 ,, ,,
[3] ,, ,, 239 ,, ,,
[4] ,, ,, 259 ,, ,,
[5] ,, ,, 273 ,, ,,

SÉANCE PUBLIQUE TENUE LE 22 MAI 1950, A 10 H. 30

Présents : [Voir séance du 16 mai.]

Le PRÉSIDENT, ouvrant l'audience, donne la parole au représentant de l'Union sud-africaine.

Le Dr STEYN prononce l'exposé reproduit en annexe [1].

(L'audience, interrompue à 13 heures, est reprise à 16 heures.)

Le Dr STEYN reprend son exposé, qu'il termine [2].

Le PRÉSIDENT remercie le représentant du Secrétaire général des Nations Unies, le représentant du Gouvernement des Philippines et le représentant du Gouvernement de l'Union sud-africaine des informations dont ils ont fait part à la Cour. Il leur est particulièrement reconnaissant d'avoir bien voulu s'en tenir strictement, au cours de leurs exposés, à la question posée. Il ajoute que la Cour se retire en Chambre du Conseil pour délibérer et décider si elle désire recevoir de plus amples informations sur certains points.

Le Président prononce la clôture de la procédure orale et précise que le Secrétaire général des Nations Unies et les gouvernements intéressés seront informés ultérieurement de la date à laquelle la Cour compte rendre son avis en audience publique.

L'audience est levée à 17 h. 45.

[*Signatures.*]

SÉANCE PUBLIQUE TENUE LE 23 MAI 1950, A 10 H. 30

Présents : [Voir séance du 16 mai.]

Le PRÉSIDENT, après avoir déclaré l'audience ouverte, annonce que la Cour n'a pas d'autres explications à demander aux représentants du Secrétaire général, des Philippines et de l'Union sud-africaine.

Le représentant de l'Union sud-africaine s'étant déclaré disposé à compléter les observations qu'il avait présentées la veille au sujet du chapitre XI de la Charte et de l'engagement qu'aurait pris son Gouvernement de présenter des rapports au sujet du Sud-Ouest africain, le Président, sans entendre exprimer une opinion quant à la pertinence de ces questions, l'invite à compléter sur ces points ses explications antérieures et lui donne la parole.

L'exposé du Dr STEYN est reproduit en annexe [3].

Le PRÉSIDENT donne ensuite la parole au représentant du Gouvernement des Philippines, qui a demandé de faire une brève déclaration.

Le juge José INGLES déclare qu'après avoir entendu l'exposé du représentant de l'Union sud-africaine, il n'estime nécessaire ni d'ajouter ni de retirer quoi que ce soit à l'exposé qu'il a lui-même présenté. Il exprime à nouveau sa confiance que la Cour sera en mesure de trouver

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[1] Voir pp. 278 *et sqq.*
[2] » » 293 » ».
[3] » » 304 » ».

PUBLIC SITTING HELD ON MAY 22nd, 1950, AT 10.30 A.M.

Present: [See sitting of May 16th.]

The PRESIDENT declared the sitting open and called on the representative of the South-African Union.

Dr. STEYN made the statement given in the annex [1].

(The sitting was suspended at 1 p.m. and resumed at 4 p.m.)

Dr. STEYN continued and concluded his statement [2].

The PRESIDENT thanked the representative of the Secretary-General of the United Nations, the representative of the Philippine Government, and the representative of the South-African Union Government for the information that they had given to the Court. He was specially grateful to them for having confined their observations strictly to the question which was before the Court. He added that the Court would now deliberate in private, and would decide whether it wished for any further information on certain points.

The President declared the oral proceedings to be closed, and added that the Secretary-General of the United Nations and the governments concerned would be informed, in due course, of the date on which the Court expected to deliver its Opinion at a public sitting.

The Court rose at 5.45 p.m.

[Signatures.]

PUBLIC SITTING HELD ON MAY 23rd, 1950 AT 10.30 A.M.

Present: [See sitting of May 16th.]

The PRESIDENT, after having opened the sitting, declared that the Court had no further explanations to ask of the representatives of the Secretary-General, of the Government of the Philippines or of the Union of South Africa.

The South-African representative having declared himself ready to supplement the observations which he presented the day before on Chapter XI of the Charter, and the undertaking alleged to have been taken by his Government to present reports on South-West Africa, the President, without expressing an opinion on the relevance of these questions, invited him to supplement his former statements on these points.

The statement of Dr. STEYN is annexed hereto [3].

The PRESIDENT then called upon the representative of the Philippine Government, who had expressed the wish to make a short declaration.

Judge José INGLES declared that, having heard the statement made by the distinguished representative of the Union of South Africa, he did not find it necessary to add or subtract in any way from his own previous statement. Furthermore, he expressed his confidence that the

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[1] See pp. 278 *et sqq.*
[2] ,, ,, 293 ,, ,,
[3] ,, ,, 304 ,, ,,

une solution équitable, fondée sur les principes de la justice et du droit international.

Le PRÉSIDENT, après avoir remercié les orateurs et avant de lever l'audience, demande au représentant du Secrétaire général des Nations Unies de transmettre à la Cour, par la voie du Greffe, l'indication des États qui ont transmis au Secrétaire général les renseignements auxquels il est fait allusion à l'article 73 de la Charte et des territoires auxquels se réfèrent ces renseignements. Ces informations devront être adressées à la Cour aussitôt que possible, sans toutefois que le Président demande qu'elles lui soient présentées sur-le-champ.

M. KERNO se déclare prêt à adresser à la Cour les informations qu'elle demande.

L'audience est levée à midi 50.

[*Signatures.*]

SÉANCE PUBLIQUE TENUE LE 11 JUILLET 1950, A 10 H. 30

Présents : [Voir séance du 16 mai.]

Le PRÉSIDENT, ouvrant l'audience, annonce que la Cour se réunit pour prononcer l'avis consultatif qui lui a été demandé, par l'Assemblée générale des Nations Unies, sur le statut international du Sud-Ouest africain.

Il prie le GREFFIER de donner lecture de la résolution du 6 décembre 1949, où est formulée la demande d'avis.

Cette lecture faite, le PRÉSIDENT rappelle que, conformément à l'article 67 du Statut, le Secrétaire général des Nations Unies et les représentants des Membres des Nations Unies directement intéressés ont été dûment prévenus.

Le Président signale qu'il va donner lecture du texte français de l'avis[1], qui est également un texte original, mais la Cour a décidé, conformément à l'article 39 de son Statut, que c'est le texte anglais qui fera foi.

Le Président prie ensuite le GREFFIER de donner lecture, en anglais, du dispositif de l'avis, après quoi il donne lui-même lecture des déclarations jointes à l'arrêt et faites par MM. Guerrero, Vice-Président, Zoričić et Badawi Pacha, juges[2].

Il signale, en outre, que MM. Alvarez, De Visscher, sir Arnold McNair, MM. Krylov et Read, juges, se prévalant du droit que leur confère l'article 57 du Statut, ont joint à l'avis de la Cour des exposés de leur opinion individuelle ou dissidente[3].

Le Président ajoute que MM. Alvarez, De Visscher, sir Arnold McNair, MM. Read et Krylov l'ont informé qu'ils ne désiraient pas donner lecture à l'audience de leurs opinions individuelles ou dissidentes.

Il prononce ensuite la clôture de l'audience.

L'audience est levée à 11 h. 30.

[*Signatures.*]

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[1] Voir publications de la Cour, *Recueil des Arrêts, Avis consultatifs et Ordonnances 1950*, pp. 128-144.

[2] Voir *ibid.*, pp. 144-145.

[3] » » , » 146-192.

Court would find an equitable solution, based on the principles of justice and international law.

The PRESIDENT, after having thanked the orators and before closing the sitting, requested the representative of the Secretary-General of the United Nations to be kind enough to communicate to the Court, through the Registry, the list of States that have communicated to the Secretary-General the information referred to under Article 73 of the Charter, and the territories to which this information refers. Without requesting that the information be supplied immediately, the President asked that it be sent to the Court, in writing, as soon as possible.

Dr. KERNO declared himself ready to send to the Court the requested information.

The Court rose at 12.50 p.m.

[*Signatures.*]

PUBLIC SITTING HELD ON JULY 11th, 1950, AT 10.30 A.M.

Present: [See sitting of May 16th.]

The PRESIDENT opened the meeting and announced that the Court had met to give the Advisory Opinion requested by the General Assembly of the United Nations on the international status of South-West Africa.

He called upon the REGISTRAR to read the Resolution of December 6th, 1949, stating the request.

After the Registrar had done so, the PRESIDENT recalled that, under Article 67 of the Statute, the Secretary-General of the United Nations and the representatives of the Members of the United Nations directly concerned had been duly informed.

The President stated that he would read the French text of the Opinion [1], which was also the original text, but that, under Article 39 of its Statute, the Court had determined that the English text should be authoritative.

The President then called on the REGISTRAR to read in English the operative part of the Opinion, after which he himself read the declarations made by Vice-President Guerrero, Judges Zoričić and Badawi Pasha [2], annexed to the Opinion.

He stated that Judges Alvarez, De Visscher, Sir Arnold McNair, Krylov and Read, availing themselves of the right conferred upon them by Article 57 of the Statute, had appended to the Opinion statements of their separate or dissenting opinions [3].

The President added that Judges Alvarez, De Visscher, Sir Arnold McNair, Read and Krylov had informed him that they did not wish to read in Court their separate or dissenting opinions.

He then declared that the meeting was closed.

The Court rose at 11.30 a.m.

[*Signatures.*]

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[1] See Court's publications, *Reports of Judgments, Advisory Opinions and Orders 1950*, pp. 128-144.

[2] See *ibid.*, pp. 144-145.

[3] " " " " 146-192.

ANNEXE AUX PROCÈS-VERBAUX

ANNEX TO THE MINUTES

1. EXPOSÉ DE M. IVAN S. KERNO

(REPRÉSENTANT DU SECRÉTAIRE GÉNÉRAL DES NATIONS UNIES)
AUX SÉANCES PUBLIQUES DES 16 ET 17 MAI 1950

[Séance publique du 16 mai 1950, matin]

Monsieur le Président, Messieurs les Membres de la Cour,

C'est pour la troisième fois depuis le début de l'année 1950 que vous entamez aujourd'hui la procédure orale relative aux questions pour lesquelles l'Assemblée générale a décidé de demander un avis consultatif au cours de sa quatrième session ordinaire. De tous les problèmes dont cette Cour, ainsi que sa devancière, la Cour permanente de Justice internationale, a eu à s'occuper, le statut juridique du Territoire du Sud-Ouest africain est certainement un des plus difficiles et des plus discutés. La documentation volumineuse que le Secrétaire général a eu l'honneur de transmettre à la Cour à la date du 17 mars dernier est en elle-même une induction suffisante de la complexité de cette affaire et de l'intérêt soutenu que tous les Membres des Nations Unies attachent à son règlement selon les méthodes de la Charte et en conformité avec les principes sur lesquels est basée notre Organisation.

Vous comprendrez donc combien pleinement je sens ma responsabilité, en me présentant devant vous, au nom du Secrétaire général des Nations Unies.

Dans la première partie de mon exposé, j'essaierai de vous dire aussi objectivement et aussi clairement que possible comment l'affaire est née et quel a été son développement historique devant les organes des Nations Unies. Je procéderai ensuite, dans la deuxième partie, à une analyse de quelques-unes des principales questions juridiques que soulève la demande de l'Assemblée. Je le ferai dans le but de faire ressortir plus nettement les préoccupations et les motifs qui ont amené l'Assemblée générale à rechercher l'avis de la Cour.

PREMIÈRE PARTIE

Dans cette première partie historique de mon exposé, je me propose de vous présenter un tableau d'ensemble des discussions qui ont eu lieu et des décisions qui ont été prises à la Commission préparatoire des Nations Unies, à la dernière Assemblée de la Société des Nations, aux quatre premières sessions de l'Assemblée générale des Nations Unies, ainsi qu'au cours de certaines sessions du Conseil de Tutelle.

I. *La Commission préparatoire des Nations Unies*

La question de la liquidation éventuelle du régime des mandats fut l'objet d'un échange de vues dès la réunion du Comité exécutif de la Commission préparatoire à Londres, en 1945, peu de semaines après la conclusion de la Conférence de San-Francisco. La Commission préparatoire — création d'un protocole spécial signé en même temps que la Charte des Nations Unies — avait pour mission de prendre les mesures provisoires

pour la première session des principaux organes de la nouvelle Organisation. Le désir général des gouvernements représentés au Comité exécutif était de voir ces organes principaux, y compris le Conseil de Tutelle, exercer leurs fonctions le plus rapidement possible. En raison des dispositions de l'article 86 de la Charte des Nations Unies, qui prescrit la composition du Conseil de Tutelle, celui-ci ne pouvait être établi avant qu'un certain nombre de territoires n'eussent été placés sous le régime de tutelle. Plusieurs moyens furent suggérés pour hâter la mise sous le système international de tutelle de territoires en nombre suffisant pour que le Conseil de Tutelle puisse être constitué. Le Comité exécutif proposa à la Commission préparatoire l'établissement d'un organe provisoire, subsidiaire de l'Assemblée générale, qui serait chargé d'assumer certaines des fonctions attribuées par la Charte au Conseil de Tutelle préalablement à la constitution de celui-ci, et notamment de donner des avis à l'Assemblée générale sur les questions que pourrait soulever le transfert à l'Organisation des Nations Unies de fonctions ou responsabilités assumées jusqu'alors en vertu du régime des mandats [1].

La Commission préparatoire, où se trouvaient représentés tous les Membres des Nations Unies, se réunit à Londres, en novembre 1945, dès l'entrée en vigueur de la Charte. Elle ne retint pas la proposition tendant à créer un comité temporaire de tutelle en raison des objections d'ordre constitutionnel exprimées par certains de ses membres et de la crainte qui fut formulée que l'établissement d'un organe temporaire n'ait pour effet, non pas de hâter, mais au contraire de retarder la constitution du Conseil de Tutelle. La Commission préparatoire décida donc de présenter à l'examen de l'Assemblée générale un projet de résolution qui soulignait les inconvénients d'un délai de l'entrée en vigueur du régime international de tutelle que l'Organisation des Nations Unies avait pour tâche d'établir. Le projet déclarait que, des trois catégories de territoires auxquels le régime de tutelle pouvait s'appliquer en vertu de l'article 77 de la Charte, seuls les territoires sous mandat pouvaient être définis avec exactitude. En conséquence, la Commission préparatoire recommandait que l'Assemblée générale adresse un appel aux États administrant des territoires en vertu d'un mandat de la Société des Nations, afin que ceux-ci prennent, de concert avec les autres États directement intéressés, les mesures nécessaires pour la mise rapide en application de l'article 79 de la Charte tendant à la conclusion d'accords de tutelle pour chacun des territoires à placer sous ce régime [2].

Le représentant de l'Union sud-africaine à la Commission préparatoire fit allusion au cours des débats à une résolution récente du corps législatif du Sud-Ouest africain demandant que ce territoire soit admis dans l'Union comme cinquième province. Il indiqua que son Gouvernement estimait qu'il avait complètement satisfait aux obligations qui lui avaient été imposées par le Pacte de la Société des Nations et ne désirait pas marquer son opposition aux désirs des habitants du territoire quant aux destinées de celui-ci. Réservant la position de l'Union sud-africaine jusqu'à la réunion de l'Assemblée générale des Nations Unies, qui jugerait

[1] Rapport du Comité exécutif à la Commission préparatoire des Nations Unies (PC/Ex/113/Rev. 1 — 12 novembre 1945), chapitre IV. — Régime de tutelle, pages 55 et suivantes.

[2] Rapport de la Commission préparatoire des Nations Unies (PC/20 — 23 décembre 1945), chapitre IV. — Le système de tutelle, pages 49 et suivantes.

si les conditions existaient pour accéder aux désirs du Territoire du Sud-Ouest africain, il s'abstint sur le vote du projet de résolution [1].

II. *La première partie de la première session de l'Assemblée générale*

Au cours du débat général sur le rapport de la Commission préparatoire, qui inaugura la première partie de la première session de l'Assemblée générale, successivement le représentant du Royaume-Uni en ce qui concerne les Territoires du Tanganyika, du Cameroun et du Togo sous mandat britannique, celui de la Nouvelle-Zélande en ce qui concerne le Samoa occidental, celui de l'Australie en ce qui concerne les Territoires sous mandat de la Nouvelle-Guinée et de Nauru, celui de la Belgique en ce qui concerne le Ruanda-Urundi, et celui de la France en ce qui concerne les Territoires du Togo et du Cameroun sous mandat français, déclarèrent formellement l'intention de leurs Gouvernements de négocier des accords tendant à placer ces territoires sous le régime international de tutelle [2]. Le représentant de l'Union sud-africaine attira l'attention sur les particularités de la situation géographique du Territoire sous mandat du Sud-Ouest africain, sur les intérêts de sécurité de son pays, sur la faible densité de la population du Sud-Ouest africain et sur sa parenté ethnique avec celle de l'Union sud-africaine. Il fit allusion aux progrès dans le domaine économique et social réalisés par son Gouvernement dans le Sud-Ouest africain pendant la période du mandat, et aux institutions autonomes qui y furent établies. Il informa l'Assemblée du désir de son Gouvernement de consulter la population du territoire sous mandat au sujet de la forme que devait revêtir son futur gouvernement. En attendant le résultat de cette consultation, il réserva la position de l'Union sud-africaine en ce qui concerne l'avenir du mandat, en même temps que son droit à une entière liberté d'action, comme le prévoit le paragraphe premier de l'article 80 de la Charte [3].

Au sein de la Quatrième Commission de l'Assemblée, à laquelle fut renvoyé le chapitre du rapport de la Commission préparatoire relatif au régime de tutelle, plusieurs représentants marquèrent avec énergie leur opposition à toute appropriation de territoires sous mandat par les Puissances mandataires et insistèrent pour que tous les territoires sous mandat qui ne seraient pas devenus indépendants dans un avenir rapproché, soient placés sous le régime international de tutelle.

Le représentant de l'Union sud-africaine, niant qu'il y ait obligation, pour la Puissance mandataire, de transformer les territoires sous mandat en territoires sous tutelle, répéta qu'il n'entrait pas dans l'intention du Gouvernement de l'Union sud-africaine d'élaborer un accord de tutelle avant que ne soit librement exprimée la volonté des populations euro-

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[1] Nations Unies. — Commission préparatoire. — Comité 4. — Tutelle. — Procès-verbal de séance n° 15 (PC/TC/42), page 40. Nations Unies. — *Journal de la Commission préparatoire* n° 27. — Quatrième séance plénière, page 7.

[2] Nations Unies. — Documents officiels de la première partie de la première session de l'Assemblée générale. — Comptes rendus *in extenso*. — 11me séance plénière, p. 166 (Royaume-Uni) ; 14me séance plénière, p. 227 (Nouvelle-Zélande) ; 15me séance plénière, p. 233 (Australie), et p. 238 (Belgique) ; 16me séance plénière, p. 251 (France).

[3] Documents officiels de la première partie de la première session de l'Assemblée générale. — Séances plénières. — Compte rendu *in extenso* de la 12me séance, pages 183 et suivantes (chemise 5).

péennes et indigènes. Quand cette volonté serait connue, l'Union soumettrait sa décision au jugement de l'Assemblée générale [1].

Comme rapporteur de la Quatrième Commission, j'eus personnellement l'honneur et la satisfaction d'annoncer à l'Assemblée, réunie en séance plénière, que la Quatrième Commission lui proposait un projet de résolution approuvé à l'unanimité de ses membres. La résolution soulignait l'importance vitale des chapitres XI, XII et XIII de la Charte pour la paix et le bien-être général de la communauté mondiale. Elle marquait notamment la satisfaction de l'Assemblée générale pour les déclarations faites par certains États administrant des territoires sous mandat concernant leur intention de négocier des accords de tutelle pour certains des territoires et, en ce qui concerne la Transjordanie, d'établir son indépendance. Elle invitait les États — tous les États — qui administrent des territoires en vertu d'un mandat, à prendre, de concert avec les autres États directement intéressés, les mesures nécessaires pour la mise en application de l'article 79 de la Charte, en vue de soumettre des accords à l'Assemblée générale pour approbation, de préférence au plus tard pendant la deuxième partie de la première session. La résolution fut adoptée à l'unanimité des quarante et un Membres présents, y compris l'Union sud-africaine [2].

III. *Dernière session de l'Assemblée de la Société des Nations*

L'Assemblée de la Société des Nations tint sa dernière session pendant l'intervalle entre la première et la deuxième partie de la première session de l'Assemblée générale des Nations Unies. Cette session ultime eut à examiner la situation et à prendre les décisions finales concernant les activités de la Société. Le Secrétaire général de la Société des Nations avait indiqué, dans son rapport, que l'Assemblée aurait notamment à examiner les méthodes qui permettraient de remplacer le système des mandats par le régime de tutelle prévu par la Charte des Nations Unies [3].

Au cours de la discussion du rapport du Secrétaire général, les représentants de la Grande-Bretagne, de la France, de la Nouvelle-Zélande, de la Belgique et de l'Australie rappelèrent à l'Assemblée que leurs Gouvernements avaient l'intention de négocier des accords tendant à placer sous la tutelle des Nations Unies les territoires qu'ils administraient sous le régime des mandats, à l'exception de ceux qui avaient acquis leur indépendance et de la Palestine, dont le statut futur faisait, à ce moment, l'objet d'une enquête. Ils déclarèrent également que, dans l'attente de nouveaux arrangements, l'intention de leurs Gouvernements était de continuer d'administrer ces territoires conformément aux principes généraux des mandats existants [4].

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[1] Documents officiels de la première partie de la première session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Procès-verbaux des séances, 3me séance, page 10 (chemise 6).

[2] Documents officiels de la première partie de la première session de l'Assemblée générale. — Résolutions, 9 (I), page 13 (chemise 8).

[3] Société des Nations. — Rapport sur les travaux de la Société pendant la guerre, présenté à l'Assemblée par le Secrétaire général par intérim (Série des Publications de la Société des Nations. — Questions générales, 1945, 2), page 15.

[4] Société des Nations. — *Journal officiel*. — Supplément spécial n° 194. — Actes des vingtième (fin) et vingt et unième sessions ordinaires de l'Assemblée, Comptes rendus des séances plénières et procès-verbaux des Première et Deuxième Commissions, pages 28, 34, 43 et 47.

Le représentant de l'Union sud-africaine déclara que son Gouvernement estimait qu'il était de son devoir de consulter les peuples du Sud-Ouest africain, tant européens que non européens, au sujet de la forme que devait revêtir leur futur gouvernement. A la lumière de ces consultations, et tenant compte des particularités qui différencient le Sud-Ouest africain des autres territoires, l'Union sud-africaine se proposait d'exposer à l'Assemblée générale des Nations Unies les raisons pour lesquelles il conviendrait d'accorder au Sud-Ouest africain un statut aux termes duquel ce territoire serait reconnu internationalement comme faisant partie intégrante de l'Union. Dans l'intervalle, l'Union sud-africaine continuerait à administrer le territoire en se conformant scrupuleusement aux obligations du mandat afin d'assurer le progrès et de sauvegarder les intérêts des habitants. La dissolution des organes de la Société des Nations qui s'étaient occupés du contrôle des mandats, à savoir en premier lieu la Commission des Mandats et le Conseil de la Société — déclara le représentant de l'Union sud-africaine — empêchera évidemment l'Union de se conformer entièrement à la lettre du mandat. Le Gouvernement de l'Union se fera cependant un devoir de considérer que la dissolution de la Société des Nations ne diminue en rien les obligations qui découlent du mandat. Il continuera de s'en acquitter en pleine conscience et avec le juste sentiment de ses responsabilités, jusqu'au moment où d'autres arrangements auront été conclus quant au statut futur du territoire [1].

La Première Commission de l'Assemblée proposa à l'adoption de celle-ci un projet de résolution soumis par la délégation de la Chine, et qui, d'après une déclaration du représentant du Royaume-Uni, avait été établi en consultation avec tous les pays intéressés à la question des mandats et d'accord avec eux. La résolution fut adoptée à l'unanimité en commission et à l'Assemblée plénière, avec une abstention, celle de la délégation de l'Égypte, qui avait fait des réserves en ce qui concerne la Palestine.

Cette résolution exprimait la satisfaction de l'Assemblée pour la manière dont les organes de la Ligue avaient rempli les fonctions qui leur avaient été confiées par le système des mandats. L'Assemblée de la Ligue se félicitait de ce que l'Irak, la Syrie, le Liban et la Transjordanie fussent devenus des membres indépendants de la communauté internationale. Elle reconnaissait que la dissolution de la Société des Nations mettrait fin à ses fonctions en ce qui concerne les territoires sous mandat, mais notait que des principes correspondant à ceux contenus dans l'article 22 du Pacte étaient incorporés dans les chapitres XI, XII et XIII de la Charte des Nations Unies. L'Assemblée notait enfin que les Membres de la Société administrant des territoires sous mandat avaient exprimé leur intention de continuer à les administrer en vue du bien-être et du développement des peuples, conformément aux obligations contenues dans les divers mandats, jusqu'à ce que de nouveaux arrangements fussent pris entre les Nations Unies et les diverses Puissances mandataires [2].

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[1] Société des Nations. — *Journal officiel.* — Supplément spécial n° 194. — Actes des vingtième (fin) et vingt et unième sessions ordinaires de l'Assemblée, Comptes rendus des séances plénières et procès-verbaux des Première et Deuxième Commissions, pages 32 et 33 (chemise 1).

[2] Société des Nations. — *Journal officiel.* — Supplément spécial n° 194. — Actes des vingtième (fin) et vingt et unième sessions ordinaires de l'Assemblée. — Annexe 24 *c*) (chemise 1).

IV. *Deuxième partie de la première session de l'Assemblée générale*

Pendant la seconde partie de sa première session, l'Assemblée générale des Nations Unies approuva des accords de tutelle pour les Territoires de la Nouvelle-Guinée, du Ruanda-Urundi, du Cameroun sous mandat français, du Togo sous mandat français, du Samoa occidental, du Tanganyika, du Cameroun et du Togo sous mandat britannique. L'Australie, la Belgique, la France, la Nouvelle-Zélande et le Royaume-Uni ayant été désignés comme autorités chargées d'administration, les conditions nécessaires à la constitution du Conseil de Tutelle se sont trouvées réunies. L'Assemblée générale procéda donc à l'élection des membres du Conseil de Tutelle n'administrant pas des territoires sous tutelle, en nombre suffisant pour créer la parité prévue par l'article 86 de la Charte, et, en mars 1946, le Conseil de Tutelle put tenir sa première session. Rappelons qu'un accord de tutelle pour Nauru fut approuvé par l'Assemblée générale au cours de sa deuxième session, et que, par une résolution du 2 avril 1947, le Conseil de Sécurité approuva, en vertu de l'article 83 de la Charte, un accord de tutelle pour les îles du Pacifique qui se trouvaient antérieurement sous mandat japonais. Les États-Unis furent désignés comme autorité chargée de l'administration de ce territoire.

Sur la proposition de l'Union sud-africaine, l'Assemblée générale décida de placer à l'ordre du jour de la deuxième partie de sa session une question ainsi libellée : « Déclaration de l'Union sud-africaine sur les résultats des conversations poursuivies avec les peuples du Sud-Ouest africain relativement au statut futur du territoire sous mandat et suite à donner aux desiderata exprimés. »

Dans un mémorandum détaillé que la délégation de l'Union sud-africaine avait transmis à l'Assemblée générale [1], le Gouvernement de l'Union rappelait les déclarations faites par ses représentants à la Conférence de San-Francisco et à la première partie de la première session de de l'Assemblée générale. Le mémorandum sud-africain faisait l'historique des conditions dans lesquelles il avait été décidé de placer, à la suite de la première guerre mondiale, le Territoire du Sud-Ouest africain sous le régime des mandats du type « C ». Le mémorandum décrivait la situation géographique du territoire, traitait des relations stratégiques existant entre le territoire et l'Union sud-africaine, de la composition et des origines nationales de la population européenne du Sud-Ouest africain, des rapports ethnologiques existant entre les habitants non européens du territoire sous mandat et la population non européenne de l'Union sud-africaine. Il soulignait le degré de fusion entre l'administration du territoire sous mandat et l'administration de l'Union sud-africaine et la dépendance économique dans laquelle le Sud-Ouest africain se trouvait par rapport à l'Union. Le mémorandum rappelait également les résultats obtenus par l'Union sud-africaine au cours de son administration du territoire et les marques de satisfaction qui avaient été exprimées à cet égard par la Commission des Mandats. En conclusion, le Gouvernement de l'Union déclarait qu'il était arrivé à la conviction qu'en raison de trois considérations principales, le système des mandats n'était plus applicable au Territoire du Sud-Ouest africain : premièrement, parce

[1] Documents officiels de la seconde partie de la première session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Première partie, Procès-verbaux des séances, annexe 13, pages 199 et suivantes (chemise 11).

que le bas potentiel économique du territoire et le niveau arriéré de la grande majorité de la population empêchaient d'atteindre le but principal du système des mandats et du régime de tutelle qui lui succédait, à savoir l'autonomie politique finale et l'indépendance nationale ; deuxièmement, parce que le but immédiat du mandat, qui était d'assurer le progrès du territoire et de sa population, ne saurait, selon le Gouvernement de l'Union sud-africaine, se réaliser de façon satisfaisante qu'aux dépens du mandataire, ce à quoi, de par la nature des choses, celui-ci ne pouvait consentir ; et, troisièmement, parce que, de l'avis du Gouvernement de l'Union sud-africaine, l'incertitude en ce qui concerne l'avenir final du territoire militait inévitablement contre la paix ethnologique et le développement maximum du pays.

Le Gouvernement de l'Union était d'avis que le système des mandats impliquait qu'aucun changement ne pouvait être introduit dans la forme de gouvernement d'un territoire sous mandat, sauf avec le consentement spécifique de la population et conformément à ses vœux. La population européenne du Sud-Ouest africain ayant déjà exprimé, de nombreuses manières, notamment par des résolutions unanimes de l'Assemblée législative du territoire, en 1943 et 1946, son désir que le mandat prenne fin et que le territoire soit incorporé à l'Union sud-africaine, le Gouvernement de l'Union avait décidé de procéder à une consultation des éléments non européens. Cette tâche avait été confiée à des fonctionnaires possédant l'expérience des affaires indigènes qui, eu égard à la coutume et aux susceptibilités des populations africaines, avaient procédé dans les différentes tribus à des consultations collectives. Le résultat de ces consultations, dont les représentants de l'Union à l'Assemblée décrivirent plus tard les modalités, fut : pour l'incorporation, 208 850 ; contre l'incorporation, 33.520 ; non consultés, 56.790.

Invoquant donc 1) cette expression d'opinion des peuples du Sud-Ouest africain en faveur d'un statut qui fasse de ce pays une partie de l'Union ; 2) les doutes qui avaient existé à l'origine quant à l'application du système des mandats à ce territoire ; 3) l'expérience qui, depuis un quart de siècle, avait démontré que les conditions exceptionnelles du territoire ne permettaient pas de bien l'administrer sous le système des mandats ou sous un système analogue ; 4) le fait que les territoires de l'Union et du Sud-Ouest africain devraient, pour des raisons géographiques, constituer une unité ; 5) le fait que les territoires des deux pays devraient, dans l'intérêt de la sécurité nationale et de la paix mondiale, constituer une unité stratégique ; 6) l'argument que la population du territoire avait une affinité ethnologique et nationale très étroite avec la population de l'Union ; 7) que le territoire dépendait économiquement de l'Union, et que la fusion de l'administration du territoire et celle de l'Union ayant déjà été partiellement effectuée, cette unification devrait être poursuivie, dans l'intérêt général du pays et de sa population, — pour toutes ces raisons donc, le Gouvernement de l'Union sud-africaine estimait qu'il faudrait donner effet sans retard aux vœux que ces populations avaient librement et pleinement exprimés en ce qui concerne le statut futur de leur pays.

Au cours de son exposé introductif à la Quatrième Commission de l'Assemblée générale, le maréchal Smuts, chef de la délégation de l'Union sud-africaine, ajouta notamment que, bien que depuis la dernière guerre son Gouvernement ait été saisi de demandes énergiques de la population européenne tendant à mettre fin au mandat, le Gouvernement de l'Union

avait nettement compris que sa responsabilité devant les autres nations ne lui permettait pas de profiter d'une situation créée par la guerre pour effectuer un changement dans le statut du Sud-Ouest africain, sans consulter à ce sujet tant les peuples de ce territoire que les organismes internationaux compétents [1].

Les propositions de la délégation de l'Union sud-africaine provoquèrent au sein de la Quatrième Commission de l'Assemblée et de la sous-commission à laquelle la question fut renvoyée pour examen approfondi, des divergences d'opinions accusées et exprimées avec force. La plupart des représentants arrivèrent à la conclusion que l'Assemblée générale ne devrait pas accepter la suggestion de l'Union sud-africaine. Il y eut, cependant, entre eux des divergences de vues marquées sur les motifs juridiques et pratiques qui étayaient cette conclusion, ainsi que sur les termes dans lesquels celle-ci devait être formulée.

Certains représentants considéraient que le rattachement du Sud-Ouest africain à l'Union ne comporterait pas d'avantages pour les populations indigènes du territoire en raison de la politique de ségrégation et de discrimination pratiquée par l'Union contre tous les non-Européens. Des doutes furent exprimés quant à la capacité des populations indigènes du Sud-Ouest africain, au niveau actuel de leur évolution, de comprendre le caractère et la portée de la consultation à laquelle elles avaient été soumises ou l'amélioration de leur statut qui pourrait résulter de l'instauration du régime de tutelle. Quelques représentants estimaient que des réalisations dans le domaine économique et social, ou des considérations d'unité administrative, de voisinage géographique ou de dépendance économique, n'étaient pas une justification suffisante pour une annexion politique. Selon eux, l'acceptation par les Nations Unies de la proposition de l'Union marquerait une régression par rapport au régime du mandat susceptible de compromettre l'idéal de progrès de la Charte et les aspirations légitimes des populations des territoires non autonomes.

Sur le plan juridique, certains délégués, se basant sur des arguments de texte et des travaux préparatoires, déclarèrent que la Charte n'imposait pas l'obligation de placer les territoires sous mandat sous le régime de tutelle. D'autres représentants considéraient que la dissolution de la Société des Nations n'offrait que deux solutions légales pour les territoires précédemment sous mandat : celle qui consisterait à leur conférer une véritable indépendance ou celle par laquelle ces territoires seraient placés sous la tutelle des Nations Unies. Si le Sud-Ouest africain, après être devenu un État indépendant, voulait, de son propre gré, entrer dans l'Union sud-africaine, une telle solution pourrait être juridiquement acceptable, mais en attendant que le territoire arrive à ce stade d'évolution, les Nations Unies avaient non seulement le droit mais aussi l'obligation de surveiller l'autorité chargée de l'administration. L'annexion du Sud-Ouest africain signifierait la cessation de la protection dont jouissait la population de ce territoire par la communauté internationale.

La plupart des membres de la sous-commission qui avait été constituée par la Quatrième Commission, après avoir entendu les exposés détaillés sur les circonstances qui avaient conduit à la consultation des populations du Sud-Ouest africain et sur les modalités de la consultation, se pronon-

[1] Documents officiels de la seconde partie de la première session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Première partie, Procès-verbaux des séances, annexe 13 *a*), pages 238, 239 (chemise 11).

cèrent contre une acceptation par l'Assemblée générale du principe de l'incorporation du territoire dans celui de l'Union. Ils estimèrent que la résolution de l'Assemblée devait indiquer que tout nouvel examen de la question du Sud-Ouest africain devait se faire à la lumière de la résolution que l'Assemblée générale avait adoptée au cours de la première partie de sa première session. La sous-commission donc, après avoir écarté deux projets de résolution, l'un présenté par l'Union soviétique [1] et l'autre conjointement par les délégations de Cuba et de l'Inde [2], adopta, par 12 voix contre 6, un projet présenté conjointement par les délégations du Danemark et des États-Unis. Le représentant de l'Union sud-africaine émit un vote affirmatif.

Le projet de résolution de la sous-commission rappelait notamment que « la Charte des Nations Unies stipule dans ses articles 77 et 79 que le régime de tutelle s'appliquera aux territoires actuellement sous mandat suivant des accords qui seraient conclus », et en déduisait que « les faits soumis à cette Assemblée ne justifiaient pas une mesure de la part de l'Assemblée générale approuvant l'incorporation.... [3] ».

La Quatrième Commission préféra cependant à ce projet une version rédigée en termes plus énergiques, proposée par la délégation de l'Inde [4]. Cette rédaction, qui fut approuvée par la Quatrième Commission par 17 voix contre 15, demandait que l'Assemblée rejette toute solution comportant l'incorporation du Territoire du Sud-Ouest africain à l'Union sud-africaine ; elle recommandait que le territoire soit placé sous le régime international de tutelle et que le Gouvernement de l'Union sud-africaine soit invité à soumettre un accord de tutelle à l'examen de l'Assemblée générale.

A la réunion plénière de l'Assemblée, les délégations du Danemark, de l'Inde et des États-Unis d'Amérique annoncèrent qu'elles s'étaient mises d'accord pour soumettre un texte commun qu'elles demandaient à l'Assemblée de substituer à celui de la Quatrième Commission. Ce fut ce texte de compromis qui fut finalement adopté par l'Assemblée, par 37 voix avec 9 abstentions.

Cette résolution du 14 décembre 1946 [5] constate avec satisfaction que l'Union sud-africaine, en soumettant la question de l'incorporation à l'Union du territoire sous mandat du Sud-Ouest africain, reconnaît l'intérêt et le souci témoignés par les Nations Unies pour la question du statut futur des territoires sous mandat. Elle rappelle les dispositions des articles 77 et 79 de la Charte, se réfère à la résolution adoptée par l'Assemblée générale au cours de la première partie de sa première session, exprime le désir qu'un accord puisse intervenir ultérieurement entre les Nations Unies et l'Union sud-africaine au sujet du statut futur du

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[1] Documents officiels de la seconde partie de la première session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Troisième partie. — Procès-verbaux des séances de la Sous-Commission 2. — Annexe 5, page 101 (chemise 13).

[2] *Id.*, page 102.

[3] Documents officiels de la seconde partie de la première session de l'Assemblée générale. — Séances plénières. — Comptes rendus *in extenso*. — Annexe 76, page 1560 (chemise 14).

[4] Documents officiels de la seconde partie de la première session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Première partie. — Procès-verbaux des séances. — Annexe 13 *c*), page 244 (chemise 11).

[5] Documents officiels de la seconde partie de la première session de l'Assemblée générale. — Résolutions, 65 (I), page 123 (chemise 16).

territoire, et note l'assurance reçue de la délégation de l'Union sud-africaine qu'en attendant cet accord, le Gouvernement de l'Union continuera d'administrer le territoire comme par le passé dans l'esprit des principes établis par le mandat. L'Assemblée générale, considérant que les indigènes du Sud-Ouest africain n'ont pas encore obtenu leur autonomie politique et n'ont pas atteint un stade de développement politique leur permettant d'exprimer une opinion réfléchie, qui pourrait être reconnue par l'Assemblée générale sur une question aussi importante que l'incorporation de leur territoire, déclare qu'elle ne saurait admettre l'incorporation du Territoire du Sud-Ouest africain à l'Union sud-africaine et recommande que le territoire soit placé sous le régime international de tutelle. Le Gouvernement de l'Union sud-africaine est invité à soumettre à l'examen de l'Assemblée générale un accord de tutelle.

Avant le vote de la résolution, le représentant de l'Union sud-africaine déclara ne pas pouvoir accepter le texte proposé et indiqua son intention de s'abstenir au vote. Il annonça que sa délégation rendrait compte de son activité aux peuples du Sud-Ouest africain et leur ferait connaître la teneur de la résolution. Le Gouvernement de l'Union sud-africaine désirait réserver la position des peuples du Sud-Ouest africain au nom de ceux-ci, ainsi que sa propre position en tant qu'autorité chargée de l'administration du territoire. En attendant, le Gouvernement de l'Union continuerait d'administrer le Territoire du Sud-Ouest africain selon l'esprit du mandat qu'il avait reçu [1].

V. *Intervalle entre la première et la deuxième session de l'Assemblée*

Le texte de la résolution du 14 décembre 1946 fut communiqué officiellement par le Secrétaire général au Gouvernement de l'Union sud-africaine. Le 15 mai 1947, le Secrétaire général s'enquit auprès de celui-ci des décisions que le Gouvernement de l'Union avait prises ou des mesures qu'il avait envisagées pour mettre à exécution les recommandations que renfermait la résolution. Par une communication datée du 23 juillet 1947 [2], le ministre de l'Union sud-africaine à Washington fit savoir au Secrétaire général que le Gouvernement de l'Union avait dûment examiné la résolution. Celle-ci avait été également discutée par le parlement de l'Union, qui avait adopté une résolution qui constatait : premièrement, que le Traité de Versailles avait conféré à l'Union sud-africaine pleins pouvoirs de législation et d'administration sur le Territoire du Sud-Ouest africain, sous la seule réserve de rapports à présenter à la Société des Nations ; deuxièmement, que la Société des Nations avait, depuis, cessé d'exister et qu'elle n'avait pas qualité, aux termes du Traité de Versailles ou du Pacte, pour transférer ses droits et pouvoirs quant au Sud-Ouest africain à l'Organisation des Nations Unies ou à toute autre organisation ou organisme international, et que, en fait, elle n'avait pas pris de décision à cet égard ; troisièmement, que l'Union sud-africaine n'avait pas

[1] Documents officiels de la seconde partie de la première session de l'Assemblée générale. — Séances plénières. — Comptes rendus *in extenso*, 64me séance, page 1326 (chemise 15).

[2] Documents officiels de la deuxième session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Comptes rendus analytiques. — Annexe 3 *a*), page 133 (chemise 21).

consenti par accord international à abandonner les droits et les pouvoirs qu'elle avait ainsi acquis et qu'elle n'y avait pas renoncé en signant la Charte des Nations Unies, qu'elle restait donc en pleine possession et exercice de ses droits et pouvoirs ; quatrièmement, que l'écrasante majorité de la population européenne et non européenne s'était prononcée en faveur de l'incorporation du Sud-Ouest africain à l'Union sud-africaine. En conséquence, la Chambre estimait que le territoire devait être représenté au Parlement de l'Union sud-africaine comme faisant partie intégrante de l'Union et invitait le Gouvernement à déposer, après avoir consulté les habitants du territoire, un projet de loi leur accordant une représentation au Parlement de l'Union. La Chambre considérait, par ailleurs, que le Gouvernement devait continuer à faire rapport à l'Organisation des Nations Unies, comme il l'avait fait dans le passé, suivant les termes du mandat.

Dans sa communication, le ministre de l'Union sud-africaine à Washington informait également le Secrétaire général qu'à la suite de l'adoption par l'Assemblée de sa résolution sur la question du Sud-Ouest africain, le Gouvernement de l'Union avait décidé de ne pas procéder à l'incorporation du territoire. La décision de l'Union à cet égard était donc en plein accord avec les termes de la résolution de l'Assemblée générale. En ce qui concerne la partie de la résolution de l'Assemblée qui invitait le Gouvernement de l'Union à soumettre un accord de tutelle pour le territoire, celui-ci estimait qu'en raison des vœux clairement exprimés au cours de la consultation des habitants par l'écrasante majorité de toutes les races indigènes du Sud-Ouest africain et par un vote unanime des représentants européens du territoire, le Gouvernement de l'Union se voyait dans l'impossibilité d'agir conformément à la résolution de l'Assemblée générale, et avait donc décidé de maintenir le *statu quo* et de continuer à administrer le territoire dans l'esprit du mandat. A cette fin, le Gouvernement de l'Union avait entrepris de soumettre aux Nations Unies, pour leur information, des rapports sur son administration du territoire. Il annonçait également qu'à la suite de la résolution adoptée par le Parlement de l'Union, des mesures seraient prises, après consultation des habitants du territoire, pour que ceux-ci soient directement représentés au sein de ce Parlement.

Par une lettre en date du 12 septembre 1947, la délégation permanente de l'Union sud-africaine auprès de l'Organisation des Nations Unies informait le Secrétaire général de la transmission du rapport du Gouvernement sud-africain sur l'administration du Sud-Ouest africain pendant l'année 1946 [1].

Par une nouvelle communication en date du 17 septembre 1947 [2], la délégation permanente transmit au Secrétaire général un mémorandum intitulé : « Compte rendu des mesures prises par le Gouvernement de l'Union pour communiquer à la population du Sud-Ouest africain les résultats des discussions qui ont eu lieu lors de la dernière session de l'Assemblée générale concernant l'avenir du territoire. » Le Gouvernement de l'Union sud-africaine indiquait dans ce document qu'en ce qui

[1] Documents officiels de la deuxième session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Comptes rendus analytiques, annexe 3 *b*), page 136 (chemise 21).

[2] Documents officiels de la deuxième session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Comptes rendus analytiques, annexe 3 *b*), page 136 (chemise 21).

concerne la population indigène on avait eu recours à des méthodes similaires à celles suivies au cours de la première consultation. Après que des explications eussent été données aux tribus, on avait demandé leur opinion sur la situation qui avait résulté de l'adoption par l'Assemblée générale des Nations Unies de la résolution du 14 décembre 1946. Il apparaissait de leurs réponses que la majorité écrasante était toujours en faveur de l'incorporation du Sud-Ouest africain à l'Union. Toutefois, les Hereros, qui s'étaient déclarés opposés à l'incorporation lors de la première consultation, n'avaient pas modifié leur attitude. En ce qui concerne la population européenne, la résolution de l'Assemblée générale avait été discutée lors d'une séance de l'Assemblée législative du Sud-Ouest africain, et une résolution avait été adoptée le 17 mai 1947, par laquelle la Chambre exprimait au premier ministre de l'Union ses remerciements pour l'attitude qu'il avait adoptée à l'Organisation des Nations Unies et exprimait l'espoir que cette Organisation accéderait aux vœux de la grande majorité des Européens et non-Européens du territoire.

VI. *Deuxième session de l'Assemblée générale*

La deuxième session de l'Assemblée générale inscrivit à son ordre du jour une question libellée : « Examen de nouveaux projets d'accords de tutelle, s'il y a lieu », et la renvoya à l'examen de la Quatrième Commission.

Un débat prolongé suivit l'exposé du représentant de l'Union sud-africaine, qui fut le premier à prendre la parole à la Quatrième Commission. Répondant à une demande de précisions du représentant du Danemark quant à la portée de la déclaration du Gouvernement de l'Union sud-africaine que le *statu quo* serait maintenu dans le Sud-Ouest africain et que le territoire continuerait à être administré dans l'esprit du mandat, le représentant de l'Union expliqua que son Gouvernement transmettrait un rapport annuel sur le Sud-Ouest africain qui contiendrait le genre de renseignements requis par l'article 73 *e)* de la Charte pour les territoires non autonomes. Son Gouvernement présumait que ce rapport ne serait pas examiné par le Conseil de Tutelle et ne serait pas traité comme si un accord de tutelle avait été effectivement conclu. Le représentant de l'Union déclara, en outre, que son Gouvernement estimait que, du fait de la disparition de la Société des Nations, le droit de présenter des pétitions n'existait plus. Ce droit supposait, en effet, l'existence du droit de contrôle et de surveillance ; or, de l'avis de l'Union sud-africaine, l'Organisation des Nations Unies n'était pas investie d'un droit de cette nature à l'égard du Sud-Ouest africain.

Au cours de la discussion, plusieurs représentants marquèrent leur satisfaction de ce que l'Union sud-africaine n'ait pas incorporé le Sud-Ouest africain. Certains d'entre eux exprimèrent toutefois la crainte que les mesures que le Gouvernement sud-africain se proposait de prendre n'impliquent, en fait, l'annexion du territoire par l'Union. De nombreux représentants furent d'avis qu'il existait une obligation à la fois juridique et morale à présenter un accord de tutelle pour le territoire, les dispositions du chapitre XII de la Charte étant obligatoires en ce qui concerne les territoires sous mandat. D'autres représentants déclarèrent qu'ils ne pouvaient accepter cette opinion. La suggestion fut émise que l'Assemblée générale demande un avis consultatif à la Cour internationale de Justice sur la question de l'obligation juridique. Plusieurs représentants

soulignèrent la valeur morale d'une recommandation de l'Assemblée générale, indépendamment de toute question d'obligation juridique, et exprimèrent l'espoir que la force morale reflétée dans les résolutions de l'Assemblée générale prévaudrait.

En ce qui concerne la procédure à suivre pour l'examen du rapport sur le Sud-Ouest africain soumis par le Gouvernement de l'Union sud-africaine, certains représentants furent d'avis que cet examen devait être entrepris par une commission de l'Assemblée générale, d'autres préféraient que le Conseil de Tutelle fût autorisé par l'Assemblée à examiner ce rapport.

Deux projets de résolution furent présentés, l'un par la délégation de l'Inde et l'autre par la délégation du Danemark. Plusieurs amendements à ces projets furent soumis par d'autres délégations. A la suite d'une tentative infructueuse d'une sous-commission, composée des auteurs des projets et des auteurs des amendements, d'arriver à un texte unique, les représentants du Danemark et de l'Inde soumirent des versions revisées de leurs projets de résolution respectifs. Ces projets, presque identiques quant au fond, différaient seulement sur la question de savoir si un délai devait être fixé à l'Union sud-africaine pour la présentation d'un projet d'accord de tutelle. Ce fut le projet indien, amendé par la délégation de la Pologne, qui fut approuvé par la Commission, par 27 voix contre 20, avec 4 abstentions [1].

A l'Assemblée plénière, le représentant du Danemark proposa des amendements tendant à atténuer les termes du projet de résolution de la Quatrième Commission [2]. Après une nouvelle discussion de la question et après que l'Assemblée générale eut déterminé que la majorité des deux tiers de ses Membres était requise pour l'adoption d'une résolution, le représentant de l'Inde accepta les amendements présentés par le représentant du Danemark. Le représentant de l'Union sud-africaine déclara que sa délégation avait décidé de voter contre toute proposition visant à demander ou à recommander à l'Union sud-africaine de présenter un accord de tutelle [3]. Le projet de résolution de la Quatrième Commission fut adopté par l'Assemblée générale, avec les amendements présentés par la délégation du Danemark, par 41 voix contre 10, avec 4 abstentions.

Cette résolution, en date du 1er novembre 1947 [4], rappelle les résolutions précédentes et la position prise à leur égard par l'Union sud-africaine et note que tous les autres États chargés de l'administration de territoires antérieurement sous mandat avaient placé ces territoires sous le régime de tutelle ou leur avaient offert l'indépendance. La résolution prend acte de la décision de l'Union sud-africaine de ne pas procéder à l'incorporation du Sud-Ouest africain ; elle maintient fermement la recommandation de l'Assemblée de placer le Sud-Ouest africain sous le régime de tutelle ; elle prie instamment le Gouvernement de l'Union sud-africaine de soumettre à l'examen de l'Assemblée générale un accord de tutelle pour le Territoire du Sud-Ouest africain et exprime

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[1] Documents officiels de la deuxième session de l'Assemblée générale. — Séances plénières. — Annexe 13, page 1537 (chemise 21).

[2] Documents officiels de la deuxième session de l'Assemblée générale. — Séances plénières, 104me séance, pages 575 et 576 (chemise 20).

[3] Documents officiels de la deuxième session de l'Assemblée générale. — Séances plénières, 105me séance, page 649 (chemise 20).

[4] Documents officiels de la deuxième session de l'Assemblée générale. — Résolutions, 141 (II), page 47 (chemise 22).

l'espoir qu'il sera possible au Gouvernement de l'Union sud-africaine de le faire en temps voulu, de manière à permettre à l'Assemblée générale d'examiner cet accord lors de sa troisième session. La résolution autorise, enfin, en attendant, le Conseil de Tutelle à examiner le rapport sur le Sud-Ouest africain présenté par le Gouvernement de l'Union sud-africaine, et à soumettre à l'Assemblée générale des observations à ce sujet.

VII. *Deuxième et troisième sessions du Conseil de Tutelle*

Le rapport du Gouvernement de l'Union sud-africaine sur l'administration du Sud-Ouest africain pendant l'année 1946 fut transmis au Conseil de Tutelle. Celui-ci procéda à son examen au cours de sa deuxième session. Plusieurs questions de procédure furent soulevées. Le Conseil de Tutelle devait-il entreprendre cet examen en suivant les procédures qu'il avait adoptées pour l'examen des rapports sur les territoires qui avaient été précédemment placés sous le régime de tutelle ? Jouissait-il à cet égard de tous les pouvoirs qui lui avaient été conférés par le chapitre XIII de la Charte ? Devait-il, au contraire, suivre les méthodes de la Commission des Mandats ? Devait-il inviter un représentant de l'Union sud-africaine à assister à l'examen du rapport ? Pouvait-il faire usage d'autres informations que celles qui se trouvaient contenues dans le rapport du représentant de l'Union sud-africaine ? Pouvait-il prendre connaissance de pétitions ? Pouvait-il entendre des personnes qualifiées qui désiraient le renseigner sur les conditions dans le territoire ?

Le Conseil décida de prier le Secrétariat de faire connaître au Gouvernement de l'Union sud-africaine la date à laquelle le rapport serait examiné conformément à la résolution de l'Assemblée générale et lui faire savoir que, si ce Gouvernement désirait envoyer un représentant, celui-ci serait le bienvenu. Cette communication fut transmise par le Secrétaire général, et la réponse du représentant permanent de l'Union sud-africaine fut que son Gouvernement n'avait pas l'intention de profiter de l'offre qui lui avait été faite, mais que si, après examen du rapport, le Conseil désirait obtenir des précisions sur ses divers chapitres, il serait heureux de lui communiquer, par écrit, les renseignements complémentaires dont il disposerait [1].

Au cours de l'examen du rapport par le Conseil, plusieurs représentants exprimèrent le désir d'obtenir des renseignements supplémentaires. Une résolution fut approuvée dans laquelle le Conseil constatait que le rapport présenté par le Gouvernement de l'Union sud-africaine semblait, à certains égards, incomplet. Le Conseil acceptait l'offre de l'Union sud-africaine de lui fournir des renseignements complémentaires et invitait le Gouvernement de l'Union sud-africaine à répondre, avant le mois de juin 1948, aux questions que le Conseil avait formulées [2]. Une proposition du représentant du Mexique [3], tendant à ce que le pasteur Michael Scott, qui avait informé l'Assemblée et le Conseil de Tutelle qu'il était porteur de pétitions émanant de certains chefs africains du

[1] Conseil de Tutelle, deuxième session. — *Extrait du compte rendu de la dixième séance*, page 8 (chemise 24).

[2] Documents officiels de la deuxième session du Conseil de Tutelle. — Résolutions, 28 (II), page 15 (chemise 26).

[3] Conseil de Tutelle, deuxième session. — Extrait du compte rendu de la dix-huitième séance, page 35 (chemise 24).

territoire, soit invité à informer le Conseil de la situation des indigènes dans le territoire, fut retirée. Le représentant du Mexique se réserva le droit de la réintroduire au cours de la troisième session du Conseil.

Le Gouvernement de l'Union sud-africaine transmit le 31 mai 1948 sa réponse au questionnaire du Conseil de Tutelle [1]. Dans une lettre d'accompagnement, le représentant par intérim de l'Union sud-africaine auprès des Nations Unies rappela que son Gouvernement considérait la transmission à l'Organisation des Nations Unies de renseignements sur le Sud-Ouest africain, sous forme d'un rapport annuel ou sous toute autre forme, comme volontaire et comme faite aux seules fins d'information. Il ne se considérait pas tenu de transmettre ces renseignements à l'Organisation des Nations Unies, mais déclarait qu'en raison du grand intérêt porté à l'administration du territoire et conformément à la pratique démocratique normale, il était désireux et soucieux de porter à la connaissance du monde les faits et les chiffres dont il disposait déjà et qu'il pouvait recueillir et coordonner sans imposer un travail excessif à son personnel au détriment des tâches urgentes de l'administration. Il rappelait qu'en offrant de présenter un rapport sur le Sud-Ouest africain, le Gouvernement de l'Union s'était conformé aux dispositions de l'article 73 *e*) de la Charte, qui demande que soient communiqués au Secrétaire général « des renseignements statistiques et autres de nature technique » et ne mentionne pas les renseignements relatifs à des questions de politique. Néanmoins, soucieux de porter une aide et une collaboration aussi grandes que possible, il avait en la circonstance répondu de façon complète relativement aux divers aspects de sa politique. Il ne considérait pourtant pas que ce faisant il créait un précédent. En outre, le Gouvernement de l'Union faisait observer que les réponses à des questions politiques ne comportaient pas l'engagement de pratiquer telle ou telle politique à l'avenir ou à rendre à un degré quelconque des comptes à l'Organisation des Nations Unies.

Le Conseil de Tutelle reprit à sa troisième session l'examen du rapport sur le Sud-Ouest africain, ainsi que des réponses du Gouvernement de l'Union au questionnaire établi à la session précédente.

Certains représentants étaient d'avis qu'en raison des termes de la résolution de l'Assemblée générale, le Conseil devait se borner à formuler des observations et laisser à l'Assemblée générale le soin de tirer ses propres conclusions. D'autres membres estimaient que le terme « observations » autorisait le Conseil à présenter des conclusions, mais qu'il était préférable que le Conseil s'abstint de faire des recommandations quant à des mesures que le Gouvernement de l'Union devrait prendre.

Le rapport du Conseil de Tutelle à l'Assemblée générale fut adopté par 6 voix contre 3, avec 3 abstentions [2].

Ce rapport servit de base à la discussion de la question du Sud-Ouest africain au cours de la troisième session de l'Assemblée générale. Il fut aussi mentionné à diverses reprises au cours de la quatrième session. Il apparaît donc nécessaire de donner ici un résumé de son contenu.

Dans le domaine politique, le rapport constate que les indigènes habitant le territoire n'ont pas le droit de vote, ne sont pas éligibles

[1] Conseil de Tutelle. — Procès-verbaux officiels, troisième session. — Supplément T/175, pages 51 et suivantes (chemise 29).

[2] Rapport du Conseil de Tutelle sur ses deuxième et troisième sessions, 29 avril 1947-5 août 1948. — Assemblée générale, documents officiels de la troisième session (supplément n° 4), page 46 (chemise 29).

et ne sont pas représentés dans les organes gouvernementaux ou dans l'administration du territoire. Dans le domaine économique, le Conseil estimait impossible, d'après les renseignements dont il disposait, d'apprécier avec exactitude la mesure dans laquelle la population indigène avait bénéficié de l'accroissement récent de prospérité du territoire et de juger si les mesures que le Gouvernement de l'Union avait déjà prises et celles qu'il envisageait de prendre, étaient suffisantes pour améliorer la situation économique des indigènes. Le Conseil constatait que les indigènes ne détenaient que 42 pour 100 des terres occupées, et faisait observer qu'il manquait de renseignements sur la question de savoir si les terres qui leur étaient laissées étaient suffisantes du point de vue de la qualité et de la productivité. Le Conseil estimait que les explications données par le Gouvernement de l'Union n'indiquaient pas si les indigènes seraient rétablis dans les droits aux terres cultivables qu'ils avaient perdues sous le régime allemand. Il observait que les restrictions imposées aux habitants indigènes des réserves situées dans la zone de police (zone de colonisation européenne) en ce qui concerne l'élevage du bétail ne s'appliquaient pas aux habitants européens, et estimait que la mesure dans laquelle les terres indigènes avaient été aliénées était l'un des facteurs qui contribuaient à laisser la tribu Herero divisée.

Dans le domaine social, le Conseil exprimait l'avis que toute séparation des populations indigènes et toute mesure tendant à leur attribuer des zones de résidence déterminées n'étaient pas favorables à leur progrès général. De l'avis du Conseil, le système visant à cantonner les indigènes dans les « réserves indigènes » était regrettable en principe, et il estimait que le Gouvernement de l'Union devrait reviser sa politique.

Le Conseil marquait son opposition de principe à la ségrégation raciale, et, tout en indiquant qu'il lui manquait des indications précises sur les raisons qui pouvaient justifier cette politique dans les zones urbaines du territoire, il estimait que le Gouvernement de l'Union devrait déployer de grands efforts pour faire disparaître par l'éducation et par d'autres mesures efficaces toutes les raisons qui expliquaient la ségrégation.

Le Conseil notait les conditions de travail dans les mines et le niveau de salaires de la main-d'œuvre. Il estimait que le nombre élevé de condamnations pénitentiaires témoignait d'une situation anormale et exprimait l'avis que les relations contractuelles entre l'entrepreneur et l'employé ne devraient pas donner lieu à des sanctions pénales. Il notait qu'aucune des conventions de l'Organisation internationale du Travail n'était appliquée dans le territoire. Il faisait observer qu'il n'y avait pas encore d'hôpitaux gouvernementaux pour les indigènes dans les régions situées en dehors de la zone de police. Le Conseil observait également que jusqu'à présent on n'avait prévu aucune formation professionnelle de médecins indigènes ou de couleur.

Dans le domaine de l'instruction, le Conseil notait que le Gouvernement n'avait créé aucun établissement d'enseignement dans les régions purement indigènes qui sont situées en dehors de la zone de police ; le Conseil estimait que la création d'établissements d'enseignement était essentielle au développement politique, économique et social de la population indigène.

[*Séance publique du 16 mai 1950, après-midi*]

Monsieur le Président, Messieurs les Membres de la Cour,

VIII. *Troisième session de l'Assemblée générale (première partie)*

Le rapport du Conseil de Tutelle dont je vous ai parlé ce matin fut soumis à la troisième session de l'Assemblée générale.

Voilà la raison pour laquelle j'ai cru nécessaire ce matin de donner un bref aperçu du contenu de ce rapport. Une divergence fondamentale entre le point de vue du Gouvernement sud-africain et celui de l'Assemblée en ce qui concerne le rôle que le Conseil de Tutelle était appelé à jouer dans l'état actuel du statut international du Territoire du Sud-Ouest africain était en effet manifeste. Ce rapport a donc une importance en ce qui concerne la question de savoir quel est le statut juridique actuel du territoire.

A la Quatrième Commission, le représentant de l'Union sud-africaine critiqua la conception que le Conseil de Tutelle s'était faite de son rôle quant à l'examen du rapport et défendit l'administration du Territoire du Sud-Ouest africain par son Gouvernement, ainsi que la position juridique et morale que celui-ci avait prise depuis la dissolution de la Société des Nations, relativement à son statut futur. Il déclara que son Gouvernement avait réexaminé la question sous tous ses aspects et avait conclu une fois de plus qu'il serait contraire aux intérêts du Territoire du Sud-Ouest africain, comme à ceux de l'Union sud-africaine, que le territoire soit placé sous l'autorité du Conseil de Tutelle de l'Organisation des Nations Unies. Dans ces conditions, le Gouvernement de l'Union considérait qu'il ne lui était pas possible de faire droit à la demande de l'Assemblée générale et de soumettre volontairement un accord de tutelle. Le Gouvernement de l'Union était fermement décidé à veiller à ce que le territoire soit administré, comme par le passé, en tenant compte de la nécessité d'accroître le bien-être matériel et moral de l'ensemble de la population. Le représentant de l'Union sud-africaine fit part à l'Assemblée générale de négociations qui venaient d'avoir lieu entre le Gouvernement de l'Union et les représentants des deux partis politiques du Sud-Ouest africain et qui avaient abouti à un accord sur une association plus étroite entre le Territoire du Sud-Ouest africain et l'Union sud-africaine. L'association des deux territoires s'effectuerait par l'envoi de représentants du Sud-Ouest africain au Parlement de l'Union, par le règlement d'affaires d'intérêt commun par le Parlement de l'Union, et par l'extension de la compétence du corps législatif du Sud-Ouest africain. Ces nouvelles dispositions, déclara le représentant de l'Union sud-africaine, ne constitueraient pas une annexion du territoire. Le Sud-Ouest africain aurait le droit de s'administrer à un degré qui n'était pas accordé aux provinces de l'Union. Un projet de loi serait soumis dans un avenir rapproché au Parlement de l'Union sud-africaine, et on pouvait s'attendre à ce que l'union la plus étroite, ou la fusion entre les deux pays, se réalise dans un proche avenir.

Plusieurs représentants à la Quatrième Commission exprimèrent une vive inquiétude quant aux mesures qui étaient envisagées par le Gouvernement sud-africain et rappelèrent les engagements pris précédemment par l'Union sud-africaine à l'égard des Nations Unies. Ils

demandèrent si ces mesures n'équivalaient pas à une incorporation du territoire dans l'Union, contre laquelle l'Assemblée générale s'était prononcée au cours de sa première session.

Un débat long et animé eut lieu, au cours duquel le statut juridique international du Sud-Ouest africain et les obligations internationales du Gouvernement de l'Union furent à nouveau analysés. Le représentant de l'Union sud-africaine affirma que le nouveau Gouvernement de l'Union sud-africaine ne faisait que poursuivre la politique de son prédécesseur. Sa ferme intention était d'administrer le Territoire du Sud-Ouest africain dans l'esprit du mandat. Il s'efforcerait donc d'accroître dans toute la mesure du possible le bien-être de tous les habitants du territoire. Les mots « dans l'esprit du mandat » ne devaient pas être interprétés comme comprenant d'autres obligations que celle-là.

Deux projets de résolution furent soumis comme base de discussion. Ce fut celui présenté conjointement par les délégations du Danemark, de la Norvège et de l'Uruguay [1] qui fut approuvé par 36 voix contre une, après le rejet par la commission de multiples amendements, notamment d'un amendement de la délégation de l'Inde [2]. Cet amendement invitait le Gouvernement de l'Union sud-africaine à ne pas procéder à des mesures qui équivaudraient à un rattachement du territoire à l'Union sud-africaine, et à accepter qu'une commission instituée par le Conseil de Tutelle visite le Territoire du Sud-Ouest africain pour y observer la situation politique, économique et sociale, ainsi que celle de l'instruction, et soumettre un rapport au Conseil de Tutelle qui le présenterait, avec ses observations, à l'Assemblée lors de sa prochaine session. L'amendement indien fut repoussé par 22 voix contre 21, avec 11 abstentions.

Le projet de la commission fut adopté en séance plénière par 43 voix contre une, et 5 abstentions. Le représentant de l'Union sud-africaine indiqua qu'il aurait à voter contre la résolution en raison de l'inclusion du paragraphe maintenant la recommandation de l'Assemblée générale que le territoire soit placé sous le régime de tutelle.

Par cette résolution du 26 novembre 1948 [3], l'Assemblée générale ayant rappelé les antécédents de l'affaire, prit acte des observations du Conseil de Tutelle au sujet du Sud-Ouest africain et invita le Secrétaire général à communiquer ces observations au Gouvernement de l'Union sud-africaine. L'Assemblée maintint ses recommandations antérieures tendant à ce que le Sud-Ouest africain soit placé sous le régime de tutelle, et nota avec regret que ces recommandations n'avaient pas été exécutées. Elle prit acte des assurances du représentant de l'Union sud-africaine que l'intention de son Gouvernement était de continuer à administrer le territoire dans l'esprit du mandat, que les nouvelles mesures proposées en vue d'associer plus étroitement le Sud-Ouest africain et l'Union sud-africaine ne signifiaient pas l'incorporation du territoire dans l'Union, ni que le territoire serait absorbé par l'autorité chargée de l'administration. L'Assemblée recommanda que, sans préjudice de ses résolutions antérieures et jusqu'à la conclusion d'un accord avec l'Organisation des Nations Unies en ce qui concerne l'avenir du Sud-Ouest africain, le

[1] Documents officiels de la troisième session de l'Assemblée générale, première partie. — Séances plénières. — Annexes aux comptes rendus analytiques des séances, A/734, page 411 (chemise 32).

[2] *Id.*, page 407.

[3] Documents officiels de la troisième session de l'Assemblée générale, première partie. — Résolutions, 227 (III), page 89 (chemise 34).

Gouvernement de l'Union sud-africaine continue à fournir chaque année des renseignements sur l'administration du Sud-Ouest africain. L'Assemblée invita enfin le Conseil de Tutelle à poursuivre l'examen de ces renseignements et à soumettre à l'Assemblée générale ses observations à ce sujet.

IX. *Communication de l'Union sud-africaine du 11 juillet 1949. — Le « South-West Africa Affairs Amendment Act 1949 ». — Cinquième session du Conseil de Tutelle*

Le 11 juillet 1949, le représentant permanent adjoint de l'Union sud-africaine auprès des Nations Unies transmit une communication au Secrétaire général, qui constituait la réponse de son Gouvernement à la résolution adoptée par l'Assemblée générale au cours de sa troisième session. Le Gouvernement de l'Union exprimait le regret de ce que l'Assemblée ne se fût pas rendue aux raisons avancées par l'Union sud-africaine contre la mise du Sud-Ouest africain sous la tutelle des Nations Unies. Il confirmait les assurances données par son représentant à l'Assemblée générale, à savoir que son intention était de continuer à administrer le Sud-Ouest africain dans l'esprit du mandat et que les nouvelles mesures tendant à associer plus étroitement le Sud-Ouest africain ne signifiaient pas l'incorporation du territoire dans l'Union, ni son absorption par celle-ci.

La recommandation de l'Assemblée générale selon laquelle l'Union devrait continuer à fournir des renseignements sur l'administration du Sud-Ouest africain, poursuivait le représentant permanent adjoint de l'Union sud-africaine dans sa communication, avait fait l'objet de l'examen le plus attentif de la part du Gouvernement de l'Union. Celui-ci rappelait qu'il n'avait reconnu à aucun moment qu'il existait pour lui une obligation légale quelconque de fournir aux Nations Unies des rapports sur le Sud-Ouest africain, mais qu'il avait offert de fournir ces rapports dans un esprit de bonne volonté, de coopération et de complaisance, étant clairement entendu, d'une part, que le Gouvernement de l'Union sud-africaine le ferait sur une base volontaire, à titre d'information strictement, et, d'autre part, que l'Organisation des Nations Unies n'avait aucun droit de regard sur le Sud-Ouest africain. Au moment de la transmission d'informations en 1947 et 1948, le Gouvernement de l'Union avait souligné que l'envoi de renseignements sur la politique suivie ne devait pas être considéré comme créant un précédent ni interprété comme un engagement pour l'avenir ou comme indiquant que le Gouvernement de l'Union avait des comptes à rendre aux Nations Unies. Le Gouvernement de l'Union avait à ce moment exprimé la conviction que le Conseil de Tutelle aborderait sa tâche d'une manière absolument objective et examinerait le rapport dans le même esprit de bonne volonté, de coopération et de complaisance qui avait conduit l'Union à faire connaître ces renseignements. Malheureusement, de l'avis du Gouvernement de l'Union, les renseignements qui avaient été fournis avaient donné à certains l'occasion de se servir du Conseil de Tutelle et de la Commission de Tutelle de l'Assemblée comme d'une tribune pour critiquer et condamner injustement l'administration par l'Union sud-africaine, non seulement dans le Sud-Ouest africain, mais dans l'Union également. Les malentendus et les accusations au cours des débats par les Nations Unies ont eu des répercussions tant dans

l'Union que dans le Sud-Ouest africain, avec des conséquences néfastes pour le maintien de relations harmonieuses, qui avaient prévalu jusqu'alors et qui étaient si indispensables à une bonne administration. En outre, le fait même de la présentation d'un rapport avait créé dans l'esprit d'un certain nombre de Membres des Nations Unies l'impression que le Conseil de Tutelle avait qualité pour formuler des recommandations sur la question de l'administration intérieure du Sud-Ouest africain et avait engendré d'autres conceptions erronées concernant le statut du territoire. Dans ces conditions, le Gouvernement de l'Union était arrivé à la conclusion que la présentation aux Nations Unies des rapports spéciaux sur le Sud-Ouest africain ne pouvait pas présenter d'avantages réels quelconques, et, tout en se proposant d'informer l'opinion publique mondiale de la situation dans le Sud-Ouest africain par d'autres moyens à sa disposition, il était arrivé à la conclusion que, dans l'intérêt d'une administration efficace, aucun rapport ne devait plus être envoyé. Toutefois, et conformément aux assurances données par le premier ministre au Parlement de l'Union, le Gouvernement de l'Union transmettait aux Nations Unies, pour information seulement, un exemplaire de la loi n° 23 de 1949, qui apporte certaines modifications à la forme de l'association existant entre le Sud-Ouest africain et l'Union sud-africaine, ainsi qu'un commentaire de cette loi.

La loi de 1949, dont le texte fut transmis par le Gouvernement de l'Union au Secrétaire général, constitue une transformation du régime constitutionnel du Sud-Ouest africain, qui avait été instauré à la suite de l'attribution du mandat à l'Union sud-africaine par une loi votée par le Parlement de l'Union de 1925. La loi de 1925 avait institué dans le territoire sous mandat, à côté de l'administrateur, un comité exécutif, un conseil consultatif et une assemblée législative, et avait défini leurs pouvoirs et fonctions respectifs dans le domaine exécutif et législatif.

La loi de 1949 a pour portée d'abolir le Conseil consultatif, de rendre l'Assemblée législative du territoire entièrement élective, d'étendre sa compétence et de pourvoir à la représentation du territoire au sein des deux Chambres du Parlement de l'Union. La loi accorde au Sud-Ouest africain six représentants à la Chambre des députés de l'Union, tous élus, et quatre représentants au Sénat, dont deux élus et deux nommés par le gouverneur général. L'un des sénateurs nommés doit être choisi surtout en raison de la connaissance approfondie qu'il possède par ses fonctions officielles, ou de toute autre manière, des besoins et des vœux raisonnables des populations de couleur du territoire.

L'Assemblée législative du Sud-Ouest africain sera, aux termes de la loi, composée de 18 membres élus par les électeurs inscrits du territoire. Sous l'empire de la loi de 1925, l'Assemblée était composée de 12 membres élus et de six membres désignés par l'administrateur du territoire. Seuls les ressortissants de l'Union de descendance européenne peuvent voter et sont éligibles tant au Parlement de l'Union qu'à l'Assemblée législative du territoire.

Le Sud-Ouest africain continuera à ne pas être soumis au régime fiscal de l'Union. La loi stipule expressément qu'à l'exception des lois relatives aux droits de douane et de régie, aucune loi du Parlement de l'Union qui impose une contribution, un droit, une servitude, ou une obligation à la population de l'Union, ne sera applicable dans le territoire. La disposition en vertu de laquelle les impôts votés par le Parlement de l'Union ne seront pas perçus dans le Sud-Ouest africain ne peut être

amendée, modifiée ou abrogée sans l'assentiment de l'Assemblée législative du Sud-Ouest africain exprimé dans une résolution communiquée au Parlement de l'Union par un message du gouverneur général.

La compétence de l'Assemblée législative du Sud-Ouest africain a été étendue à certaines nouvelles catégories de questions. Restent exclues de sa juridiction les affaires indigènes ou toutes affaires intéressant particulièrement les autochtones, y compris la création d'impôts sur les personnes, les terres, et les habitations ou les gains des autochtones, et également les questions relatives à l'aviation civile, aux chemins de fer et ports, au statut des fonctionnaires publics, à la compétence et à la procédure des tribunaux, aux postes, télégraphes et téléphones, aux affaires militaires, à l'immigration, au tarif douanier, aux impôts indirects, à la monnaie et à la banque. L'Assemblée législative du Sud-Ouest africain a cependant le pouvoir de recommandation et peut rendre des ordonnances en ce qui concerne ces questions, à condition d'y être autorisée par l'administrateur. Elle peut également être saisie par l'administrateur des demandes d'avis.

Seul le Parlement de l'Union aura dorénavant le pouvoir de légiférer pour le territoire sur les questions hors de la compétence de l'Assemblée législative. Le Parlement de l'Union aura également le droit d'annuler les dispositions de toute ordonnance de l'Assemblée. Une ordonnance promulguée par l'Assemblée législative n'aura effet que dans la mesure où elle ne sera pas en contradiction ou incompatible avec une loi du Parlement applicable au territoire.

Signalons que les dispositions du préambule de l'Acte de 1925 ayant trait aux dispositions du mandat qui enjoignaient au Gouvernement de l'Union de promouvoir dans toute la mesure du possible le bien-être matériel et moral et le progrès social des habitants du territoire, ont été maintenues. Par contre, dans la formule de serment prévue pour les membres de l'Assemblée législative, la référence au mandat fut éliminée. Il en est de même de l'article 44 de la loi de 1925, qui contient une clause de sauvegarde touchant le droit de l'Union d'administrer le territoire et de légiférer à ce sujet, et qui dans la loi de 1925 se référait d'une manière explicite au mandat. Cette référence est remplacée dans la loi nouvelle par un texte qui traite d'une manière plus générale des « pleins pouvoirs d'administration et de législation que l'Union exerçait jusqu'ici dans le territoire en tant que partie intégrante de l'Union ».

Le Conseil de Tutelle entreprit au cours de sa cinquième session l'examen de la communication du 11 juillet 1949 du représentant permanent adjoint de l'Union sud-africaine au Secrétaire général. Par une résolution [1], en date du 21 juillet 1949, le Conseil décida d'attirer l'attention de l'Assemblée générale sur le fait que le Gouvernement de l'Union sud-africaine avait désormais, suivant sa lettre du 11 juillet 1949, mis à exécution son intention d'établir une forme plus étroite d'association entre le Sud-Ouest africain et l'Union et avait décidé de ne plus transmettre de rapports sur ce territoire. Le Conseil faisait connaître à l'Assemblée que le refus par le Gouvernement de l'Union de présenter de nouveaux rapports le mettait dans l'impossibilité d'exercer les fonctions dont le chargeait la résolution de l'Assemblée du 26 novembre 1948.

[1] Documents officiels de la cinquième session du Conseil de Tutelle. — Résolutions, III (V), page 19 (chemise 38).

X. *Quatrième session de l'Assemblée générale*[1]

Au cours de la quatrième session de l'Assemblée générale, le débat à la Quatrième Commission s'engagea sur la base de la communication du Gouvernement sud-africain du 11 juillet 1949 et du rapport du Conseil de Tutelle. Le représentant de l'Union sud-africaine reprit les principaux points de la communication de son Gouvernement et critiqua point par point les observations qu'avait faites le Conseil de Tutelle l'année précédente relativement au rapport sur l'administration du Territoire du Sud-Ouest africain au cours de l'année 1946. Plusieurs orateurs condamnèrent le Gouvernement de l'Union sud-africaine pour l'attitude que celui-ci avait prise à l'égard des résolutions de l'Assemblée générale. Certains émirent l'opinion que la loi de 1949 constituait virtuellement l'incorporation du territoire dans celui de l'Union, et signalèrent certaines déclarations faites par le premier ministre de l'Afrique du Sud dans le Parlement de l'Union, d'où il résulterait notamment qu'à la suite de la promulgation de la nouvelle loi, l'Union sud-africaine ne reconnaissait plus l'existence du mandat.

Au cours de la discussion, la question fut posée de savoir si certaines communications relatives au Sud-Ouest africain reçues par le Président de la Quatrième Commission et le Secrétaire général devaient être distribuées en tant que documents de séance, et s'il convenait que la commission entendît ceux des représentants des autochtones du Sud-Ouest africain qui lui en avaient adressé la demande. Ces propositions soulevèrent de longs débats de procédure. La commission finit par adopter une proposition invitant le Secrétaire général à distribuer les parties d'une communication concernant la demande d'audience présentée par le pasteur Michael Scott [1]. Le pasteur Scott avait informé le président de la Commission qu'il se trouvait aux États-Unis à titre de consultant de la Ligue internationale des droits de l'homme et qu'il y était venu à la demande et aux frais de la tribu des Hereros [2].

La commission adopta ensuite une autre résolution [3], par laquelle elle décidait d'accorder une audience à un ou plusieurs représentants de la population indigène du Sud-Ouest africain qui auront dûment justifié de leur mandat par la présentation de leurs pouvoirs. Une sous-commission fut chargée d'examiner ces pouvoirs. Le représentant de l'Union sud-africaine fit connaître à la commission qu'il ne pouvait accepter de siéger à la sous-commission, son Gouvernement estimant que sa participation aux travaux de la sous-commission pouvait être interprétée comme une acceptation du principe que la commission avait adopté dans cette résolution.

La sous-commission examina la seule requête dont elle était saisie, à savoir la demande d'audience devant la Quatrième Commission pré-

[1] Documents officiels de la quatrième session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Comptes rendus analytiques des séances, 131me séance, page 239 (chemise 40).

[2] Documents officiels de la quatrième session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Annexe aux comptes rendus analytiques des séances, A/C. 4/L. 57, page 13 (chemise 41).

[3] Documents officiels de la quatrième session de l'Assemblée générale. — Séances plénières. — Annexe aux comptes rendus analytiques des séances, A/1180, par. 10, page 2 (chemise 42).

sentée par le pasteur Scott. Elle constata que les pouvoirs du pasteur Scott devaient être considérés comme étant pleinement valables.

Après avoir approuvé le rapport de sa sous-commission, la Quatrième Commission décida d'accorder une audience au pasteur Scott. Le représentant de l'Union sud-africaine déclara que, sa présence pouvant être interprétée comme une acceptation de la décision de la commission, sa délégation n'assisterait pas à cette audience.

Le pasteur Scott fit une déclaration verbale au cours de la 138me séance de la Quatrième Commission. A la suite de cette audition, la commission accepta une proposition de la délégation des Philippines tendant à faire figurer dans les comptes rendus officiels de l'Assemblée générale certaines annexes auxquelles le pasteur Scott avait fait allusion dans sa déclaration [1].

Au cours de la 139me séance, le représentant de l'Union sud-africaine déclara qu'en raison des événements qui s'étaient déroulés à la commission, son Gouvernement avait donné pour instruction à la délégation sud-africaine de n'assister à aucun autre débat de la Quatrième Commission sur la question du Sud-Ouest africain.

La commission passa alors à l'examen des projets de résolution. Une première proposition de la délégation de l'Inde [2] visait la communication aux Nations Unies par le Gouvernement de l'Union sud-africaine de rapports sur le Sud-Ouest africain. Le projet de cette délégation proposait à l'Assemblée d'exprimer le regret de la répudiation par l'Union sud-africaine de son engagement antérieur et invitait le Gouvernement de l'Union à reprendre la présentation de ces rapports.

Ce premier projet de résolution fut approuvé par l'Assemblée plénière le 6 décembre 1949 par 33 voix contre 9 et 10 abstentions [3]. Dans sa forme finale, la résolution exprime le regret de l'Assemblée générale du retrait par le Gouvernement de l'Union de sa promesse antérieure de présenter à l'Organisation des Nations Unies, pour information, des rapports sur son administration du Territoire du Sud-Ouest africain. L'Assemblée confirme les termes de toutes ses résolutions antérieures sur la question du Sud-Ouest africain et invite le Gouvernement de l'Union à reprendre la présentation de rapports à l'Assemblée générale et à se conformer aux décisions exprimées par l'Assemblée générale dans ses résolutions antérieures.

La deuxième résolution que l'Assemblée générale adopta lors de sa quatrième session fut celle relative à la demande d'un avis consultatif à la Cour internationale de Justice. Deux projets furent soumis à cet égard à la Quatrième Commission : celui présenté conjointement par les délégations du Danemark, de la Norvège, de la Syrie et de la Thaïlande [4] proposait à l'Assemblée générale de rappeler ses résolutions

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[1] Documents officiels de la quatrième session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Comptes rendus analytiques des séances, 138me séance, page 285 (chemise 40).

[2] Documents officiels de la quatrième session de l'Assemblée générale. — Séances plénières. — Annexe aux comptes rendus analytiques des séances, A/1180, Rapport de la Quatrième Commission, page 4 (chemise 42).

[3] *Documents officiels de la quatrième session de l'Assemblée générale.* — Résolutions, 337 (IV), pages 45-46 (chemise 43).

[4] Documents officiels de la quatrième session de l'Assemblée générale. — Séances plénières. — Annexe aux comptes rendus analytiques des séances, A/1180, Rapport de la Quatrième Commission, page 6 (chemise 42).

antérieures sur la question du Sud-Ouest africain, de noter la teneur de la communication de l'Union sud-africaine en date du 11 juillet 1949, ainsi que du texte du *South-West Africa Affairs Amendment Act 1949* et les commentaires sur les dispositions de cette loi transmis par le Gouvernement de l'Union, et de formuler la question à la Cour de la manière suivante :

« Quel est le statut international du Territoire du Sud-Ouest africain, et quelles sont les obligations internationales du Gouvernement de l'Union sud-africaine en ce qui concerne ce territoire, et, notamment,

a) Le Gouvernement de l'Union sud-africaine a-t-il encore des obligations internationales en vertu du mandat pour le Sud-Ouest africain, et, si c'est le cas, quelles sont-elles ?

b) Les dispositions des chapitres XI et XII de la Charte sont-elles applicables au Territoire du Sud-Ouest africain, et, si c'est le cas, avec quelles modalités d'application ? »

Le projet de l'Inde [1] sur le même sujet donnait à la question la forme suivante :

« Compte tenu des instruments internationaux que la Cour jugera pertinents, ainsi que des objectifs et du fonctionnement du système des mandats,

Compte tenu de la dissolution de la Société des Nations et de la résolution adoptée le 18 avril 1946 par l'Assemblée de la Société des Nations sur la question des mandats,

Compte tenu des dispositions de la Charte des Nations Unies, et, notamment, des articles 77 et 80,

Quels sont les droits et obligations du Gouvernement de l'Union sud-africaine en ce qui concerne le Territoire du Sud-Ouest africain, et quel est le statut international de ce territoire ?

a) Le Gouvernement de l'Union sud-africaine a-t-il notamment le droit de prendre unilatéralement des mesures touchant le statut international du Territoire du Sud-Ouest africain ?

b) Dans le cas d'une réponse négative à la question *a*) ci-dessus, qui a compétence pour modifier le statut international du Territoire du Sud-Ouest Africain ? »

A la lumière de la discussion de ces deux projets par la Quatrième Commission, les délégations du Danemark, de la Norvège, de la Syrie, de la Thaïlande et celle de l'Inde s'entendirent sur un texte commun qui combinait leurs propositions primitives [1]. Les questions y étaient rédigées comme suit :

« Quel est le statut international du Territoire du Sud-Ouest africain, et quelles sont les obligations internationales de l'Union sud-africaine qui en découlent, et notamment,

a) L'Union sud-africaine a-t-elle encore des obligations internationales en vertu du mandat pour le Sud-Ouest africain, et, si c'est le cas, quelles sont-elles ?

b) L'Union sud-africaine est-elle tenue de négocier et de conclure un accord de tutelle qui placerait le Territoire du Sud-Ouest africain sous le régime international de tutelle ?

[1] Voir note 4, page 182.

c) Dans le cas d'une réponse négative à la question *b*), le Sud-Ouest africain est-il un territoire auquel s'appliquent les dispositions du chapitre XI de la Charte ?

d) L'Union sud-africaine a-t-elle compétence pour modifier le statut international du Territoire du Sud-Ouest africain, ou, dans le cas d'une réponse négative, qui a compétence pour déterminer et modifier le statut international du territoire ? »

Le projet de résolution ajoutait que le Secrétaire général joindrait aux documents qu'il était chargé de transmettre à la Cour notamment : le texte de l'article 22 du Pacte de la Société des Nations, le texte du mandat pour le Sud-Ouest africain allemand, confirmé par le Conseil de la Société des Nations le 17 décembre 1920, les documents pertinents concernant les objectifs et les fonctions du système des mandats, le texte de la résolution sur la question des mandats adoptée par la Société des Nations le 18 avril 1946, le texte des articles 77 et 80 de la Charte, ainsi que les renseignements sur les débats auxquels ces articles ont donné lieu à la Conférence de San-Francisco et à l'Assemblée générale, le rapport de la Quatrième Commission et les documents officiels, y compris les annexes, se rapportant à l'examen de la question du Sud-Ouest africain lors de la quatrième session de l'Assemblée générale.

Au cours de la 140me séance de la Quatrième Commission [1], les auteurs de ce projet de résolution commun acceptèrent un amendement de la délégation du Mexique tendant à prier la Cour de transmettre son avis à l'Assemblée générale, si possible avant la cinquième session de celle-ci. Le représentant de Haïti, qui insista pour que les documents soumis par le pasteur Scott soient transmis à la Cour, retira un amendement à cet effet après qu'il fut assuré que ces documents seraient communiqués à la Cour comme annexes aux documents officiels de la quatrième session de l'Assemblée.

Le projet de résolution présenté par les cinq délégations fut mis au vote à la Quatrième Commission, en plusieurs parties. Le deuxième paragraphe du préambule, qui prenait acte de la communication de la délégation sud-africaine du 11 juillet 1949, fut rejeté par 24 voix contre onze, et onze abstentions. Une proposition du Guatemala, qui suggérait par voie d'amendement le libellé suivant de la question à la Cour :

« Quelles sont les obligations de l'Union sud-africaine en ce qui concerne le Territoire du Sud-Ouest africain aux termes des dispositions pertinentes du Traité de Versailles, du Pacte de la Société des Nations, du mandat de 1920 et de la Charte des Nations Unies ? »

fut rejetée par 18 voix contre 15, avec 13 abstentions. Les alinéas *b*) et *c*) du dispositif du projet des cinq délégations furent éliminés par 24 voix contre 17 et 5 abstentions.

Deux amendements au texte proposé par la délégation des Philippines furent également rejetés. Le projet résultant de ces différents votes fut finalement adopté par la commission par 37 voix contre 7, avec 4 abstentions.

A la séance plénière de l'Assemblée, le représentant de l'Union sud-africaine rappela une fois encore la position prise par son Gouvernement

[1] Documents officiels de la quatrième session de l'Assemblée générale. — Quatrième Commission. — Tutelle. — Comptes rendus analytiques des séances, 140me séance, pages 292 et suivantes (chemise 40).

sur la question. Il se plaignit de ce qu'au cours du débat de la Quatrième Commission, la bonne foi de son Gouvernement dans l'accomplissement de sa tâche ait été délibérément mise en doute. Il répéta que, de l'avis de son Gouvernement, l'association plus étroite entre l'Union et le territoire, récemment réalisée en vertu du *South-West Africa Affairs Amendment Act,* non seulement n'avait pas excédé la limite du mandat, mais que, de plus, il ne s'agissait pas d'une annexion parce que le territoire conservait une entité distincte. Il protesta contre la décision qu'avait prise la Quatrième Commission d'accorder une audience au pasteur Scott et fit remarquer que les termes de la première résolution proposée par la commission à l'approbation de l'Assemblée générale et l'invitation qui s'y trouvait incluse au Gouvernement de l'Union sud-africaine de reprendre la présentation de rapports anticipaient les conclusions de la Cour internationale de Justice sur la question qui lui était posée par l'Assemblée générale dans la deuxième de ces résolutions. En ce qui concerne celle-ci, le délégué de l'Union sud-africaine déclara avec force que son Gouvernement croyait en la suprématie du droit et qu'il avait un sens profond de ses obligations envers la communauté internationale. Il exprima également la crainte que la question ne soit pas réglée par l'Assemblée générale conformément à l'avis de la Cour, mais qu'elle continue, même après que cet avis aura été donné, d'être soulevée à l'Assemblée pour des raisons politiques. Il fit ses réserves quant au libellé de la question qui allait être adressée à la Cour, et en particulier quant à la liste de documents que l'Assemblée demandait au Secrétaire général de transmettre à celle-ci.

Le représentant du Danemark soumit, en son nom et au nom de seize autres délégations, un amendement à la résolution de la commission, qui ajoutait un alinéa au dispositif de celle-ci, par lequel l'Assemblée demandait à la Cour de se prononcer, parmi les questions particulières, sur celle de savoir si les dispositions du chapitre XII de la Charte étaient applicables au Territoire du Sud-Ouest africain et, dans l'affirmative, de quelle façon.

Le représentant du Danemark, qui avait été le président de la Quatrième Commission au cours de la quatrième session, et le rapporteur de celle-ci au cours de la session précédente, insista sur l'importance qu'il y avait pour l'Assemblée à obtenir l'avis de la Cour. L'Assemblée, dit-il, si elle adopte la résolution, disposera à sa cinquième session d'un avis autorisé sur les aspects juridiques de la question du Sud-Ouest africain, et sera mieux à même de parvenir à une décision qui aura d'autant plus de poids qu'elle reposera sur une étude juridique effectuée par l'organe judiciaire principal de l'Organisation des Nations Unies. La Cour comprendra, sans aucun doute, déclara le représentant du Danemark, que l'Assemblée attend d'elle qu'elle élucide entièrement tous les problèmes juridiques posés par la question du Sud-Ouest africain. L'adoption du projet de résolution et de l'amendement à cette résolution permettra d'obtenir, conformément au Statut de la Cour, une réponse détaillée. D'autres orateurs, les représentants du Guatemala, des États-Unis, du Royaume-Uni, de la Thaïlande et de l'Inde appuyèrent également le renvoi de la question à la Cour. L'amendement proposé conjointement par les dix-sept délégations associées fut adopté par 39 voix contre 6, avec 7 abstentions.

L'ensemble du projet de résolution fut approuvé par 40 voix contre 7, avec 4 abstentions.

Telle est, Monsieur le Président et Messieurs les Membres de la Cour, présentée aussi objectivement et aussi succinctement qu'il m'a été possible de le faire, l'histoire déjà longue de la question du Sud-Ouest africain devant les Nations Unies.

Vous avez pu constater que l'Assemblée générale a recommandé d'une manière constante une solution quant au statut futur du territoire sous mandat du Sud-Ouest africain que le Gouvernement de l'Union n'a pas jugé pouvoir accepter.

A côté d'arguments politiques, de nombreux arguments juridiques furent avancés pour étayer la thèse de l'Assemblée générale. Le recours à la Cour internationale de Justice, en vue de préciser la position juridique et de mesurer l'étendue des droits et des obligations internationales de l'Union sud-africaine, avait été suggéré à diverses reprises tant par les représentants du Gouvernement de l'Union que par d'autres membres de l'Assemblée. Finalement, au cours de sa quatrième session, l'Assemblée générale a jugé qu'avant de proposer une solution qui, cette fois-ci, espère-t-on, amènera un règlement définitif de cette question hérissée de difficultés, il était important qu'elle s'entoure de l'avis de la Cour et que, en vue d'arriver à une solution acceptable et conforme aux principes qui servent de base à l'Organisation des Nations Unies, elle mette ainsi à contribution la haute autorité dont la Cour internationale de Justice jouit auprès de tous les gouvernements qui se réclament du respect du droit international.

XI. *Le dossier transmis à la Cour*

En conformité avec la deuxième partie de la résolution du 6 décembre 1949, le Secrétaire général a transmis à la Cour internationale un dossier qui comprend tous les textes que l'Assemblée générale a explicitement mentionnés. Le Secrétaire général y a ajouté d'autres documents qui, à son avis, pouvaient servir à élucider la question et faciliter l'examen de l'affaire par les membres de la Cour.

Dans la première partie du dossier, les membres de la Cour pourront trouver des dispositions du Traité de Versailles, par lesquelles l'Allemagne a renoncé en faveur des Principales Puissances alliées et associées à tous ses droits et titres sur ses possessions d'outre-mer. Le dossier contient également des extraits du Traité de Berlin de 1921 relatif au rétablissement de la paix entre l'Allemagne et les États-Unis d'Amérique. A côté de l'article 22 du Pacte de la Société des Nations et du texte du mandat sur le Sud-Ouest africain, tel qu'il fut confirmé par le Conseil de la Société des Nations le 17 décembre 1920, le dossier comprend le texte de la décision du Conseil suprême de la Guerre du 7 mai 1919, relative à l'attribution du mandat sur l'Afrique du Sud occidentale allemande à l'Union sud-africaine.

La tâche de sélection des documents pertinents concernant les objectifs et les fonctions du régime des mandats ne fut pas sans difficulté. Nous n'avons pas voulu transmettre à la Cour des textes autres que ceux émanant de sources officielles. Parmi ceux-ci, il aurait peut-être convenu que nous communiquions les comptes rendus, les rapports et les actes de toutes les sessions de la Commission permanente des Mandats. En raison même du volume de cette documentation, il nous a fallu nous en abstenir. La Cour trouvera, cependant, dans le dossier

certains documents essentiels : la constitution de la Commission permanente des Mandats et son règlement intérieur, le premier rapport présenté par le Conseil à l'Assemblée sur les responsabilités qui incombaient à la Société des Nations en vertu de l'article 22 du Pacte, avec d'importantes annexes, des documents sur les procédures relatives aux pétitions, les questionnaires de la Commission des Mandats concernant les mandats « C », et enfin une publication officielle de la Société des Nations datée d'avril 1945, relative au système des mandats, à son origine, à ses principes et à son application. Des extraits d'actes de la dernière session de l'Assemblée de la Société des Nations et le texte de la résolution qui y fut approuvée ont été également inclus dans le dossier.

Le dossier comprend également le texte des chapitres XI et XII de la Charte, le texte des comptes rendus de la Conférence des Nations Unies sur l'Organisation internationale de San-Francisco, comportant la discussion des articles figurant dans ces chapitres, et l'ensemble des comptes rendus et des documents des différents organes des Nations Unies qui se sont à ce jour occupés de la question du Sud-Ouest africain. Une table des matières et un index faciliteront, je l'espère, le dépouillement et l'utilisation du dossier.

PART II

In this second part of my statement, the Court will permit me to make a number of observations regarding the legal problems raised by the questions which the Assembly has referred to the Court for an advisory opinion.

The questions submitted to the International Court of Justice by the General Assembly have been framed in very broad terms.

How should the accepted principles of international law and the methods of legal interpretation of international instruments and practices be applied to the complex situation of a territory which has been administered under a League of Nations mandate, but which has not been placed under the international Trusteeship System ?

In order to facilitate, at least to a certain degree, the task of the Court, I shall attempt to emphasize at the outset what was the international status of the Territory of South West Africa prior to the dissolution of the League of Nations. I shall attempt then to determine the obligations of the mandatory Power which resulted from this status. Having spoken about the dissolution of the League of Nations and its juridical effects, I shall devote one chapter to the study of the pertinent provisions of the Charter of the United Nations. Finally, I shall attempt to bring some light on the question as to who has the competence to determine and modify the international status of the Territory.

I. *The international status of the Territory of South-West Africa prior to the dissolution of the League of Nations*

A. *Basic international instruments and decisions*

Four basic international instruments and decisions which determined the status of South-West Africa after the end of the First World

War should be considered above all in this respect. These are: first—Articles 118 and 119 and the following articles of the Treaty of Versailles; second—Article 22 of the Covenant of the League of Nations; third—the decision of the Supreme Council of the Principal Allied and Associated Powers allocating the mandates; and fourth—the Mandate for South-West Africa. The examination of these texts leads to the following basic conclusions:

1. Articles 118 and 119 of the Treaty of Versailles [1] represent a *complete renunciation on the part of Germany* of all her rights and titles to her oversea possessions. It is therefore unnecessary for us to consider the status of the Territory of South-West Africa prior to World War I. That it was under the sovereignty of Germany has not been questioned and is inferentially recognized in the opening paragraph of Article 22 of the Covenant. In the early years of the war, the Territory was occupied by troops from the Union of South Africa and it was administered as an occupied territory until the end of the hostilities. By Article 118 of the Versailles Treaty, Germany undertook to recognize and to conform to the measures which might be taken by the Principal Allied and Associated Powers, in agreement where necessary with third Powers, to carry into effect the renunciation by Germany of its rights, titles and privileges.

2. *The renunciation by Germany was in favour of the Principal Allied and Associated Powers*, that is the United States of America, the British Empire, France, Italy and Japan. It will be noted that the renunciation was not in favour of the League of Nations, nor of the Union of South Africa.

It will be recalled that while the United States never ratified the Treaty of Versailles, it reserved for itself in a separate treaty, which it concluded with Germany in Berlin in 1921 [2], all the rights and advantages stipulated in the Treaty of Versailles for the Principal Allied and Associated Powers, including those in respect of the former German colonies. The Treaty of Berlin also stipulated that the United States should not be bound by the provisions of the Treaty of Versailles relating to the Covenant of the League of Nations or by any action taken by the League of Nations, unless the United States should expressly give its assent to such action.

Notwithstanding this reservation in the Treaty of Berlin, there are no grounds for the view that so far as the United States is concerned, its failure to ratify the Treaty of Versailles has invalidated or weakened in any way the dispositions made in the creation and the operation of the Mandates System. The point is moreover made quite clear in the written statement submitted to the Court by the Government of the United States in the present case [3].

3. The Covenant of the League of Nations was an integral part of the Treaty of Versailles. Articles 118 and 119 of the Treaty must

[1] The Treaty of Peace between the Allied and Associated Powers and Germany, 28 June, 1919.—Part IV, German Rights and Interests outside Germany (Folder 1).

[2] Treaty concerning the re-establishment of peace between Germany and the United States of America, signed at Berlin, 25 August, 1921 (Folder 1).

[3] International Court of Justice.—International Status of South-West Africa (Request for an Advisory Opinion).—List of documents accompanying the request; Written Statements, p. 93.

therefore be read and understood in connexion with Article 22 of the Covenant.

I shall not attempt to retrace the genesis of Article 22 [1], although a comprehensive study of the political and humanitarian ideals, the declarations of statesmen and the political writings, during and immediately after the First World War, on the question of the ultimate disposal of territories to be detached by the Allies from the enemy States, would undoubtedly assist in the understanding of the objectives and the functioning of the Mandates System.

Field Marshal Smuts' *Practical Suggestion for a League of Nations* [2] has been generally recognized as the main blueprint for the Mandates System. In this plan, published in December 1918, Field Marshal Smuts proposed, with respect to certain territories which had belonged to the European and Near-Eastern Empires, that the League should be regarded "as the reversionary in the most general sense and as clothed with the right of ultimate disposal in accordance with certain fundamental principles. Reversion to the League of Nations would be substituted for any policy of national annexation." "The delegation of certain powers to the mandatory State", wrote Field Marshal Smuts, "must not be looked upon as in any way impairing the ultimate authority and control of the League.... For this purpose it is important that in each such case of mandate, the League should issue a special act or charter clearly setting forth the policy which the mandatory will have to follow in that territory. This policy must necessarily vary from case to case, according to the development, administrative or police capacity and homogeneous character of the people concerned. The mandatory State should look upon its position as a great trust and honour, not as an office of profit or a position of private advantage for itself or its nationals." Accordingly, Field Marshal Smuts recommended that the "degree of authority, control of administration exercised by the mandatory State shall in each case be laid down by the League in a special act or charter, which shall reserve to it complete power of ultimate control and supervision, as well as the right of appeal to it from the territory or people affected against any gross breach of the mandate by the mandatory State".

It should be pointed out, however, that the Smuts plan envisaged application of the mandates only to the territories of Eastern Europe and of the Near East. With respect to German colonies, he considered that their disposal should be decided according to the principles which President Wilson had laid down in the fifth of his fourteen points. It was only at a later stage in the negotiations between the Allies of the Treaty of Versailles that the Mandates System was made applicable to the German territories in Africa.

The fifth of President Wilson's famous points read :

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[1] Cf. League of Nations.—The Mandates System : Origin, Principles, Application (series of L. of N. Publications—VI. A. Mandates—1945. VI. A. 1, p. 13. See also Quincy Wright, *Mandates under the L. of N.* (1930) ; David Hunter Miller, *The Drafting of the Covenant*, Vols. I and II, 1928) ; D. F. W. Van Rees, *Les Mandats internationaux, Le Contrôle international de l'Administration mandataire*, Vol. 1 (1927).

[2] *The League of Nations, A Practical Suggestion.* Reprinted in David Hunter Miller, *The Drafting of the Covenant*, Vol. II, p. 27.

"A free, open-minded and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that, in determining all such questions of sovereignty, the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined."

The terms of Article 22 [1] made it expressly applicable to those colonies and territories which, as a consequence of the war, ceased to be under the sovereignty of the States which formerly governed them, and which are inhabited by peoples *not yet* able to stand by themselves under the strenuous conditions of the modern world.

The principle was laid down that the well-being and development of the peoples of these territories constituted a *sacred trust of civilization*. It was provided that as the best method for giving effect to this principle, the *tutelage* of these peoples should be entrusted to advanced nations best fitted to undertake *this responsibility*. It was further stipulated that this tutelage was to be exercised by these States as mandatories *on behalf of the League of Nations*. With respect to the colonies formerly belonging to the Turkish Empire—those territories which were to become the "A" Mandates—it was considered that they had reached a stage of development where their existence as independent nations could be provisionally recognized, subject to the rendering of *administrative advice and assistance* by a mandatory until such time as they would be able to stand alone. With specific reference to South West Africa and other territories which were to become "C" Mandates, it was stated that they could be *best administered* under the laws of the mandatory *as integral portions of its territory*, subject to safeguards in the interests of the indigenous population.

4. Paragraph 8 of Article 22 prescribed that the degree of authority, control or administration to be exercised by the mandatory would, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council, but no provision was made regarding the authority which would appoint the mandatory.

Basing himself on the intentions of the authors of the Covenant, on the text of Articles 118 and 119 of the Treaty of Versailles, Mr. Hymans, Rapporteur of the Council of the League, concluded, and the Council agreed, that the right to appoint mandatory Powers should belong to the Principal Allied Powers and that "the legal title held by a mandatory Power must therefore be a double one, one conferred by the Principal Powers and the other by the League of Nations" [2].

Actually, on 7 May, 1919, several weeks prior to the signing of the Treaty of Versailles, the Supreme Council of the Allied and Associated Powers took a series of decisions on the allocation of mandates and

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[1] The Treaty of Peace between the Allied and Associated Powers and Germany, 28 June, 1919, Part I—The Covenant of the League of Nations (Folder 1).

[2] See League of Nations, *Responsibilities of the League arising out of Article 22 (Mandates)*.—Report by the Council to the Assembly (20/48/161), page 2 (Folder 1), and Annex 4, Report presented by the Belgian representative, Mr. Hymans, and adopted by the Council of the League of Nations meeting at San Sebastian, 5 August, 1920, *id.*, page 14.

determined that the Mandate with respect to German South-West Africa would be held by the Union of South Africa [1]. This decision was officially communicated to the President of the Council of the League of Nations by a letter from the Prime Minister of France dated 16 October, 1920 [2].

5. While agreeing that the mandatory Powers must, in accordance with the Treaty of Versailles, be selected by the Principal Allied and Associated Powers, the Council of the League held that it was in the last resort itself responsible for approving and, if necessary, for drawing up the terms of the mandates. It decided, however, that it was prepared to receive the proposals of any of its Members with regard to the terms of mandates provided these proposals were made within a reasonable time [3].

After some delay and several requests on the part of the President of the Council, Mr. Arthur Balfour presented to the Council on 14 December, 1920, draft mandates which had been prepared by his Government for several territories, including a draft mandate for South-West Africa [4]. On 17 December, 1920, the Council decided, subject to certain amendments, to confirm the draft mandate for South-West Africa.

The preamble of the Mandate [5] refers to Article 22 of the Covenant and contains the acceptance by "His Britannic Majesty for and on behalf of the Union of South Africa" of the Mandate in respect of German South-West Africa and the undertaking by the mandatory that the Mandate shall be exercised on behalf of the League of Nations and in accordance with its provisions.

I shall return to the other provisions of the Mandate in the part of my statement devoted to the more detailed examination of the obligations of the mandatory Power.

B. *Jurists' discussion on location of sovereignty*

In the report which I mentioned a moment ago and which was adopted by the Council of the League on 5 August, 1920, the Rapporteur, Mr. Hymans, dealing with the question of the determination of the terms of the mandates, remarked:

> "The degree of authority, control or administration is, so far as 'B' or 'C' Mandates are concerned, a question of only secondary importance. In the former case, as in the latter, the mandatory Power will enjoy in my judgment a full exercise of sovereignty, in so far as such exercise is consistent with the carrying out of the obligations imposed by paragraphs 5 and 6. In paragraph 6, which deals with 'C' Mandates, the scope of these obligations is perhaps

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[1] *Id.*, Annex 2, page 7.
[2] *Id.*, Annex 6, page 20.
[3] *Id.*, Annex 4, page 14.
[4] League of Nations Council.—*Official Journal.*—Procès-verbal of the Eleventh Session, page 36.
[5] Terms of League of Nations Mandates.—Republished by the United Nations (Document A/70) (Folder 1).

> narrower than in paragraph 5, thus allowing the mandatory Power more nearly to assimilate the mandated territory to its own [1]."

But a little further on and discussing the extent of the League's right of control, he stated :

> "I shall not enter into a controversy—though this would certainly be very interesting—as to where the sovereignty actually resides. We are face to face with a new institution. Legal erudition will decide as to what extent it can apply to this institution the older juridical notions.... [2]"

Throughout the life of the League, this official position of refraining from an examination of the exact location of sovereignty was maintained by all its organs. This was true not only because the question was recognized as extremely difficult with chances of agreement small, but also because at no time did a solution appear indispensable in dealing with the practical problems involving the responsibility of the mandatory Power before the League of Nations.

However, while League organs have observed this prudent attitude, eminent jurists of many nations eagerly accepted Mr. Hymans' challenge, and there is a wealth of legal literature on the subject. In spite of this abundance of legal theory, there exists no consensus, nor even a clearly discernible preponderance of opinion. In reviewing the literature on the subject, it may be observed that sovereignty has been variously attributed by jurists to the Principal Allied and Associated Powers [3], to the mandatories [4] in their own right or on behalf of the League of Nations, to the mandated communities [5] or to the League of Nations [6] either as such or as representing the international community. Nearly every possible combination of these four basic theories has been advanced, including theories of joint, divided and suspended sovereignty [7]. Further, many jurists have expressed the opinion that

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[1] League of Nations, Responsibilities of the League arising out of Article 22 (Mandates).—Report by the Council to the Assembly (20/48/161), Annex 4, page 15 (Folder 1).

[2] *Id.*, page 17.

[3] For example, see Fauchille, in second part of his Treatise, *Traité de Droit international public*, tome 1, 2me partie, 1925, p. 849 ; Potter, *Origin of the System of Mandates under the League of Nations*, "The American Political Science Review", Vol. 16, No. 4, November 1922, pp. 563-583.

[4] For example, see Rolin, *Le Système des Mandats coloniaux*, "Revue de Droit international et de Législation comparée", troisième série, tome I (1920), pp. 329-363 ; Lindley, *The Acquisition and Government of Backward Territory* (1926), pp. 266-267 ; Diena, *Les Mandats internationaux*, "Académie de Droit international, Recueil des Cours", tome 5 (1924, IV), pp. 215-261.

[5] For example, see Stoyanovsky, *La Théorie générale des Mandats internationaux* (1925) ; Pic, *Le Régime du Mandat d'après le Traité de Versailles, son application dans le Proche-Orient*, « Revue générale de Droit international public », vol. 30 (1923), pp. 321-371.

[6] For example, see Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 191-202 ; Schücking and Wehberg, *Die Satzung des Völkerbundes* (2nd ed., 1924), pp. 688-711 ; Redslob, *Théorie de la Société des Nations* (1927), pp. 175-216.

[7] For example, see Hall, *International Law* (Higgins 8th ed., 1924), pp. 158-163 ; Corbett, *British Yearbook of International Law* (1924), p. 134.

there is no sovereignty with respect to mandated territory [1] or have argued that existing conceptions of sovereignty have little practical application to such a novel state of affairs as that presented by the Mandates System [2].

With the Court's permission, I should like to refer very briefly to some of the arguments which have been advanced with regard to these various theories of sovereignty.

Those supporting the view that sovereignty is in a condominium of the Principal Powers point to the fact that Germany renounced its rights in favour of those Powers, and to the absence of an explicit transfer of sovereignty thereafter. Against this it has been stated that the function of the Principal Powers was limited to the designation of the mandatory and to participation in the setting up of the mandates. Upon the performance of this function, it was argued, their rights under Articles 118 and 119 of the Treaty of Versailles came to an end.

Those supporting the view that sovereignty is in the mandatory Power emphasized the completeness of the powers of government possessed by the mandatory. They did recognize that such sovereignty would be subject to the limitations and servitudes set forth in the Covenant and in the Mandate. The arguments opposed to the view that sovereignty is in the mandatory have been numerous, and I will deal with some of these in more detail in a few minutes when I consider the work of the Permanent Mandates Commission. They are based in part on inferences from the words mandate, tutelage and trust; in part on the incongruity of a State at the same time possessing sovereignty and administering in the name of the League, and in part on the absence of the usual legal relations which accompany sovereignty.

The theory that sovereignty resided in the mandated community was advanced with particular strength with regard to the "A" Mandates, but was also argued with respect to "B" and "C" Mandates. It was sometimes stated that the exercise of sovereignty was in suspense. Those supporting this view attached particular significance to the term "tutelage" as used in Article 22, and also to the principles of non-annexation strongly insisted upon at Versailles. Those opposing the view that sovereignty is in the inhabitants pointed to the absence in these territories of a community capable of possessing sovereignty and to the political immaturity of the peoples.

The publicist supporting theories attributing sovereignty in full or in part to the League of Nations placed emphasis on the phrase "on behalf of the League" appearing in Article 22, and also on the necessity for the consent of the Council for the modification of a mandate. Some writers found additional support for this theory in an analogy to the private law concept of mandate. Against the view that sovereignty was in the League, it was stated that the powers of supervision given to the League were not those of a sovereign. A few were of the opinion that the League was not capable of possessing sovereign powers, while others who recognized that the League might have sovereignty over a territory believed that it had not been given such powers in the case of the mandate.

[1] Scelle, *Manuel de Droit international public* (1948), pp. 222-238; Hales, *Some Legal Aspects of the Mandates System : Sovereignty—Nationality—Termination and Transfer*, "Transactions of the Grotius Society", Vol. 23 (1938), pp. 85-126.

[2] Oppenheim, *International Law*, Vol. I (McNair, 4th ed., 1928), pp. 201-215.

In view of these conflicting theories, it is not surprising that a number of international jurists have expressed the opinion that sovereignty is not a useful concept in describing the status of the mandates. It was suggested that a new relationship had been created under the Covenant and the mandates, and that the international status of the territory was to be determined from the terms of these instruments without attempting to force them into preconceived concepts of sovereignty.

C. *Court decisions with respect to the status of the mandates*

Having briefly considered the theories advanced in juristic writings, I might also mention the consideration of the status of mandates which may be found in Court decisions. It will be recalled that the Permanent Court of International Justice dealt with only one case arising under the terms of a mandate—the Mavrommatis Palestine Concessions case [1]. The majority opinion of the Court does not deal directly with the question of the status of the Territory. It does hold Great Britain, as mandatory, internationally responsible for actions in Palestine but it does so under the terms of the Mandate. The Court, in the course of this opinion, states that "the international obligations of the mandatory are not, *ipso facto*, international obligations of Palestine [2]. A more explicit statement concerning the status of the Territory is to be found in the dissenting opinion of Judge Bustamante, who said: "Great Britain is not the sovereign of Palestine but simply the mandatory of the League of Nations.... [3]"

The question of the status of mandated territory has been involved in a number of national court decisions [4], and the closely related question of the nationality status of the inhabitants has been the subject of considerable litigation [5]. Perhaps the best known, and most interesting with relation to the present question, of the cases arising in the

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[1] See Judgment No. 2 (Jurisdiction), 30 August, 1924, Series A, No. 2, pp. 6-93 It may also be noted that Advisory Opinion No. 12 of 21 November, 1925, concerning the interpretation of Article 3, paragraph 2, of the Treaty of Lausanne, involved the boundary of Iraq, a mandated territory. But this case did not concern questions of the Mandate as such. See also international arbitration between France and Mexico involving nationality status of inhabitants of mandated territory, Navera Case, *Annual Digest of Public International Law Cases, 1927-1928*, Case No. 30, pp. 52-53.

[2] Series A, No. 2, p. 23.

[3] Series A, No. 2, p. 81.

[4] For example Rex *v.* Christian, *South-African Law Reports*, 1924, Appellate Division, pp. 101-137; Ffrost *v.* Stevenson, 58 *C.L.R.* (1937), p. 528; Att.-Gen. *v.* Goralschwili, *L. R. Palestine*, 1920-1933, p. 353; Rex *v.* Ketter, 108 *L.J.* 345, 1 KB 787 (1940), (1939) 1 ALL E. R. 729; Talagoa *v.* Inspector of Police (1927), *N.Z.L.R.* 883; Delegate of the High Commissioner in Alexandretta, *Gazette des Tribunaux libano-syriens*, 3rd year, 1927, p. 1010, *Annual Digest* 1927-1928, Case No. 32; Antoine Bey Sabbagh *v.* Mohamed Pacha Ahmed, *Gazette des Tribunaux mixtes d'Égypte*, 18th Year, 1927-1928, p. 13; In *re* Caussègue and Cot, Sirey, 1930, Part 3, p. 7, *Annual Digest* 1929-1930, Case No. 15, p. 30; In *re* Karl and Toto Sané, *Dalloz*, 1931, Part 3, p. 36, *Sirey*, 1931, Part 3, p. 129, and other cases noted, *Annual Digest* 1931-1932, Case No. 22, pp. 48-49; *Re* Tamasese (1929), New Zealand, *L.R.* 209; Nelson *v.* Braisby (1934), *New Zealand Law Reports* 559.

[5] See summary of eleven cases by Hales in *Transactions of the Grotius Society*, 1937, Vol. 23, pp. 95-112.

courts of the mandatory Powers is that of Rex *v.* Christian [1], decided by the Supreme Court of the Union of South Africa in 1923. Jacobus Christian, a leading figure in the Bondelzwarts Rebellion in 1922, was convicted by the Courts of South-West Africa on the charge of high treason. The case came to the Supreme Court of the Union by way of appeal on a question of law relating to the international status of the Mandate. Put in its simplest terms, the question was whether the Union of South Africa as mandatory possessed the sovereignty necessary to maintain a charge of treason. The conviction was affirmed by the unanimous decision of five judges. Three of the judges (Chief Justice Innes, Associate Justices Solomon and Katzé) expressed the opinion that the crime of high treason can be committed against a State which possesses internal sovereignty, even though its external powers may be limited. They held that the Union, as mandatory, possessed sufficient internal sovereignty, or *majestas*, to warrant a charge of treason. The two other judges (Associate Justices de Villiers and Wessels), in expressing the view that sovereignty over the Territory was in the Union, did not distinguish between internal and external sovereignty.

In the four separate opinions written in this case, the position of the mandated Territory of South-West Africa under the Treaty of Versailles, the Covenant and the Mandate is examined at length.

I shall not attempt to present these opinions in full, but should like to mention a few points of special interest. Chief Justice Innes, in considering Article 119 of the Treaty of Versailles, stated that, while the expression "renounce in favour of" was used elsewhere in the Treaty to mean "cede to", it did not have that meaning in Article 119. The *animus* essential to legal cession was not present on either side. This, he believed, was not only supported by Article 22, but also by a comparison of Articles 254 and 257 of the Treaty. Under the first of these Articles a State to whom territory was ceded was compelled to assume responsibility for a proportion of the German debt, whereas no such obligation was imposed on the mandatory under Article 257.

This opinion of Chief Justice Innes, although recognizing that South Africa did not possess full sovereignty, expressed the view that it had full legislative and administrative power and was not itself subject to the sovereignty of another State. It was argued that neither the League nor the Principal Powers as such constituted a State, and therefore that they could not possess sovereignty. Justice de Villiers developed this point further by stating that while the exercise of sovereignty by the Union was limited by the terms of the Mandate, such limitation did not deprive the sovereign of *majestas* so long as there was no abdication of sovereignty in favour of another State.

While the arguments in these opinions have been cited in support of the view that sovereignty is in the mandatory, the decision itself did not rest on a finding that the Union of South Africa possessed sovereignty so far as the international status of the Territory was concerned.

The status of mandated territory has been the subject of Court decisions in a number of cases in the Australian Courts. It appears that some of the earlier Australian cases imply the existence of sover-

[1] *South-African Law Reports*, 1924, Appellate Division, pp. 101-137.

eignty in the mandatory. However, in Ffrost *v.* Stevenson [1] now cited as the leading Australian case, the Court considered at length the nature of the mandates and did not accept the view that sovereignty had been acquired over the Territory of New Guinea. In this case the High Court of Australia was called upon to decide a question relating to the extent of legislative powers in mandated territories. Chief Justice Latham expressed doubt whether any light could be thrown on the question by considering the applicability to mandated territories of a conception itself so uncertain and so disputable as that of sovereignty. The grant of mandates, he thought, introduced a new principle into international law, and he concluded that a mandated territory is not a possession in the ordinary sense. Justice Evatt in his opinion in this same case expressed the view that every recognized authority on international law accepts the view that the mandated Territory of New Guinea is not part of the King's Dominions.

There are, of course, a large number of cases arising in Palestine and the other "A" Mandates [2]. I will only mention one of these. The High Court of Palestine in Attorney-General *v.* Goralschwili held that the British Crown had not acquired full sovereignty by accepting the Mandate for Palestine, and the subjects of this Territory had not become British nationals.

D. *Practice of the Permanent Mandates Commission*

Having surveyed a few of the Court decisions relevant to the status of mandated territory, I should now like to deal with the practice of the League of Nations as it reflects on this problem. As I noted earlier in this statement, throughout the practice of the League, the organs responsible for the supervision of the Mandates System consistently refrained from any effort to determine the exact location of sovereignty. I mentioned that this may have been partly due to the difficulty of the question, but the more important factor seems to have been that its solution was at no time indispensable in dealing with the practical problems which arose.

However, conclusions were definite on the point that sovereignty did not rest with the mandatory Power. The records of the Permanent Mandates Commission show that that body at all times assumed the unequivocal and emphatic view that the mandatory did not possess sovereignty over mandated territories. This conclusion was also approved in reports and resolutions of the Council of the League.

Between 1921 and 1939, the Permanent Mandates Commission, a body of experts selected by the Council of the League of Nations for their personal merits and competence, held thirty-seven sessions in its capacity as advisor to the Council. It examined the annual reports in the presence of the representative of the mandatory Power. It received and examined petitions and considered other matters relating to the observance of the mandates either at the request of the Council or upon its own initiative. Discussions of the question of sovereignty by the Permanent Mandates Commission occurred in connexion with a variety of questions. I can only mention a few of these at this time.

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[1] *58 C.L.R. (1937)*, p. 528.
[2] *L.R. Palestine*, 1920-1923, p. 353.

Perhaps the fullest consideration of the question of sovereignty before the organs of the League of Nations was occasioned by a statement in the Preamble of a frontier agreement concluded between the Union of South Africa and Portugal in relation to the boundary between the mandated Territory of South-West Africa and Portuguese Angola. This Preamble contained the assertion that "the Government of the Union of South Africa, subject to the terms of the Mandate, possesses sovereignty over the Territory of South-West Africa". This statement was called to the attention of the tenth session of the Permanent Mandates Commission held in 1926 by its Chairman, the Marquis Theodoli, who was of the opinion that the correct expression should be "exercises sovereign power". During the discussion that ensued, several different views were expressed by members of the Commission on the subject. Without attempting to solve the fundamental question of where sovereignty with respect to mandated territories was located, the Commission in the Report of its tenth session stated: "Under the circumstances, the Commission doubts whether such an expression as 'possesses sovereignty' used in the Preamble to the above-mentioned Agreement, even when limited by such a phrase as that used, in the above-quoted passage, can be held to define correctly, having regard to the terms of the Covenant, the relations existing between the mandatory Power and the territory placed under its mandate [1]." The question was again discussed at length in the eleventh session of the Commission in 1927. A note on the question of sovereignty which was prepared by M. Van Rees, Vice-Chairman, and included in the report of the Commission, again called the attention of the Council to what appeared to the Commission to be a claim to legal relations between the mandatory and the territory not in accord with the fundamental principles of the Mandates System.

In the course of the discussion, the representative of the Union of South Africa, Mr. Smit, gave his strictly personal opinion "that the ownership of 'sovereignty', if such an expression were permissible, was dormant, but, while that state of affairs continued, the Government of the Union of South Africa exercised and possessed that sovereignty on behalf of a third party undefined. That was his position: there could be no question of annexation [2]."

M. Merlin, a member of the Commission, thought that, in these circumstances and for the moment at any rate, the question in whom this sovereignty resided was of little importance. "Did the Allied and Associated Powers possess it?" He asked: "Did the League of Nations possess it? Or, rather, did it not belong to the peoples who were still regarded as minors and for whom the mandatory Power agreed to act as guardian?" He concluded that: "Just as the guardian had no right of possession over the property of his ward, so the mandatory Power did not possess that sovereignty which would ultimately belong

[1] For discussion in the Commission, see the following:
Minutes of tenth session, pp. 22, 82-85, 85-86 and 182; Minutes of eleventh session, pp. 87-92, 169, 175-176, 176, 204-205; Minutes of thirteenth session, p. 11; Minutes of fifteenth session, pp. 77, 294, 298-299; Minutes of eighteenth session, pp. 12, 129 and 130. See also 44th session of the Council of the League, *Official Journal*, 8th year, No. 2 (April 1927), pp. 347 and 423, and 58th session of the Council of the League, *Official Journal*, February 1930, pp. 69-70.

[2] Minutes of the eleventh session, p. 92.

to the people under mandate on the day when they were in a condition to be emancipated, and to enjoy their full independence [1]."

Upon the failure of the Union of South Africa to give a reply satisfactory to the members of the Commission, the matter was again the subject of discussion and report in 1929 at the fifteenth session of the Commission.

The Council of the League adopted resolutions on the basis of the Commission's Reports on 8 September, 1927, and 13 January, 1930. The report accompanying the first of these resolutions, adopted by the Council on 8 September, 1927, recalled the Council's position that it should not express any opinion on the difficult point as to where sovereignty over a mandated territory resides. However, with regard to the legal relationship between the mandatory Power and the mandated Territory, the Report expressed the view that this relationship is a new one in international law. For this reason, the use of time honoured terminology in the same way as previously was thought inappropriate to the new conditions.

The Report accompanying the Resolution of 13 January, 1930, was more direct in stating that there was no reason to modify the opinion that sovereignty in the traditional sense of the word does not reside in the mandatory Power.

The Union of South Africa, by a letter of 16 April, 1930, stated its acceptance of the definition of the powers of the mandatory contained in these Reports to the Council. This letter was noted with great satisfaction by Mr. Van Rees, Acting Chairman, at the opening of the eighteenth session of the Permanent Mandates Commission.

[*Public sitting of May 17th, 1950, morning*]

The question of the status of the mandated territories was also discussed with regard to a number of other subjects considered by the Permanent Mandates Commission. At the request of the Council, the Commission studied the problem of the national status of the inhabitants of the "B" and "C" Mandates at its second session in 1922, and submitted a report to the Council. The Council, by Resolution adopted on 23 April, 1923 [2], recognized the principles that the status of the native inhabitants of a mandated territory is distinct from that of the nationals of the mandatory, and that the native inhabitants are not invested with nationality by reason of the protection extended to them. This position was based on the view that the mandated territories were separate from the territories belonging to the mandatory Power [3].

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[1] Minutes of the eleventh session, p. 92.

[2] League of Nations, *Official Journal*, Twenty-fourth Session of the Council, 4th Year, No. 6 (June 1923), p. 604.

[3] For discussion in Permanent Mandates Commission, see: Minutes of second session, pp. 16-20, 21, 85-87; Report of second session, League of Nations, Doc. A. 39. 1922. VI (C. 550. M. 332. 1922. VI); Minutes of third session, p. 7; Minutes of fourth session, pp. 125-126; Minutes of twelfth session, pp. 100-101, 198; Minutes of fourteenth session, pp. 15, 80-81, 208-210, 225, 274; Minutes of fifteenth session, pp. 14, 24-27, 62, 65, 75, 212-213, 276-279, 294; Minutes of sixteenth session, pp. 128-131, 155, 187-191, 202-203; Minutes of eighteenth session, p. 11.

The Council at the same time stated that it was not inconsistent with these principles that individual inhabitants might voluntarily obtain naturalization from the mandatory Power. Special treatment of the Germans in South-West Africa was also permitted, and legislation of the Union provided for their naturalization as a group, leaving them, however, the option to retain their German nationality.

Another problem considered by the Commission in which it was recognized that the mandated territory constituted a distinct entity from the international point of view involved the application of special international conventions to mandated territories [1]. The Commission in the report of its third session accepted the view that even "C" Mandates, although administered as an integral part of the territory of the mandatory, had a distinct international status, and that accordingly international treaties signed by the mandatory State did not apply *de jure* to territory under "C" Mandate. The Council of the League, on 15 September, 1925, adopted resolutions [2] recommending the extension to mandated territories of international conventions which were applicable to neighbouring colonies, thus implicitly accepting the view that those territories possessed a separate status.

The Mandates Commission considered during its third and fourth sessions the question of land tenure arising out of the transfer of property of the German Government to the mandatory Power under Articles 120 and 257 of the Treaty of Versailles [3]. In the course of this discussion, Mr. Van Rees presented to the Commission a report in which he examined at length the various views which had been put forward with regard to the "sovereignty of the mandatory Power [4]".

He concluded that under the Mandates System the mandatory State was merely the governor of a territory which did not belong to it. This

[1] Minutes of the third session, pp. 110-111, 309-310 ; Minutes of the sixth Session, pp. 100-102, 116-117, 146, 169-170, 172 ; Minutes of the ninth session, p. 10.

[2] League of Nations, *Official Journal*, Thirty-fifth Session of the Council, 6th year, No. 10 (October 1925), p. 1511.

[3] The texts of these Articles are :

Article 120.—"All movable and immovable property in such territories belonging to the German Empire or any German State shall pass to the government exercising authority over such territories, on the terms laid down in Article 257 of Part IX (financial clauses) of the present Treaty. The decision of the local courts in any dispute as to the nature of such property shall be final."

Article 257.—"In the case of the former German territories, including colonies, protectorates or dependencies, administered by a mandatory under Article 22 of Part I (League of Nations) of the present Treaty, neither the territory nor the mandatory Power shall be charged with any portion of the debt of the German Empire or States.

"All property and possessions belonging to the German Empire or to the German States situated in such territories shall be transferred with the territories to the mandatory Power in its capacity as such, and no payment shall be made nor any credit given to those Governments in consideration of this transfer.

"For the purposes of this Article, the property and possessions of the German Empire and of the German States shall be deemed to include all the property of the Crown, the Empire or the States and private property of the former German Emperor and other royal personages."

For discussion in Permanent Mandates Commission, see Minutes of third session, pp. 21-22 ; 30-32, 216-239, 312 ; *Minutes of Fourth* Session, pp. 123-124, 147, 156-157 ; Minutes of Ninth Session, p. 32.

[4] Minutes of third session, Annex 2, pp. 217-222.

fact, he thought, should be borne in mind in interpreting the transfer of property under Articles 120 and 257. He also noted that under Article 257 the transfer was "to the mandatory Power in its capacity as such".

At its fourth session, the Permanent Mandates Commission, upon the proposal of Mr. Van Rees, incorporated into its report [1] the opinion that the mandatory Powers do not possess, in virtue of Articles 120 and 257 of the Treaty of Versailles, any right over any part of the Territory under mandate other than that resulting from their having been entrusted with the administration of the Territory. It was also suggested that if any legislative provision relating to land tenure should lead to conclusions contrary to these principles, it would be desirable if the text were modified. This opinion expressed by the Permanent Mandates Commission was endorsed by the Council of the League of Nations in its Resolution of 9 June, 1926 [2].

A particular application of this principle may be found with regard to the South-West-African Railways and Harbours Act of 1922 [3]. According to this Act, the railway system and ports of the Territory were incorporated in the railway system and ports of the Union of South Africa and vested in the Union in "full dominion". An interpretation of the term "full dominion" was given by the Union Government which was considered by the Commission at its sixth session in 1925 to be in accordance with Articles 120 and 257 of the Treaty of Versailles. However, it was suggested that, in order to avoid misunderstanding, it would be advisable to amend the law of 1922.

When South Africa did not take immediate action to amend this law in accordance with the wish of the Commission, the matter was called to its attention at the ninth, eleventh and fourteenth sessions. In the report of the fifteenth session in 1929, the Commission again noted that it had received no information concerning steps to amend the Act in order to bring the legal régime of the railways and harbours into conformity with the principles of the Mandate, the Treaty of Versailles, and the decision of the Council of the League of Nations of 19 June, 1926. Thereafter, the Commission, at its eighteenth session in 1930, received and noted with satisfaction a communication from South Africa informing it that the desired amendment had been made.

The status of the Territory was also discussed by the Commission during its consideration of the question of loans, advances and investments of public and private capital [4]. The Commission, at its third session, was impressed by the fact that the mandated territories might be placed under an economic disadvantage owing to the uncertainty

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[1] See Minutes of fourth session of Permanent Mandates Commission, p. 157.

[2] League of Nations, *Official Journal*, 7th Year, No. 7 (1926), p. 867.

[3] For discussion in Permanent Mandates Commission, see: Minutes of third session, p. 325; Minutes of sixth session, p. 178; Minutes of ninth session, pp. 42-44, 129 and 220; Minutes of eleventh session, pp. 176, 176-177, 193; Minutes of fourteenth session, pp. 71-79, 115, 116 and 275; Minutes of fifteenth session, pp. 76-77, 294; Minutes of eighteenth session, pp. 130, 204.

[4] For discussion in the Permanent Mandates Commission, see: Minutes of third session, pp. 76-78, 90, 161, 191, 197-199, 311-312; Minutes of fourth session, pp. 140-141, 146; Minutes of fifth session, pp. 154-156, 161-162, 176-180; Minutes of sixth session, pp. 52-54, 117-119, 145, 151-153, 154-156, 156-158, 171-172; Minutes of seventh session, p. 6.

in their status, particularly with regard to the possibility of revocation or transfer of the Mandate [1]. I shall return to the discussion of revocability, which the Commission considered highly theoretical, in a latter part of this statement. It may be mentioned here that the Commission considered that a pronouncement by the Council of the League, tending to remove the lack of confidence arising from the uncertainty of status, would greatly promote the economic prospects of the Territory. The Commission subsequently, at its sixth session [2], recommended that the Council declare that obligations assumed by a mandatory Power in a mandated territory and rights of every kind regularly acquired under its administration should have under all circumstances the same validity as if the mandatory Power were sovereign. It further recommended that the Council should decide that : "In the event of a cessation of a mandate or of its transfer—however improbable this may be—*to a fresh mandatory Power*, the Council, without whose approval no such change could take place, should not give such approval unless it has been assured in advance that the new government undertaking the administration of the Territory will accept responsibility for the fulfilment of the financial obligations regularly assumed by the former mandatory Power and will engage that all rights regularly acquired under the administration of the latter shall be respected."

The Council considered this recommendation during its 35th Session. M. Undén, in his report to the Council on 15 September, 1925, noted that the text as proposed by the Commission used the word "sovereign". This, he thought, raised certain complicated questions of international law which it did not seem necessary to take up at that time. The paragraph was, therefore, redrafted in order to eliminate reference to the word "sovereign". The resolution, as adopted, declared that the validity of financial obligations assumed by a mandatory Power on behalf of a mandated territory in conformity with the provisions of the Mandate and all rights regularly acquired under the mandatory régime were in no way impaired by the fact that the territory was administered under mandate [3].

Mr. Van Rees, in referring to this resolution, remarked during the eleventh session of the Commission that this question would never have arisen if the Council had not taken the view that these territories did not belong to the Powers which exercised the Mandate over them [4].

The question of sovereignty, particularly as it related to South-West Africa, was also raised in the Commission in connexion with the South-West Africa Constitution Act of 1925 [5], in connexion with the resolution of the South-West Africa Assembly of 1934 concerning incorporation of the Territory as a fifth province of the Union [6], and

[1] Minutes of third session, pp. 311-312.

[2] Minutes of sixth session, pp. 171-172.

[3] League of Nations, *Official Journal*, 6th year, No. 10, pp. 1510-1511.

[4] Permanent Mandates Commission, Minutes of eleventh session, pp. 87-88. See also Report of M. van Blokland, adopted by the Council on 8 September, 1927. *Official Journal*, 8th year, p. 1120.

[5] Permanent Mandates Commission, Minutes of ninth session, pp. 33-35.

[6] Permanent Mandates Commission, Minutes of 22nd session, pp. 23-25 ; Minutes of 23rd session, p. 82 ; Minutes of 26th session, pp. 46-52, 62-64, 163-166, 167, 207 ; Minutes of 27th session, p. 12 ; Minutes of 29th session, pp. 126-128, 166, 211 ; Minutes of 30th session, p. 13 ; Minutes of 31st session, pp. 111-116, 175, 192 ; Minutes of 33rd session, pp. 140-141, 171 ; Minutes of 34th session, pp. 74-76.

in connexion with several statements made by South-African statesmen which the Commission considered to state incorrectly the relationship of the Union to the mandated Territory. Field Marshal Smuts, in a letter to M. Rappard, Director of the Mandates Section of the League Secretariat, in 1922 referred to the fact that under Article 22 South-West Africa could be administered under the laws of the Union as an integral portion of its territory and stated the view that the "C" Mandates are in effect not far removed from annexation [1]. Field Marshal Smuts further amplified this position in a statement before the South-African Parliament which was called to the attention of the ninth session of the Permanent Mandates Commission in 1926. In this statement, he said that the Mandate gives the Union "such complete power of sovereignty not only administrative but legislative that we need not ask for anything more". He continued: "When the Covenant of the League of Nations and, subsequently, the Mandate gave to us the right to administer that country as an integral portion of the Union, everything was given to us. I remember at the Peace Conference one of the great Powers tried to modify the position, and, instead of saying 'as an integral portion', an amendment was made to introduce the word 'if', so that it should read—'as if an integral portion of the mandatory Power'. But, after consideration, the 'if' was struck out. We therefore have the power to govern South-West Africa actually as an integral portion of the Union [2]."

The members of the Permanent Mandates Commission were quick to state their opposition to this position. Mr. Van Rees remarked that the Mandates Commission had always interpreted paragraph 6 of Article 22 of the Covenant in the sense that the mandated territory should be administered "as if it were an integral portion of the territory of the mandatory [2]". Sir Frederick Lugard at the same time stated that he did not think that the insertion or omission of the word "if" made any real difference in practice [3]. Mr. Orts did not believe that what had been said during the discussions preceding the adoption of the Covenant could be used as an argument, as no minutes had been kept of the Conference, and M. Rappard concurred in this view [3]. M. Merlin stated "that the 'C' Mandate for South-West Africa laid upon the mandatory the same obligations as the 'B' Mandates, except that concerning economic equality. Both 'B' and 'C' Mandates involved the obligation to present an annual report and recognized the right of the inhabitants to present petitions. These were the points which made it impossible to describe the mandates as an equivalent to annexation [3]."

Mr. Van Rees, at the eleventh session, after a review of a number of the decisions of the Council and of the Commission, concluded "that on no occasion had the Commission or the Council, or the mandatory Powers themselves, ever agreed to recognize that mandated territories

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[1] Annex to the Minutes of the second session of the Permanent Mandates Commission, pp. 91-93.

[2] Permanent Mandates Commission, Minutes of ninth session, p. 33.

[3] *Ibid.*, p. 34.

formed in reality an integral part of the territory belonging to those Powers [1]".

Somewhat similar discussions of the proper conception of the mandate ensued with regard to other territories. I might mention, for example, discussions which took place at the 10th session of the Commission in 1926 and at the 12th session in 1927 with regard to statements concerning the status of Western Samoa. At the former session, great satisfaction was expressed with regard to a statement by the Governor-General of New Zealand that "Western Samoa is not an integral part of the British Empire, but a child of which we have assumed the guardianship [2]". On the other hand, at the latter session the following year, the Chairman of the Commission viewed with concern a statement made by the Administrator during the celebration of the King's birthday which referred to Western Samoa as "part of the British Empire [3]".

The representative of New Zealand assured the Commission that the New Zealand Government was content to accept the view which, if he remembered rightly, was taken by the Commission, that a new sort of relationship, unknown in international law hitherto, had been created by the mandates.

II. *Obligations of the Union of South Africa under the Mandate*

Having thus commented on the general question of the international status of the mandated territory before the dissolution of the League, I will now endeavour to list briefly the specific obligations of the Union of South Africa which arose under the Mandate. I shall examine in this respect the obligations which have their source in Article 22 of the Covenant and in the Mandate for South-West Africa. I shall also refer to certain practices which have developed during the period when the organs of the League of Nations have exercised their functions of supervision over the administration of the mandated territories. Only thus can the exact nature and extent of the duties expressly enumerated in Article 22 and in the Mandate be fully measured. In this connexion, may I recall that the General Assembly of the United Nations, in paragraph 2 of its Resolution, refers not only to the Covenant of the League and the Mandate for South-West Africa, but also to the objectives and functions of the Mandates System.

Article 2 of the Mandate for South-West Africa [4] gives to the mandatory full powers of *administration and legislation* over the Territory under mandate. As in the other "C" Mandates, it authorizes the mandatory to administer the Territory as an integral portion of the Union of South Africa and to apply the laws of the Union of South Africa to the Territory subject to such local modifications as circumstances may require. The extent of these powers of administration and legislation is, however, qualified by the objectives prescribed by Article 22 of the Covenant and the Mandate itself. Article 22 of the Covenant refers in general terms to the "well-being and development" of the inhabitants and provides in its paragraph 5 for certain "specific safeguards". The Mandate provides for corresponding "securities" for

[1] *Minutes of the eleventh session, p. 88.*
[2] Minutes of the tenth session, p. 24.
[3] Minutes of the twelfth session, p. 103.
[4] Folder 1.

the "performance" of this "sacred trust of civilization". Its Article 2 prescribes that the mandatory shall promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory. Article 3 prohibits slave trade and forced labour except under specific conditions; it regulates the traffic in arms and ammunition and forbids the supply of intoxicating spirits and beverages to the natives. Article 4 restricts military training of the natives and prohibits the establishment of military or naval bases or fortifications. Article 5 guarantees freedom of conscience and religion, subject only to the maintenance of public order and public morals. It allows missionaries to enter into, travel and reside in the Territory for the purpose of pursuing their calling.

These obligations with respect to the administration and legislation of the Territory clearly have an *international character*. Under Article 6 of the Mandate, the mandatory is to present to the Council of the League an annual report *to the satisfaction of the Council*, as to the measures taken to carry out *the obligations* assumed under Articles 2, 3, 4 and 5.

The Council of the League very early gave expression to its views as to the extent of the *right of control* to be exercised by the League of Nations. The report of M. Hymans, adopted by the Council on 5 August, 1920 [1], stated the following:

> "What will be the responsibility of the mandatory Power before the League of Nations, or in other words in what direction will the League's right of control be exercised? Is the Council to content itself with ascertaining that the mandatory Power has remained within the limits of the powers which were conferred upon it, or is it to ascertain also whether the mandatory Power has made a good use of these powers, and whether its administration has conformed to the interests of the native population?
>
> It appears to me that the wider interpretation should be adopted. Paragraphs 1 and 2 of Article 22 have indicated the spirit which should inspire those who are entrusted with administering peoples not yet capable of governing themselves, and have determined that this tutelage should be exercised by the States in question, as mandatories and in the name of the League. The Annual Report stipulated for in Article 7 should certainly include a statement as to the whole moral and material situation of the peoples under the mandate. It is clear, therefore, that the Council also should examine the question of the whole administration. In this matter, the Council will obviously have to display extreme prudence, so that the exercise of its right of control should not provoke any justifiable complaints, and thus increase the difficulties of the task undertaken by the mandatory Power."

In its report to the First Assembly [2], the Council summarized its views in the following way:

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[1] League of Nations.—Responsibilities of the League arising out of Article 22 (Mandates): Report by the Council to the Assembly, Annex 4, page 17 (Folder 1).

[2] League of Nations.—Responsibilities of the League arising out of Article 22 (Mandates): Report by the Council to the Assembly, page 3 (Folder 1).

"With regard to the responsibility of the League for securing the observance of the terms of the Mandates, the Council interprets its duties in this connexion in the widest manner.

Nevertheless, the League will obviously have to display extreme prudence, so that the exercise of its rights of control should not in any way increase the difficulties of the task undertaken by the mandatory Powers."

The annual reports submitted by the mandatory Powers served as the chief source of information at the disposal of the Permanent Mandates Commission. They were prepared on the basis of a detailed questionnaire [1], drafted by the Commission for the purpose of indicating the points with which it desired the mandatory Power to deal. The reports and the annexes did, in fact, cover the whole field of activity of the various branches of the administration of the territory and contained in particular specific questions on the status of the territory, the status of the native inhabitants, international treaties or conventions applied to the territory and the extent of legislative and executive powers delegated to the chief administrative officer. Under a Council Resolution of 29 August, 1924, the mandatories were required to attach to their annual reports the complete text of all legislative or administrative decisions adopted in the mandated territories.

The Constitution of the Permanent Mandates Commission [2] which was approved by the Council on 1 December, 1920 (a date prior to the confirmation of the Mandate for South-West Africa on the 17th of the same month), provided for the appointment by the mandated Powers of a "*duly authorized representative*" through whom the annual reports of the mandatory Powers were to be transmitted, and who would be prepared to offer any supplementary explanations or supplementary information which the Mandates Commission might request. The Commission was to examine each individual report in the presence of the special representative who had the right to participate with absolute freedom in the discussion of the report.

As pointed out in the study of the Mandates System published by the Secretariat of the League of Nations in 1945 [3], the hearing of the accredited representative generally enabled the Commission to make good any deficiency in the written information at its disposal, to clear up obscure or doubtful points, to dispel any misunderstandings and thus to eliminate the possibility that its conclusions might be based on incomplete data. The presence of special representatives, particularly when they were officials personally responsible for the administration of the territory, proved of the greatest assistance to the Commission in the performance of its tasks. It afforded an opportunity for the discussion, not only of questions arising out of the examination of the

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[1] League of Nations (A. 14. 1926. VI) B and C Mandates.—List of questions which the Permanent Mandates Commission desires should be dealt with in the Annual Reports of the mandatory Powers (Folder 1).

[2] League of Nations.—Responsibilities of the League arising out of Article 22 (Mandates) : Report by the Council to the Assembly, Annex 14 page 34. See also League of Nations (C.P.M. 8(2)), Permanent Mandates Commission, Rules of Procedure (Folder 1).

[3] League of Nations.—The Mandates System : Origin, Principles, Application, page 39 (Folder 1).

annual reports, but also of any questions of a general nature regarding the mandatory régime. As a result, there grew up a genuine collaboration between the Commission and these representatives.

The question was also considered by the Commission whether it *might make an investigation on the spot* of the conditions in a mandated territory. Some members were of the opinion that the Commission was entitled to ask the Council to send a visiting mission into a mandated territory about which the Commission desired more information than was available through the ordinary sources. However, there is no instance in which the Commission did undertake such a visit to a mandated territory, nor was there any disposition on the part of the Council to give such authorization, although the Council itself in several instances did send special commissions to mandated territories in cases of an inquiry concerning a question pending between two States which had been referred to the Council by the parties concerned [1].

The Commission had as a further source of information a variety of documents collected by the Mandates Section of the Secretariat, which was instructed by the Commission to submit to it any *publications or documents* which might be of interest to it and to provide it with information regarding expressions of public opinion throughout the world concerning the Mandates System. The materials thus collected were not only official documents, such as the records of parliamentary debates concerning mandated territories, but also information emanating from private sources, such as scientific studies or articles published in reviews or in the daily press.

The practice which developed under the Mandates System with regard to the *right of petition* has especially been mentioned in the General Assembly. There was no express provision in the Covenant nor in the Mandate concerning the right of petition. Nor was there reference in the Hymans Report or in the Constitution and original rules of procedure of the Permanent Mandates Commission to this subject of petitions. Nevertheless, the right of petition was soon recognized as a factor of fundamental importance in the exercise by the League of the functions of supervision under the Mandates System, and as constituting not only a means whereby those concerned might state their grievances and secure redress for wrong done them, but also an additional source of information.

On 31 January, 1923, the Council of the League adopted rules of procedure in respect of petitions regarding inhabitants of mandated territories [2]. It was pointed out in the report by M. Salandra that

[1] The investigation of the causes of the Bondelzwarts rebellion in South-West Africa and of its repression was made by a commission of inquiry appointed by the mandatory Power. This commission was appointed following assurances given to the Assembly of the League by the mandatory that a full and impartial inquiry would be made. The reports of this commission of inquiry were studied by the Permanent Mandates Commission. See Resolution of Assembly of League of Nations, 20 September, 1922, League of Nations, Records of the 3rd Assembly, Plenary Meetings, Vol. 1, page 166 ; Report on the Bondelzwarts Rebellion, Permanent Mandates Commission, Annexes to the Minutes of the third session, 20 July-10 August, 1923, pp. 290-296 ; and Report and Resolution of Council of League of Nations, *Official Journal*, 27th Session of the Council, 5th Year, No. 2 (February 1924), pp. 339-341, 391-393.

[2] League of Nations, *Official Journal*, 4th Year, No. 3, March 1923.—Twenty-third Session of the Council.—Procedure in respect of petitions regarding inhabitants of mandated territories (Annex 457) [C. 44 (1). M. 73. 1923. VI] (Folder 1).

"as administration is exercised by the mandatory Powers on behalf of the League of Nations, the latter could not remain deaf to the pleas of those who are directly or indirectly concerned in a just application of the principles contained in the Covenant [1]".

On the other hand, however, M. Salandra noted that "important as it is in the interests of justice and of peace that every serious and sincere petition should be impartially investigated by the League of Nations, it is no less important, in the interests of justice and of good government, to discourage seditious or trivial petitions by persons whose motives may be either culpable or frivolous [2]".

The question whether the Commission might give an *oral hearing* to petitioners was considered at some length by the Commission and the Council [3]. The Commission, in the report of its ninth session, adopted the view that experience had shown that the Commission had been unable at times to form a definite opinion as to whether certain petitions were well founded and that in those cases it might appear indispensable to allow the petitioners to be heard. The Commission, however, the report continued, did not desire to formulate a definite recommendation on this subject before being informed of the views of the Council [4].

The Council requested the views of the mandatory Powers on this question. In their replies submitted to the Council, these Powers were unanimous in opposition to the hearing of petitioners. They stated that with such a procedure the parties would in fact be engaged in a controversy before the Commission and they thought that any procedure which would transform the Commission into a court of law would be inconsistent with the nature of the mandatory system.

The Council, in a Resolution adopted on 7 March, 1927, having taken note of the replies of the mandatory Powers, decided that there was no occasion to modify the procedure which had hitherto been followed by the Commission in regard to the hearing of petitioners. The report accompanying this Resolution, however, recognized that if in any particular case the circumstances should show that it was impossible for all necessary information to be secured by the usual means, the Council could decide on such exceptional procedure as might seem appropriate and necessary in the particular circumstances [5].

A further important factor to note in considering the obligations of the mandatory Power was the provision in Article 7, paragraph 1, of the Mandate for South-West Africa, that the consent of the Council of the League of Nations was required for any *modification* of the terms

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[1] Voir note 2, p. 206.

[2] League of Nations, *Official Journal*, 4th Year, No. 3, March 1923. Twenty-third session of the Council.—Procedure in respect of petitions regarding inhabitants of mandated territories (Annex 457) [C. 44 (1). M. 73. 1923. VI]. See Folder 1.

[3] See for example Minutes of the third session, Permanent Mandates Commission, pp. 62, 64-67; Minutes of the eighth session, Permanent Mandates Commission, pp. 157-160; ninth session, pp. 47-54, 55-56, 129-130, 189-193, 216; 41st session of the Council, *Official Journal*, October 1926, pp. 1231-1237, 1239. *Official Journal*, December 1926, pp. 1646-1653; 44th session of the Council, *Official Journal*, April, 1927, pp. 347-348 and 437-438.

[4] Minutes of the ninth session, p. 216.

[5] League of Nations, *Official Journal*, 44th Session of the Council (April 1927), pp. 437-438.

of the Mandate. I will only mention this point now, since I will consider it more thoroughly with regard to the question concerning the *modification* of the present status of South-West Africa.

A final obligation of the Union of South Africa as mandatory is that established by Article 7, paragraph 2, of the Mandate. Under this paragraph the mandatory agreed that, if any dispute whatever should arise between the mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it could not be settled by negotiation, should be submitted to the *Permanent Court of International Justice.*

III. *The dissolution of the League of Nations*

These are the few comments I wished to make on the international status of the mandated Territory of South-West Africa and on the international obligations which devolved from it upon the Union of South Africa. It will be of interest at this point to examine in detail the precise circumstances in which the dissolution of the League of Nations took place and the conditions governing the assumption by the United Nations of a number of League functions.

It should first be recalled that when the Assembly of the League met at its last session to take the necessary steps for the methodical dissolution of the League, the way had already been partly cleared. The great majority of League Members had taken part in the San Francisco Conference ; the United Nations Charter had come into force ; during the first part of its first session, the General Assembly had adopted resolutions relating to certain of the functions previously performed by the League.

Les us recall briefly the contents of these Resolutions of 12 February, 1946.

1. As regards the functions and powers belonging to the League of Nations by virtue of *international agreements*, the General Assembly of the United Nations was in principle ready to assume certain of these functions and certain of these powers. More particularly, the General Assembly declared itself ready : (*a*) to assume on behalf of the United Nations the *functions of a secretariat ;* (*b*) to proceed with the necessary measures to assure the uninterrupted exercise of the functions and powers *of a technical and non-political character;* (*c*) to examine itself or to submit to the competent organs of the United Nations any request from the parties that the United Nations should assume the exercise of the functions and powers *of a political character.*

2. As regards the non-political functions and activities of the League of Nations *other* than those which had devolved upon it by virtue of international agreements, the General Assembly of the United Nations invited the Economic and Social Council to proceed to a complete examination, with a view to determining those which should be assumed by organs of the United Nations or of specialized agencies. In a temporary capacity the Council was to assume immediately the tasks previously fulfilled by the following sections of the League: the economic, financial, transit, public health and opium. The Secretary-General received the task of assuring the continuity of the services of the Library, the Archives and of the publication of the Treaty Series.

It was therefore in the light of these Resolutions of 12 February, 1946, of the General Assembly of the United Nations that the last Assembly of the League of Nations took the necessary measures with a view to its own dissolution.

A large number of statements made in the course of the discussion enable us to understand the meaning and the effect which the Governments represented wished to give to the liquidation of the League. I may limit myself to mentioning the first Rapporteur of the First Committee, Mr. Bailey (Australia), who declared that the Assembly was anxious to take steps for the dissolution of the League in such a fashion as would make possible the continuance of all the work of permanent value that the League had been doing, in such form as might be found acceptable to the new international organization [1]. May I also refer to the passages of the Preamble to the General Resolution on the dissolution of the League of Nations adopted by the Assembly on 19 April, 1946:

> "The Assembly of the League of Nations,
>
> Considering that the Charter of the United Nations has created, for purposes of the same nature as those for which the League of Nations was established, an international organization known as the United Nations to which all States may be admitted as Members on the conditions prescribed by the Charter and to which the great majority of the Members of the League already belong;

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[1] League of Nations, *Official Journal*, Records of the Twentieth (Conclusion) and Twenty-first Ordinary Sessions of the Assembly, page 57.

The following noteworthy passage occurs in the closing remarks by the Chairman of the First Committee, Mr. Bourquin, the representative of Belgium (*ibid.*, page 101):

"Among the ideas which have been expressed from the tribune of the Assembly, there is one which had been taken up by almost all speakers and which has become, as it were, the leitmotiv of this session—the idea that the League of Nations is disappearing only in order to reappear in a new form. I desire to take it up, in my turn, and to adopt it as the conclusion of our debates.

"We are liquidating a great enterprise with which many of us have been intimately associated and which we cannot see come to an end without a certain feeling of melancholy. This feeling, natural and legitimate as it may be, is not, however, our dominating feeling at this moment. We are dominated, on the contrary, by a hope, a constructive determination, which, while not oblivious of the past, is essentially directed towards the future.

"The work goes on with the same object, with the same ideal and under the influence of the same necessities; it is to that work that we must bring the contribution which it demands of us.

"The Charter of 1945 succeeds the Covenant of 1919. In order that it should be possible to pass from one to the other, the ground had to be cleared. It was that thankless task which fell to our lot. We have accomplished it conscientiously."

Another noteworthy passage appears in the speech by Mr. Noel Baker, the representative of the United Kingdom, after the adoption of the final resolution on the dissolution of the League of Nations (*ibid.*, page 65):

"..... Some of us have spoken as though our resolution were the end of some great enterprise in which for a season we have been privileged to take part. An end! An end of what? Is it more an end than what is happening in many countries at the present time? By our resolution, one written constitution will be no more; one set of institutions will cease to be; but already a new constitution, new institutions in the same society for the same end have taken their place. A new Assembly has already held a meeting...."

Desiring to promote, so far as lies in its power, the continuation, development and success of international co-operation in the new form adopted by the United Nations;

Considering that, since the new organization has now commenced to exercise its functions, the League of Nations may be dissolved; .... [1]"

The dissolution of the League was effected by this General Resolution and by a number of resolutions on specific subjects. Here are the titles: (1) the Dissolution of the Permanent Court of International Justice; (2) the Assumption by the United Nations of the Functions and Powers previously exercised by the League of Nations by virtue of international agreements; (3) the Assumption by the United Nations of Activities hitherto performed by the League of Nations; (4) Mandates; (5) International Bureaux and other International Organs placed under the direction of the League of Nations or brought into relation with it; (6) International Institute of Intellectual Co-operation.

Let us examine specially the Resolution on Mandates.

In submitting this Resolution to the Plenary Assembly, together with those concerning the bureaux placed under the direction of the League of Nations and the International Institute of Intellectual Co-operation, the rapporteur, Professor Bailey, stated:

"The Assembly comes now to three major activities of the League, which as activities of the League will, of course, from now on be brought to their termination. That does not mean, however, that the activities themselves as international activities will come to an end. It means rather that they will be continued in some other form.

. . . . . .

Although the immediate process on which the Assembly is engaged is a process of technical dissolution, it is only part of an essentially constructive and continuing process in the work of international organization [2]."

The Resolution on Mandates was unanimously adopted on 18 April, 1946, with the sole abstention of the Egyptian delegate. Let us recall the terms of the last two paragraphs of this Resolution [3]:

"3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the

[1] League of Nations, *Official Journal*, Records of the 20th (Conclusion) and Twenty-first Ordinary Sessions of the Assembly, page 281.

[2] League of Nations, *Official Journal*, Records of the 20th (Conclusion) and 21st Ordinary Sessions of the Assembly, page 58 (Folder 1).

[3] League of Nations, *Official Journal*, Special Supplement No. 194, Records of the 20th (Conclusion) and 21st Ordinary Sessions of the Assembly, Annex 24 (*c*) (Folder 1).

peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers."

This text is, I believe, of considerable importance. Whatever its juridical effect may be, this Resolution provides an indication of the desires of the League of Nations at the time it was terminating its existence as to *the path to be followed*. The Assembly recognizes that the dissolution of the League of Nations necessarily puts an end to *its* functions in regard to the territories under mandate. All the bodies that had exercised supervisory functions, on behalf of the League, over the administration of these territories will, in fact, have disappeared with the closure of the 21st and last Session of the Assembly.

But apart from this question of the responsibilities of the League itself, the Resolution does not resolve the problem of the survival of the mandates as international institutions. In the same sentence in which it refers to the consequences of the dissolution of the League of Nations, the Assembly limits itself to noting the fact that principles corresponding to those of Article 22 of the Covenant have been embodied in the United Nations Charter. Then the Assembly, wishing to be satisfied, as far as possible, as to the immediate future of the mandated territories, takes note of the intentions expressed to it by the mandatory Powers to continue to administer these territories for the well-being and development of the peoples concerned (these are the actual terms of Article 22 of the Covenant) and in accordance with the obligations contained in the respective mandates. This will continue, according to the last passage of the Resolution, "until other arrangements have been agreed between the United Nations and the respective mandatory Powers".

It was important, I believe, to state clearly the conditions under which the League of Nations was dissolved. This outline doubtless casts an interesting light on the problem before us, but it also raises a number of questions of interpretation, and questions regarding the application of legal principles to a difficult and hitherto largely unexplored field.

Did the dissolution of the League of Nations terminate the international status established for South-West Africa by the Treaty of Versailles and the Mandate ?

Let us examine firstly the arguments which may be invoked in favour of an affirmative reply to this question. It may be argued that the mandatory Powers intended to undertake an obligation towards the League of Nations, juridical person in international law, and it was therefore the latter which was the "obligee" of the obligations assumed by the Union of South Africa. The populations of the Territory were the beneficiaries of the obligations assumed ; they were not themselves the "obligees", since they were not parties to the instruments which created the obligations. But, the argument continues, it will be said that the disappearance of an obligee, unless another juridical person succeeds him, entails the disappearance of the obligation. Without doubt the United Nations took the place of the League of Nations in the sense that it now exercises in fact the general functions which were incumbent on the defunct institution. But, legally, the United Nations is not the general "successor" of the League of Nations, because it did not wish to assume this character and to undertake *de plano* all the functions, all

the rights and all the obligations of the League of Nations [1]. The United Nations made clear its political intentions with regard to the future status of the mandated territories, but did not formally declare, either in the Charter or in any of the decisions of the General Assembly, that it assumed the functions of the League of Nations with regard to the supervision of the Mandates System. Nor has there been any agreement between the United Nations and the Union of South Africa in this matter.

Secondly, it may be said that the supervision and the control of the League of Nations over the engagements undertaken by the mandatory Powers has disappeared, and that the functions of the League of Nations have not been formally undertaken by the United Nations. Further, it may be said that this supervision and this control form such an essential part of the System that their disappearance must necessarily entail the disappearance of the System itself and the obligations resulting therefrom.

Finally, whatever may be the situation concerning these two ordinary causes of extinction of international obligations, it may be argued that the disappearance of the League of Nations constitutes a new factor and such a considerable change that the doctrine of *rebus sic stantibus* should apply.

Let us consider now the view according to which the Mandate remains in force despite the disappearance of the League of Nations. According to this view, it may be argued that the engagements had been undertaken towards the League of Nations because at that time it was the personification of the international community. The League of Nations has disappeared, but the international community remains and it has created for itself a new organ which is the United Nations. The United Nations is not, of course, legally the successor of the League of Nations and it is not in its capacity as successor of the League, in the proper sense of the word, that it exercises certain functions of the defunct organization. However, the United Nations, like the League of Nations, is the representative organ of the international community, and in this capacity has the task to undertake the functions exercised by the League of Nations, and to maintain the place which the League held vis-à-vis the States which had subscribed to engagements before organs of the League. It therefore falls to the United Nations to decide whether to undertake certain functions which the League of Nations exercised, and whether to exercise the rights which belonged to the League of Nations by virtue of engagements undertaken by the States toward it.

It may also be maintained that the Mandates were engagements undertaken towards the populations of the territories, the League of Nations having only supervisory functions which could or could not be taken over by another international organization representing the international community.

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[1] See resolution 24 (I) of 12 February, 1946, an extract of which follows:

"*Functions and Powers under Treaties, International Conventions, Agreements and Other Instruments having a Political Character.*

"The General Assembly will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character."

It may also be added that the obligations undertaken by the mandatory Powers in respect of the territories under mandate may continue to be fulfilled even after the disappearance of the League of Nations, the disappearance having only entailed the disappearance of the supervision and the control exercised by the latter.

Finally, Article 80 of the Charter, with which I shall deal later, may be invoked in support of the view of the survival of the Mandate. The statements made by the mandatory Powers during the course of the last session of the League of Nations [1], containing the assurance that, until the trusteeship agreements entered into force, the obligations under the Mandate would retain their full validity, may also be recalled. The last Assembly of the League of Nations took note of these declarations in its Resolution concerning the Mandates [2]. Finally, we have the resolution of the General Assembly of the United Nations on the future government of Palestine [3], by which the Assembly during its second session recommended "to the United Kingdom as the mandatory Power for Palestine, and to all other Members of the United Nations, the adoption and implementation" of a plan in which it was said "the Mandate for Palestine shall terminate as soon as possible, but in any

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[1] League of Nations, *Official Journal*, Special Supplement No. 194, Records of the Twentieth (Conclusion) and Twenty-first Ordinary Sessions of the Assembly, Text of the Debates at the Plenary Meetings and Minutes of the First and Second Commissions :

P. 28, Viscount Cecil of Chelwood (United Kingdom) : ".... Until the three African Territories have actually been placed under trusteeship and until fresh arrangements have been reached in regard to Palestine—whatever those arrangements may be—it is the intention of His Majesty's Government in the United Kingdom to continue to administer these Territories in accordance with the general principles of the existing Mandates."

P. 32, Mr. Leif Egeland (Union of South Africa) : ".... The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the Territory."

P. 43, Mr. Knowles (New Zealand) : ".... New Zealand does not consider that dissolution of the League of Nations and, as a consequence, of the Permanent Mandates Commission will have the effect of diminishing her obligations to the inhabitants of Western Samoa or of increasing her rights in the Territory. Until the conclusion of our Trusteeship Agreement for Western Samoa, therefore, the Territory will continue to be administered by New Zealand, in accordance with the terms of the Mandate, for the promotion of the well-being and advancement of the inhabitants."

P. 47, Professor Bailey (Australia) : ".... After the dissolution of the League of Nations and the consequent liquidation of the Permanent Mandates Commission, it will be impossible to continue the Mandates System in its entirety. Notwithstanding this, the Government of Australia does not regard the dissolution of the League as lessening the obligations imposed upon it for the protection and advancement of the inhabitants of the mandated territories, which it regards as having still full force and effect."

[2] League of Nations, *Official Journal*, Special Supplement No. 194, Records of the Twentieth (Conclusion) and Twenty-first Ordinary Sessions of the Assembly, Annex 24 C (Folder 1).

[3] Official Records of the Second Session of the General Assembly, Resolution 181 (II), page 132.

case not later than 1 August, 1948". This clearly implies that the Assembly considered the Mandate to be still in force despite the termination of the existence of the League of Nations.

To conclude this part of my statement, I should like to emphasize that I do not think it possible to reply to the questions put by the General Assembly without having previously examined the provisions of the Charter of the United Nations. I have already had occasion to observe that the Charter entered into force prior to the dissolution of the League of Nations. The succeeding part of my statement will therefore be devoted to a brief examination of the pertinent provisions of the Charter.

IV. *The provisions of the United Nations Charter*

The General Assembly's second particular question is: "Are the provisions of Chapter XII of the Charter applicable to the Territory of South-West Africa, and, in the affirmative, in what manner?"

The San Francisco Conference may justly be considered as one of the important congresses which from time to time, following great upheavals having universal repercussions, have had to frame an international structure for the future. The delegates of the great majority of the States comprising the international community, including amongst them the representatives of the very great majority of Members of the League of Nations, had the desire to deal there with all the problems of international interest of our times which, directly or indirectly, may affect the peace of the world. They were therefore fully justified in devoting a considerable part of their efforts to the problem of the future of the populations of non-self-governing territories.

As stated by one of the representatives of the United States [1], the Charter of the United Nations concerns these populations in more than

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[1] U.N. Conference on International Organization, 1945.—Verbatim minutes of Committee on Trusteeship System (III 4), May 22-June 1.—U.N. Archives, Vol. 69, Eleventh Meeting, Running Number 23.

Commander STASSEN: ".... I just want to make a brief statement to assure the distinguished delegate from the Philippines that this document in its completion, this Charter that we are drafting, at San Francisco, I am certain will prove to be *the greatest document there has ever been in the history of the world for the* progressive advancement of people toward independence, self-government, better standards of living, and full recognition of sovereignty in the world.... There are these four important parts. Assuming that we are able to complete our work at San Francisco and that we have this trusteeship document, as we are now beginning to envisage it, included in the Charter, there will be four important sections of the Charter with which the dependent peoples throughout the world will be very much concerned. They are the general purposes of the entire Organization, Chapter I; Chapter II, the general principles of the entire Organization; third, the general policy statement that we are here concerned with; and fourth, the direct, basic objectives of the Trusteeship System, and this is the manner in which they are applied. As the entire organization in all of its aspects and the responsibility of those having a responsibility in the administration of peoples, the peoples themselves, proceed to develop, they reach the stage where they do come under the general purpose, Purpose 2, which states that every member is obliged to follow these principles when they sign this document, to develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples. That is the very important statement that applies. Every member who signs this document must believe it. Then, on the basis of the development that

one respect. The equality of "rights of men and women and of nations large and small" is one of the principles provided in the Preamble. Self-determination is one of the principles of Article 1. We have then the "declaration" contained in Chapter XI and, lastly, Chapters XII and XIII establish an international Trusteeship System.

A. *Article 80*

With regard to the application of Chapter XII, let us first consider the provisions of Article 80. They read as follows:

> "1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the Trusteeship System, and until such agreements have been concluded, *nothing in this Chapter* shall be construed in or of itself to alter *in any manner* the rights whatsoever *of any States or any peoples or the terms of existing international instruments* to which Members of the United Nations may respectively be parties.
>
> 2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation *and conclusion* of agreements for placing mandated and other territories under the Trusteeship System as provided for in Article 77."

In the working paper which was accepted as basis for the discussions of Committee II/4, the corresponding text said: "Except as may be agreed upon in individual trusteeship arrangements placing each territory under the Trusteeship System, nothing in this Chapter should be construed in and of itself to alter in any manner the rights of any State or any peoples in any territory [1]."

At the ninth meeting of Committee II/4, this text was amended by the delegate of the United States with the agreement of the Committee and continued to serve as basis for the discussion in the following form: "Except as may be agreed upon in individual trusteeship arrangements made under paragraphs 4 and 6 placing each territory under the Trusteeship System, nothing in the Chapter should be construed in and of itself to alter in any manner the rights of any State or any peoples in any territory, *or the terms of any mandate* [2]."

The Egyptian delegate, in an amendment, expressed his preference for a text that would have stipulated: "Nothing in this Chapter should be construed in and of itself to alter in any manner the rights of the people of any territory or the terms of any mandate [2]." There was thus no reference to the rights of States in the Egyptian text.

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takes place, first under the trusteeship, or first under a colony, the progressive development under those objectives or under the policies, they reach the stage where on the matter of the self-determination based on their development they can apply for membership in the United Nations. When they reach the stage of membership in the United Nations, the first principle comes into play, and that is that it is based on the principle of sovereign equality of all the Members, and by the signing of this document every signatory will agree that every Member is entitled to sovereign equality."

[1] Documents of the United Nations Conference on International Organization, San Francisco, 1945, Vol. 10, Commission II, page 678.

[2] *Ibid.*, page 477.

At the Committee's tenth meeting, the amendment by the Egyptian delegation was rejected by 25 votes to 5 [1]. A similar proposal by the representative of Syria was also rejected, after it had been pointed out that this amendment might weaken the conservatory clause by failing to preserve some of the implied rights [1].

The text of the United States representative was then adopted by 29 votes to 5 [1]. At this same meeting, the representative of the United States made a statement on the Article, of which the Committee took formal note. The statement is included in the summary record of the meeting, as follows [2]:

> "The delegate for the United States stated that paragraph B 5 was intended as a conservatory or safeguarding clause. He was willing and desirous that the minutes of this Committee show that it is intended to mean that all rights, whatever they may be, remain exactly the same as they exist—that they are neither increased nor diminished by the adoption of this Charter. Any change is left as a matter for subsequent agreements. The clause should neither add nor detract, but safeguard all existing rights, whatever they may be."

At its thirteenth meeting, the Committee had previously rejected a text proposed by the delegate of Iraq, which read as follows [3]:

> "(*a*) In the event of any territory being placed under the Trusteeship System, nothing in this Chapter should be construed in and of itself to alter in any manner the rights of any State in any territory or to diminish the rights of the people of that territory.
>
> (*b*) Notwithstanding anything contained in this Chapter, in the event of the transfer to the Trusteeship System of any territory now administered on the basis of paragraph 4 of Article 22 of the Covenant of the League of Nations, such trusteeship shall not apply to such a territory save within the limits and for the purposes laid down in the aforementioned paragraph of the Covenant."

At this meeting, the Committee agreed to replace the text adopted at its tenth meeting by a new text submitted by the representative of the United States. This text contains, for the first time, a second sentence which later became paragraph 2 of Article 80 [3]. The summary report of this meeting, which is the official record transmitted to the Court, contains no explanation of this new sentence. However, the verbatim minutes of this meeting show that Commander Stassen, in introducing this amendment, stated the following [4]:

> "Then we add a new sentence: 'This paragraph should not be interpreted as giving grounds for delay or postponement of the negotiations and conclusion of the agreements for placing mandated

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[1] *Ibid.*, page 487.
[2] *Ibid.*, page 486.
[3] *Ibid.*, pages 515-516.
[4] Verbatim minutes of thirteenth meeting, 8 June, 1945. Running Numbers 24, 25. U.N. Archives, Vol. 70.

and other territories, as provided for in paragraph 3, under the Trusteeship System.'

Now, there are a number of factors that come into the amendments that we are proposing. Let me state, in the first instance, that this does not change the conservatory nature of the clause as we originally proposed it, but it does clarify and take away some of the possible misinterpretations that have been raised.

It is clear that paragraph 5 is intended to preserve the rights during that in-between period from the time this Charter is adopted and the time that the new agreements are negotiated and completed with the new Organization. And it is not intended that paragraph 5 should be any basis of freezing eternally the situation affecting any territory.

On the other hand, neither does paragraph 5 take away at all from the other paragraphs of this Chapter as to the method by which the negotiations of the subsequent agreements should be carried out. We make it very clear in the new sentence that no one can point to paragraph 5 in the future and say: 'I refuse to negotiate; I simply stand on paragraph 5, and I insist we stay there forever.' "

This text also contained a new phrase in the first sentence—"and until such agreements have been concluded", and the phrase "or the terms of any mandate" was enlarged to read "or the terms of existing international instruments". It was this text adopted at the 13th meeting which, with certain minor drafting changes, became the present Article 80 of the Charter. The report [1] of Committee II/4 points out that some delegates had proposed that changes be made in this conservatory paragraph, so that it would apply only to the rights of the peoples concerned and not to the rights of mandatory Powers and other States and peoples, but that the opinion held by the majority was that all rights without distinction should be treated equally.

The report recalls the interpretation given to the clause by the United States delegate and indicates that as regards the suggestion that the clause should include a specific reference to paragraph 4 of Article 22 of the Covenant of the League of Nations, the Committee had decided that the phrase "existing international instruments" was preferable and had accepted the interpretation that among the "rights whatsoever of any States or any peoples", there were included all the rights set forth in paragraph 4 of Article 22 of the Covenant of the League of Nations.

B. *Voluntary or obligatory transformation of the mandates*

There are several articles in Chapter XII of the Charter of which one must take note in considering the question of whether the placing of mandated territories under the Trusteeship System is compulsory or optional.

Article 75 of the Charter provides that the United Nations shall establish under its authority an international Trusteeship System for the administration and supervision of such territories *as may be*

[1] Documents of United Nations Conference on International Organization, San Francisco, 1945, Vol. 10, Commission II, Document 1115, p. 611.

placed thereunder by subsequent individual agreements. It is more specifically provided in Article 77 that the Trusteeship System shall apply to such territories in certain specified categories *as may be placed thereunder by means of trusteeship agreements.* These specified categories are, first, territories now held under mandate; second, territories which may be detached from enemy States as a result of the Second World War, and third, territories *voluntarily* placed under the System by States responsible for their administration. A second paragraph of Article 77 states that it will be a matter *for subsequent agreement* as to which territories *in the foregoing categories* will be brought under the Trusteeship System and upon what terms.

Article 78 specifically excludes from the application of the Trusteeship System territories which have become Members of the United Nations.

In Article 79 it is provided that the terms of the trusteeship agreements shall be agreed upon by the States directly concerned, including the mandatory Power in the case of territories held under mandate by a Member of the United Nations. These terms must be approved in the case of strategic areas by the Security Council and, in case of other areas, by the General Assembly.

And finally, as I have just noted, there is the conservatory provision in Article 80 of the Charter, and the statement in paragraph 2 that the first paragraph in this Article shall not be interpreted as giving ground for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the Trusteeship System as provided for in Article 77.

There has been a sharp division of opinion in the General Assembly concerning the legal issue whether or not these provisions of the Charter make it compulsory to place a mandated territory under trusteeship. While the Assembly has repeatedly recommended that the Territory of South-West Africa be placed under international trusteeship, no two-thirds majority of its Members has been found to confirm the view held by a great many members of the Fourth Committee that "it is the *clear intention* of Chapter XII of the Charter that all territories previously held under mandate, until granted self-government or independence, shall be brought under the international Trusteeship System", and that therefore the placing of such territories under trusteeship was obligatory [1].

Those believing that the placing of a mandated territory under trusteeship is compulsory, have placed particular emphasis on the fact that the word "voluntary" appears only in relation to the third category of territories listed under Article 77. They argued that the use of the word "voluntary" in category (*c*) excludes the idea that the placing of territories now held under mandate, as specified in category (*a*), is also voluntary. They have further expressed the view that with regard to mandated territories, only two courses are legally permissible: either they be granted full independence or they be placed under the Trusteeship System. They find confirmation for their position in Article 80, paragraph 2, and some interpret this

[1] See draft resolution recommended by the Fourth Committee during the second session of the General Assembly. Report of the Fourth Committee, A/422, page 1543 (Folder 21).

provision to mean that the Union of South Africa, while free to agree upon the particular terms of a trusteeship agreement, is not legally free to refuse to negotiate and to conclude such an agreement.

Those believing that the Trusteeship System is voluntary point out that Article 75 refers to such territories as may be placed under the Trusteeship System by subsequent individual agreements, and that Article 77 likewise states that the Trusteeship System shall apply to such territories as may be placed thereunder by means of trusteeship agreements. Furthermore, they argue that paragraph 2 of Article 77, which provides that it will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the Trusteeship System, applies equally to each of the three specified categories in the first paragraph of Article 77. Finally, they rely on Article 80 as evidence that nothing in Chapter XII of the Charter alters in any manner the rights of a State holding a territory under mandate.

As the Court will have to pronounce itself on this question, it may be of interest if I refer to the genesis of Article 77 at the San Francisco Conference.

The Court will recall that there were no provisions concerning specifically non-self-governing territories in the Dumbarton Oaks Proposals, but several governments presented proposals on this subject to the San Francisco Conference. The proposals submitted by the Governments of France, the United States, the United Kingdom, China and the Union of Soviet Socialist Republics were similar in suggesting that the Organization should establish a system of international trusteeship for the administration and supervision of such territories as may be placed thereunder by subsequent agreement. Among these territories were included the "territories now under mandate".

The proposal of the Government of Australia, on the other hand, suggested that the territories to which the Trusteeship System should apply should be declared either by the voluntary action of the Member administering the territory or by the General Assembly, after consideration of the recommendations of a conference or conferences, especially convened by the United Nations, of Members responsible for the administration of dependent territories.

During the course of the general discussion in Committee II/4, the delegate from Australia expressed the view that the principal issue before the Committee was whether the application of the Trusteeship System to territories other than League mandates and ex-enemy dependencies should be left to the voluntary action of the Powers responsible for their administration. In the Australian view, he said, merely voluntary procedure was inadequate [1].

The United Kingdom delegate, on the other hand, objected to the compulsory application of the Trusteeship System to existing colonies [2].

The delegate of the United States pointed out that his Government did not seek to change the relations existing between a mandatory and

[1] Summary Report of 2nd meeting of Committee II/4, 10 May 1945. U.N.C.I.O. document 241, II/4/7. U.N.I.O. Vol. 10, pp. 428, 429.

[2] Summary of 4th meeting of Committee II/4, 14 May, 1945. U.N.C.I.O. document 310, II/4/11. U.N.I.O. Vol. 10, p. 440.

a mandated territory without the former's consent, and supported the principle of voluntary submission of territories to the System [1].

The delegate from the Union of South Africa, at the fourth meeting of Committee II/4, stated that the terms of existing mandates could not be altered without the consent of the mandatory Power [2].

In the working paper [3] adopted by the Committee as a basis of discussion, the paragraph which served as the original for what was to become Article 77 of the Charter, read as follows: "The Trusteeship System should apply only to such territories in the following categories as may be placed thereunder by means of trusteeship arrangements: (*a*) territories now held under mandate; (*b*) territories which may be detached from enemy States as a result of war; and (*c*) territories voluntarily placed under the system by States responsible for their administration. It would be a matter for subsequent agreement as to which territories would be brought under a Trusteeship System and upon what terms. The Trusteeship System should not apply to territories which have become Members of the United Nations."

When this paragraph was considered by the Committee at its 8th meeting on 22 May, 1945, the delegate of Egypt proposed that it be amended to read: "The Trusteeship System should apply to (*a*) all territories now held under mandate; (*b*) territories which may be detached from enemy States as a result of this war; and (*c*) territories voluntarily placed under the System by States responsible for their administration. The Trusteeship System should not apply to territories which have become Members of the United Nations." The essentials of this amendment were thus, first, the deletion of a reference to subsequent agreement and, second, the addition of the word "all" before the phrase "territories now held under mandate".

In support of this amendment, it was argued that no private title to a mandated territory could lie with a mandatory Power and that it would be for the League itself to pass title to such territories. It was further argued that it would be impossible for the League System of Mandates and the new Trusteeship System to exist side by side. It was also suggested as a reason for deleting the reference to agreement that the ex-enemy States could not be allowed to be a party to an agreement for placing a territory under the Trusteeship System. Finally, it was stated that, with regard to the third category of territories, no agreement was called for in the event of a voluntary transfer. Consequently, all reference to individual agreements was considered superfluous [4].

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[1] *Ibid.*

[2] *Ibid.*, p. 439.

[3] Documents of the United Nations Conference on International Organization, San Francisco, 1945. Document 323, II/4/12. U.N.I.O. Vol. 10, p. 678.

[4] Summary Report of 8th meeting of Committee II/4, 22 May, 1945. Document 512, II/4/21. U.N.I.O. Vol. 10, p. 469.

In the verbatim record of the meeting, a statement by the delegate of Iraq is in part as follows: "I can't see how, after this United Nations Organization is formed, we can think of having two systems side by side, the Mandate System and the Trusteeship System. What I have in mind is that after this Organization is formed, automatically mandates should be transferred to trusteeship, because I can't see how the world can support two systems side by side. And, of course, we say all the members in this room are going to be Members of the United Nations.

In opposition to the amendment, it was stated by some that the proposed changes would have the effect of creating a compulsory system and thus of legislating beyond the competence of the Conference. It was argued by others that it would prejudge decisions which ought to be left to subsequent meetings of the United Nations. It was also stated that the proposed Trusteeship System would differ appreciably from the League System of Mandates, and the simple form of succession suggested by the amendment was therefore not practicable. No Power now holding a mandate, it was stated, should be expected to accept responsibility under a new system, if it had no share in deciding upon the revised terms of its trust [1].

Following this discussion, the Egyptian amendment was put to a vote in two parts. The proposed deletion of the reference to agreements was rejected by 22 votes to 5, and the proposed addition of

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That does not mean we are forcing them. I don't see any element of force. It is voluntary. Of course, it is understood to be voluntary that all mandates are going to be transferred to trusteeship." Verbatim minutes of 8th meeting of Committee II/4, Running Numbers 31, 32. U.N. Archives, Vol. 69.

[1] Summary Report of 8th Meeting of Committee II/4, 22 May, 1945. Document 512, II/4/21. U.N.I.O. Vol. 10, p. 469.

The verbatim record of the statement of the delegate of the United States is, in part, as follows: "The effect of the amendment would be that we would legislate, compulsorily, that all territories now held under mandate must go under the Trusteeship System, and that all territories which are attached to any enemy States during this war must go under the Trusteeship System. And I submit to you that that is far beyond the province of this Conference, or the desires of the delegates that are represented here, and that we must not accept an amendment of this kind; we must proceed on the general understood basis of the voluntary Trusteeship System." Verbatim minutes of 8th meeting of Committee II/4, Running Number 18. U.N. Archives, Vol. 69.

The verbatim record of the statement of the delegate of the Union of South Africa is, in part, as follows: "Mr. Chairman, I wish to support the point of view put forward by Commander Stassen on behalf of the United States. We feel that we should not be required to hand over existing mandates without our agreement, and without our being consulted with regard to the terms of that agreement. That precisely puts the whole position.

"To delete the words, or the amendment rather, put forward by the delegate from Egypt, would, I submit Sir, create an absurd position. These mandates are ordinary contracts which would have to be entered into by the Trusteeship Council on the one hand, and by the mandatory Power on the other. There must, in other words, be an agreement on the terms and not merely a bare acceptance of the mandate without any terms being agreed upon beforehand." Verbatim minutes of 8th meeting of Committee II/4, Running Numbers 20, 21. U.N. Archives, Vol. 69.

The verbatim record of the statement by the delegate of the United Kingdom is, in part, as follows: "There is one other point even in respect of existing mandates contained in this clause of the chapter. Clearly there must be new individual agreements at some stage which would take the place of the old mandate agreements. Now those agreements may or may not continue the trusteeship. That will depend entirely on the appropriate circumstances of the case, and will be a matter for discussion between the mandatory Power and whatever is the body which is set up to represent the interests of the United Nations. We can't, as I see it, at this stage, prejudge that position. It is no good us going beyond our powers, and therefore I suggest to the Egyptian delegate, and to all the members of the Committee, though I fully realize the reason for which he has put forward his amendment, as a matter of fact it is too rigid and too far-reaching, and that it ought not to be accepted." Verbatim minutes of 8th meeting of Committee II/4, Running Number 29. U.N. Archives, Vol. 69.

the "all" before "territories now held under mandate" was rejected by 20 votes to 6 [1].

The report of the Rapporteur of Committee II/4 [2], which was adopted at the third meeting of Commission II on 20 June, 1945 [3], stated that it recognized this paragraph—future Article 77—as the primary paragraph of Chapter XII.

Field Marshal Smuts, in commenting on the report of Committee II/4, stated that Section B dealt to some extent with the old field already covered in the Covenant of the League of Nations. The provision, he said, is this: "That with regard to certain types of dependent territories, old mandate territories, territories newly conquered and taken from existing Powers, and also colonies where the governing Power is prepared voluntarily to place them under trusteeship—all these various types of territories will fall under the Trusteeship System, which will impose stricter conditions than those prescribed in Section A. You will find all this set out in the recommendations and in the report [4]."

The delegate of Egypt recalled the objection of his delegation to making trusteeship subject to an agreement with the countries now administering territories, and especially mandated territories, but expressed confidence that these provisions would grow into something greater and better [5].

Mr. Fraser, of New Zealand, who had served as Chairman of Committee II/4, concluded the discussion of the report in Commission II with the following statement: ".... whatever difficulties there are, the rule that we will be guided by—I know I speak for my own country, but I feel I speak also for every country in a similar position—is that we have accepted a mandate as a sacred trust, not as part of our sovereign territory. The mandate does not belong to my country or any other country. It is held in trust for the world. The work immediately ahead is how these mandates that were previously supervised by the Mandates Commission of the League of Nations can now be supervised by the Trusteeship Council with every mandatory authority pledging itself in the first instance as the test of sincerity demands, whatever may happen to the territory afterwards, to acknowledge the authority and the supervision of this Trusteeship Council that has been helped towards its formation this evening [6]."

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[1] Summary Report of 8th meeting of Committee II/4, 22 May, 1945. Document 512, II/4/21. U.N.I.O. Vol. 10, p. 469.

The delegate of Egypt proposed several other amendments, the purpose of which was to insist on the compulsory character of the trusteeship agreement. These amendments were all rejected by the Committee. See, for example, the proposal to delete reference to subsequent individual agreements from Article 75 of the Charter. Summary Report of 7th meeting of Committee II/4, 18 May, 1945. Document 448, II/4/18. U.N.I.O. Vol. 10, p. 460.

[2] Report of the Rapporteur of Committee II/4, Document 1115, II/4/44 (1) (*a*) (20 June 1945). U.N.I.O. Vol. 10, pp. 607-622.

[3] Verbatim minutes of 3rd meeting of Commission II, 20 June, 1945. Document 1144, II/16. Vol. 8, p. 154.

[4] *Ibid.*, p. 127.

[5] *Ibid.*, pp. 148, 149.

[6] *Ibid.*, p. 154.

[*Public sitting of May 17th, 1950, afternoon*]

C. *Statement by the delegation of South Africa*

Reference was made in the General Assembly to a statement made at the San Francisco Conference by the delegate of the Union of South Africa, referring to the intention of the Government of the Union with respect to the future of the mandated Territory of South-West Africa. The records in the United Nations archives indicate in this respect that on 4 May, 1945, the South-African delegation submitted a paper entitled "Proposals submitted by the delegation of the Union of South Africa with regard to the mandated Territory of South-West Africa." After setting forth the Union's views concerning the special circumstances with regard to the Territory of South-West Africa, the document had the following conclusion:

> "The delegation of the Union of South Africa therefore claims that the Mandate should be terminated and that the Territory should be incorporated as part of the Union of South Africa."

A letter from the Secretary-General of the Conference, dated 5 May, 1945, acknowledged receipt of this draft and stated that it had been entered as a conference document and would be distributed to the various delegations. It was in fact mimeographed as document 2, G/26(*b*). The document does not appear on the official list of the documents of the Conference. Photostatic copies of it are included in bound volumes No. 3 and No. 34 of the Conference records, which are in the archives of the United Nations. The document is preceded, in each instance, by a typewritten insert which states as follows: "The following paper, Doc. 2, G/26(*b*), was withdrawn before it was given full distribution." At the third meeting of Committee II/4, on 11 May, 1945, the delegate of the Union of South Africa read the full text of the statement on South-West Africa "in order to illustrate the problems in respect of one of the mandated territories". The Chairman ruled that the references to specific territories were only in order when used for illustrative purposes. The task of the Committee, he said, was to discuss principles and machinery, not individual territorial issues [1].

D. *Chapter XI*

The subject of the applicability of Chapter XI has not been specifically referred to the Court, and, in fact, an express question on this point was rejected by the Fourth Committee of the General Assembly. However, the Court may find it necessary to consider Chapter XI in connexion with the general question concerning the international status of the Territory and the obligations arising therefrom. It will be noted that this point has been discussed in the written observations which the Government of the United States of America has submitted to the Court.

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[1] Summary Report of 3rd meeting of Committee II/4, 11 May, 1945. U.N.C.I.O. document 260, II/4/8. U.N.I.O. Vol. 10, p. 434. The text of the statement as read in the Committee appears in the verbatim minutes of the 3rd meeting of Committee II/4, Running Numbers 31-33. U.N. Archives, Vol. 68.

By Chapter XI, which is entitled "Declaration regarding non-self-governing territories", all the Members of the United Nations have assumed responsibility for the administration of territories whose peoples have not yet obtained a full measure of self-government and recognize the principle that the interests of the inhabitants of these territories are paramount. They accept as a sacred trust the obligation to promote to the utmost the well-being of the inhabitants of these territories. To that end, they accept certain specific obligations, including the obligation to develop self-government and to assist the inhabitants in the progressive development of their free political institutions.

Among these obligations the provisions of Article 73 should be specially mentioned, by which Members of the United Nations, having responsibility for the administration of non-self-governing territories, accepted the obligation to transmit regularly to the Secretary-General, for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible, other than those territories to which Chapters XII and XIII apply.

As stated by the President of Commission II at the San Francisco Conference, Field Marshal Smuts, this Chapter of the Charter "applies the trusteeship principle to all dependent territories, whether they are mandates, whether they are territories taken from defeated countries, or whether they are existing colonies of Powers. The whole field of dependent peoples living in dependent territories is now covered [1]."

I shall limit myself to two observations on these provisions of Chapter XI of the Charter. First, that the scope of the information which is to be transmitted by virtue of sub-paragraph (*e*) of Article 73, is more limited than the information which is transmitted to the General Assembly on trust territories upon the basis of the questionnaire formulated by the Trusteeship Council in accordance with Article 88 of the Charter. This questionnaire bears in particular not only on economic, social and educational matters, but also on political matters. Likewise, the information transmitted under Article 73 (*e*) is of a more limited scope than the information which was transmitted by the mandatory Powers to the Council of the League of Nations.

My second observation is that no exact definition has been attempted, until now, of the territories to which Chapter XI applies. It may be recalled that, at the first part of its first session, the General Assembly drew the attention of the Members to the fact that the obligations accepted under Chapter XI of the Charter by all Members of the United Nations were in no way contingent upon the conclusion of trusteeship agreements, or upon the bringing into being of a Trusteeship Council, and were therefore already in full force [2].

At the second part of its first session, the General Assembly noted the information it had received from several governments and the

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[1] Verbatim minutes of 3rd meeting of Commission II, 20 May, 1945. Document 1144, II/16. U.N.I.O. Vol. 8, p. 127.

[2] Resolutions adopted by the General Assembly during the first part of the first session—9 (I), page 13 (Folder 8).

intention of certain other governments to transmit information in the future and instructed the Secretary-General to summarize, analyze and classify this information, and include it in his annual report to the General Assembly [1]. The Government of the Union of South Africa, which at the time had seized the Assembly with its proposal of closer association of South-West Africa with the Union, was not listed among the Members of the United Nations who were transmitting information under Article 73 (*e*).

At its fourth session, the General Assembly considered in a resolution that it was within its responsibility to express its opinion on the principles which have guided or which may in future guide the Members concerned, in enumerating the territories for which the obligation exists to transmit information under Article 73 (*e*) of the Charter. The special committee which is to consider, before the fifth session of the Assembly, the information transmitted under Article 73 (*e*) of the Charter, was invited to examine the factors which should be taken into account in deciding whether any territory is or is not a territory whose peoples have not attained a full measure of self-government [2].

V. *Modification of the international status of South-West Africa*

We come, thus, to the last question submitted by the General Assembly, a question the importance of which was particularly stressed by a number of representatives in view of its far-reaching implications: "Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does the competence rest to determine and modify the international status of the Territory?"

The approach of the Court to this question will depend, of course, on the opinion which it will have formed with respect to the present status of the Territory.

For my part, I should like to limit myself to bringing out some data with respect to the question of the modification of the Mandate under the League of Nations and then, in the final part of my statement, to endeavour to point to some of the possibilities which the Court may have to consider with regard to the modification of the present status of the Territory.

A. *Consideration with regard to the modification of a mandate under the League of Nations*

Whether or not the Court comes to the conclusion that the Mandate for South-West Africa has continued in force, a consideration of the methods by which a mandate could be terminated or modified under the League of Nations will, I am certain, be of interest.

The text of Article 22 of the Covenant does not provide a clear answer to the question of the termination of the mandated status for a territory under a "C" Mandate. The situation is more precise with respect to "A" Mandates, as paragraph 4 of Article 22 provides that "their exist-

[1] Resolutions adopted by the General Assembly during the second part of the first session—66 (I), page 124.

[2] Resolutions adopted by the General Assembly during the fourth session—334 (IV), page 43.

ence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a mandatory, until such time as they are able to stand alone". As to the "B" and "C" Mandates, paragraphs 5 and 6 of Article 22 do not contain similar indications. Paragraph 6, in particular, refers to the sparseness of the population of the territories, their small size, their remoteness from centres of civilization, their geographical contiguity to the territory of the mandatory. But then, paragraph 1 of Article 22, which governs all categories of mandated territories, refers to "peoples *not yet* able to stand by themselves under the strenuous conditions of the modern world". What was to occur when these peoples did reach the stage when they could govern themselves ? The short history of the League does not offer any examples. I will presently furnish some indications as to the views of the members of the Mandates Commission in this respect.

The modification of the legal status of a territory under mandate could have been brought about by *a change in the legal instruments* which governed it. Can the possibility of a change in Articles 118 and 119 of the Treaty of Versailles or in the decision of the Supreme Council of the Principal Allied and Associated Powers allocating the Mandate for South-West Africa be envisaged ? It may be held, on the one hand, that these provisions, having once been executed, became irrevocable, or, on the other hand, that the residuum of power under certain circumstances might have remained in the signatories of the Treaty of Versailles or in the Principal Allied and Associated Powers.

A change in the terms of Article 22 of the Covenant of the League could have been brought about by an amendment to the Covenant under Article 26. This Article provided that amendments would take effect when ratified by all Members of the League represented on the Council and by a majority of the Members of the League represented in the Assembly. It will be recalled, however, that no such amendment was to bind a Member of the League which signified its dissent therefrom, but in case of such dissent it would cease to be a Member of the League. The determination of the exact position of a mandatory Power which might have withheld its assent from a duly ratified amendment to Article 22 of the Covenant would not have been an easy one. But this is now of only academic interest.

Finally, there is the question of a change in the Mandate Charter itself. Article 7 of the Mandate for South-West Africa provided in its first paragraph that the consent of the Council of the League of Nations was required for any modification of the terms of the Mandate. A similar provision was contained in all other mandates. Whether the requirement of consent by the Council extended not only to a modification of the *terms* of the Mandate, but also to the re-allocation of the Mandate itself and to its termination was a question raised in discussion before organs of the League. The practice of the League, particularly in connexion with the termination of the Mandate for Iraq, appears to have answered it in the affirmative.

The normal method by which modification or termination of the Mandate could occur appears to have been with the consent of both *the Council and the mandatory Power*. This method was followed in 1921 and 1922 in the case of the change of boundary between Ruanda-Urundi under Belgian administration and Tanganyika under British

administration, and in 1931 and 1932 with regard to the frontier between Iraq and Syria. In the first of these cases, the Permanent Mandates Commission directed the attention of the Council, in the report on its second session [1], to the unfortunate consequences to the native population resulting from the boundary line between the two Territories. By Resolution of 4 September, 1922, the Council instructed its President to transmit for the information of the Belgian and British Governments the observations of the Mandates Commission with reference to this frontier. Following this Resolution, the British and Belgian Governments reached an agreement under which the area known as Kissaka was detached from the Territory originally allocated to Great Britain and attached to the Belgian mandated Territory. The Council, on 31 August, 1923, noted this agreement and gave its consent to the consequent modifications of Article 1 of the Belgian Mandate for Ruanda-Urundi and of Article 1 of the British Mandate for Tanganyika [2].

In the case of the frontier between Iraq and Syria, the mandatory Powers, being unable to agree, brought this question to the Council, and a rectification of the frontier was accomplished by a decision of the Council.

Another example of a change in the terms of a mandate is that of the modification of the Palestine Mandate to exclude from the "Territory known as Transjordan" the application of the provisions relating to the Jewish National Home. This modification was proposed by the British Government as the mandatory Power and became effective following approval by the Council on 16 September 1922 [3]. In each of these instances in which terms of the Mandate were modified, there was a manifestation of consent by both the mandatory Power and the Council of the League of Nations.

These instances, however, relate only to changes in a mandate which continued in existence and did not affect actual changes in the international status of the Territory. With regard to a complete change in international status, a very full discussion of the general conditions to be fulfilled before the mandate régime could be brought to an end occurred in 1930 and 1931 when the termination of the Mandate for Iraq was under discussion. The Council of the League of Nations, on 13 January, 1930, adopted a Resolution [4] expressing its desire to determine what general conditions must be fulfilled before the mandate régime could be brought to an end and requested the Mandates Commission to submit any suggestions that might assist the Council in coming to a conclusion.

From the discussions and decisions of the Commission [5], certain points of interest may be adduced : First, it was the view of the Commission

[1] League of Nations, Assembly documents, A. 39. 1922 VI, C. 555. M. 332. 1922. VI, pp. 5-6.

[2] League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), pp. 1273-1274.

[3] League of Nations, Minutes of twenty-first session of Council, *Official Journal*, (November 1922), p. 1188.

[4] League of Nations, Minutes of 58th session of Council, *Official Journal*, 11th Year, No. 2 (February 1930), p. 77.

[5] See Permanent Mandates Commission, Minutes of 18th session (18 June-1 July, 1930), pp. 11, 43, 158, 170-174, 200 ; Minutes of 19th session (4-19 November, 1930), pp. 153-156, 173-176, 205 ; Minutes of 20th session (9-27 June, 1931), pp. 12, 149-156, 177-187, 189, 195-210, 228-229.

that the Mandates were intended as temporary—to exist only until such time as the inhabitants were able to stand alone. It was recognized that the question of whether the régime was temporary had given rise to controversy, particularly in regard to the territories under "B" and "C" Mandates, but it was pointed out that even though the goal was so remote as to be only of theoretical interest, this consideration could not affect the accepted principle that the Mandates System implied only a temporary charge. The mandate must terminate when certain conditions have been fulfilled [1]. It was also stated that the Council, in formulating the general question as it did, had made a unanimous pronouncement as to the temporary character of the mandate [2]. Count de Penha Garcia, in his report, concluded: "The System was created to remedy the incapacity of the territories to govern themselves. *Ablata causa cessit effectus* [3]." This temporary character of the mandates was assumed as the first underlying principle for the Commission's report.

Second, it was the view *that the Council of the League of Nations was the competent authority to pronounce the termination of a mandate.* It was pointed out that co-operation of three separate parties, the Supreme Council of Principal Allied and Associated Powers, the League, and the mandatory Powers, had been necessary for the introduction of the Mandates System. However, it was the opinion of the members of the Commission that the role of the Supreme Council had come to an end following the establishment of the mandate [4].

There was a difference of opinion whether the Council of the League could terminate a mandate without the consent of the mandatory Power. It was stated by Count de Penha Garcia and Mr. Van Rees on the one hand that the termination could not take place without the consent of the mandatory Power [4]. Otherwise, it was argued, the termination would be equivalent to a unilateral decision incompatible with the decisions of the Principal Allied and Associated Powers which conferred the mandates and with the acceptance by the mandatories of the burdens and responsibilities of the mandate [5].

Lord Lugard, on the other hand, thought there was conflict between the view that the mandate can only be terminated if the mandatory Power requests it, and the view that when a territory had reached the required standard the mandate must be terminated. The latter view he thought was the more correct [6].

It may be concluded that there was a consensus that the Council was the competent authority to pronounce the termination of a mandate, and this was assumed as a second premise of the report. It was also accepted that *normally* this pronouncement would be made only upon the proposal or with the consent of the mandatory Power.

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[1] Permanent Mandates Commission, Minutes of 20th session (18 June-1 July, 1930), pp. 197, 201, 205.
[2] *Ibid.*, pp. 201, 206.
[3] *Ibid.*, p. 205.
[4] *Ibid.*, pp. 197, 209.
[5] *Ibid.*, p. 207.
[6] *Ibid.*, p. 201.

With regard to the third point of interest which I desire to mention, there was greater controversy. This point concerned the *definition of "the inhabitants"* who were to be able to stand alone before a mandate might be terminated[1]. In the discussion in the Commission, particular reference was made to the white minorities in the Territories of South-West Africa and Tanganyika. After hearing various statements on the subject, the Commission inserted in its report a provision to the effect that the conditions of political maturity must apply to the whole of the Territory and its population. The Commission recorded thus its view that the fact that a certain part of the Territory or its population was able to stand by itself would not justify the termination of the Mandate.

The report of the Commission on the general conditions which must be fulfilled before the mandate régime can be brought to an end in respect of a country placed under that régime was considered by the Council on 4 September, 1931[2]. The Council noted the conclusions of the Permanent Mandates Commission and decided, in view of responsibilities devolving upon the League of Nations, that the degree of maturity of mandated territories which it may in the future be proposed to emancipate should be determined in the light of the principles thus laid down, though only after a searching investigation on each particular case.

The report of the Commission, thus accepted by the Council as a standard for determining when a mandate might be terminated, set forth the opinion that the emancipation of a territory under mandate should be made dependent on two classes of preliminary conditions: First, the existence in the territory of *de facto* conditions which justify the presumption that the country has reached the stage of development at which a people has become able, in the words of Article 22 of the Covenant, "to stand by itself under the strenuous conditions of the modern world", and second, *certain guarantees* to be furnished by the country desirous of emancipation to the satisfaction of the League of Nations, in whose name the Mandate was conferred and has been exercised by the mandatory[3].

The principles laid down in this Resolution were followed with regard to the termination of the Mandate for Iraq[4]. It may be noted that Major Pienaar, speaking on behalf of the Minister of External Affairs of the Union of South Africa, at the time that the Council Resolution of 4 September, 1931, was adopted, expressed his desire to safeguard his country's rights as a mandatory. He said that he did not oppose the report, provided it were understood that South

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[1] See note by Lord Lugard, Permanent Mandates Commission, Minutes of 20th session (18 June-1 July, 1930), in which he stated: "A comparatively small community, more or less homogeneous in a country where the mass of the inhabitants is quite unable to stand alone, can be granted local or municipal autonomy, but the mandated territory must be treated as a single entity and the mandate cannot be withdrawn until the bulk of the people are able to stand alone." See discussion, *ibid.*, pp. 150-153, 178-179, 179-180.

[2] League of Nations, *Official Journal*, 12th Year, No. 11 (November 1931), pp. 2044-2058.

[3] For full text, see Permanent Mandates Commission, Minutes of 20th session (9 June-27 June, 1931), pp. 228-229.

[4] See particularly the Special Report of the Permanent Mandates Commission to the Council on the proposal of the British Government with regard to the emancipation of Iraq (Minutes of the 21st session, p. 221, Annex 22).

Africa did not thereby accept the recommendation of the Commission as suitable for application to mandates other than Iraq, or as waiving South Africa's right to ask for a modification when the question of the termination of other types of mandate arose [1].

This review of the practice of the League, as I have mentioned, indicates that the normal procedure for modifying or terminating a mandate was with the consent of both the Council and the mandatory Power. I should now like to refer to discussions in the Permanent Mandates Commission concerning the possibility of *unilateral change* either by revocation on the part of the League or by annexation on the part of the mandatory.

During the course of the consideration of the subject of loans in mandated territories, there was discussion of the point whether the Mandate could be revoked without the consent of the mandatory Power. It was stated on the one hand that the possibility of revocation feared by certain investors did not really exist since the Mandate could not be revoked without the agreement of the two interested parties [2].

This statement was challenged on the grounds that it would be dangerous to exclude, even in theory, the hypothesis of revocability in case of serious abuse—an hypothesis entirely in conformity with the character of the Mandate and with all general legal principles [3]. It was then conceded that the Mandate could, in theory, *be revoked* in case of abuse, but it was stated that revocation could only be carried out by a unaminous decision of an organ of the League, of which the mandatory in question was a member [4]. It was also suggested that revocation could only take place in the event of gross violation of the Mandate and at the instance of the International Court [5].

The Council's Resolution of 1925 on the question of loans did not contain any conclusion on the question of revocability. It did state, however, that the Council agreed that the cessation or transfer of a

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[1] League of Nations, *Official Journal*, 12th Year, No. 11 (November 1931), p. 2051.

[2] Permanent Mandates Commission, Minutes of fifth session, pp. 1924, 155-156.

[3] See statement by Mr. Rappard. Minutes of fifth session, p. 156. At the sixth session, he said : "To state that, however unworthy in theory a mandatory Power might be, its misdeed could never in any conceivable circumstances lead to revocation, would be to weaken, before public opinion, that sentiment which gives its special value to the institution of which we are the recognized defenders." Minutes of sixth session, p. 157.

[4] Minutes of fifth session, p. 156.

[5] A note submitted to the fifth session of the Commission by Sir Frederick Lugard stated : "Wherever the power of revocation (in consequence of breach of contract by maladministration) may exist, there can be no doubt that in this almost inconceivable contingency the International Court of Justice would be the agency employed and that it would make full provision for all 'legitimate claims and rights'." Minutes of fifth session, pp. 177-178. A memorandum submitted to the sixth session of the Commission in 1925 by Mme Bugge-Wicksel expressed the opinion that revocation could only occur if the mandatory Power had misused its administrative rights over the territory, to the detriment of the native population or of other Members of the League of Nations, to such an extent that one of the latter felt bound to petition the Council or the Permanent Court of International Justice for the transfer of the Mandate to another country. Minutes of sixth session of the Permanent Mandates Commission, p. 154.

mandate could not take place unless the Council had been assured in advance that the financial obligations regularly assumed by the former mandatory Power would be carried out [1].

The problem of a possible *annexation* of the mandated Territory has also been the subject of prolonged debate in the Permanent Mandates Commission. It may be noted that this question was raised with particular reference to the Territory of South-West Africa. At the sixth session in 1925, the attention of the Commission was called to certain statements in the Press concerning a proposal to incorporate South-West Africa in the Union. Mr. Smit, High Commissioner for the Union of South Africa and its accredited representative to the Permanent Mandates Commission, stated that the inclusion of South-West Africa in the Union could only come about as the result of a treaty between South-West Africa, as an independent government, and the Government of the Union [2].

Mr. Smit said there would come a time when South-West Africa would reach a stage of development which would fit it to become independent of the mandatory. When this stage was reached, the guardianship of the Mandates Commission would be at an end, and it would be for the people of South-West Africa themselves to declare whether they desired to join the Union or not [3].

Mr. Rappard in reply stated that it was not for the white minority in a mandated territory to declare when the moment had arrived for the territory to be able to stand alone. It would be contrary to the spirit of the arrangement, he said, if, upon the demand of some ten thousand settlers, a mandated territory were, in fact, to be incorporated with the territory of the mandatory Power [4].

From the 26th session in 1934 on, the question of the incorporation of South-West Africa into the Union as a fifth province appeared

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[1] League of Nations, *Official Journal*, 35th session of Council, 6th Year, No. 10 (October 1925), p. 1511. It was stated by the Rapporteur that the Resolution of the Council did not deal with question of the powers of the Council in connexion with the cessation of mandates in general. *Ibid.*, p. 1364.

[2] Permanent Mandates Commission, Minutes of sixth session, p. 59. See also statements by Sir Frederick Lugard and Mr. Van Rees. *Ibid.*, pp. 59-60.

[3] Permanent Mandates Commission, Minutes of sixth session, p. 60. At the 9th session, Mr. Smit also stated : "South-West Africa would never be actually annexed to South Africa, even if the Mandate were withdrawn. There were two parties to be considered in addition to South Africa, one of them being the League of Nations and the other an independent South-West Africa which would eventually be associated with the Union." Minutes of ninth session, p. 34. See also statements during the twenty-second session of the Permanent Mandates Commission, Minutes of twenty-second session, p. 23.

[4] Permanent Mandates Commission, Minutes of sixth session, p. 60. At the 9th session, M. Rappard observed that : "It was necessary to ascertain what was meant by the territory being able to stand alone. The Mandates System had been introduced in behalf of the peoples not yet able to stand by themselves and would presumably cease as soon as the inhabitants were able to manage their own affairs. South-West Africa, however, was being administered by a small minority of white people and no one doubted that this minority would soon be capable of administering the country independently of the South-African Union. This, however, did not at all mean that the inhabitants, that was to say, the native majority, would be able to stand by themselves. The Commission ought, therefore, to satisfy itself that the native population was able to stand alone before it could advise the Council that the Mandate should be terminated." Minutes of ninth session, p. 35.

prominently in the Commission's discussions [1]. This discussion originated as a result of notice taken by the Commission that the Legislative Assembly of South-West Africa had adopted a motion aiming at the constitution of the Territory into "a fifth province of the Union, subject to the provisions of the Mandate".

Considering whether incorporation would violate the Mandate, Lord Lugard was of the opinion that, as long as the mandatory Power was bound by the Mandate and continued to send to Geneva a representative to be interrogated as to the manner in which it had carried out its Mandate, the incorporation of South-West Africa in the Union of South Africa would not be regarded as an attempt at annexation. In his view, the crucial features in the Mandates System were the obligation to carry out the provisions of the Mandate and the obligation to send a representative to Geneva [2].

Mr. Palacios, on the other hand, expressed the opinion that the Mandate would be violated solely by the establishment of the province. The Mandate, he said, was not made up solely of a whole group of protective provisions. By making these provisions the basis of a *sui generis* status for the Territory and its inhabitants, it constituted a new institution set up under Article 22 of the Covenant as an historic compromise between extremely complicated interests [3].

The Commission in its report reserved its opinion as to the compatibility of the course proposed by the Legislative Assembly with the Mandates System until it would have been informed of the point of view of the mandatory Government [4].

The Commission renewed its discussion of the subject at its 27th session in 1935. The Commission was informed by Mr. te Water, the accredited representative of the Union of South Africa, that his Government had appointed a special committee to study certain constitutional problems raised by the motion of the Legislative Assembly of South-West Africa concerning its incorporation as a fifth province of the Union. He assured the Commission that the Union Government had no intention of presenting the Commission with a *fait accompli* [5].

The report of the South-West Africa Commission was communicated to the Permanent Mandates Commission. The latter, at its 31st session in 1937, noted the statement of the Government of the Union of South Africa that it was of the opinion that to administer the mandated Territory as a fifth province of the Union *subject to the terms of the Mandate* would not be in conflict with the terms of the Mandate itself. It also noted that the Union felt that sufficient grounds had not been adduced for taking such a step.

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[1] Permanent Mandates Commission, Minutes of 26th session, pp. 46-52, 62-64, 163-166, 167-207 ; Minutes of 27th session, pp. 11, 158, 159-164, 180, 183, 229, 239 ; Minutes of 28th session, p. 12 ; Minutes of 29th session, pp. 126-128, 166, 211 ; Minutes of 30th session, p. 13 ; Minutes of 31st session, pp. 111-116, 175, 192 ; Minutes of 33rd session, pp. 140-141, 171 ; Minutes of 34th session pp. 74-76.

[2] Permanent Mandates Commission, Minutes of the 26th session, p. 163.

[3] *Ibid.*, p. 164.

[4] *Ibid.*, p. 207.

[5] Minutes of 27th session, p. 160. The Union of South Africa gave repeated assurances to this effect. See Minutes of 28th session, p. 12 ; Minutes of 29th session, p. 211.

The Mandates Commission stated that it did not express any opinion as to a method of administration, the scope of which it had no opportunity of judging and the adoption of which, according to the statement of the mandatory Power, was not contemplated. It confined itself to making all legal reservations on the question [1].

In the records of the Permanent Mandates Commission, brief mention may also be found of the possibility that the power to reallocate "B" and "C" Mandates was vested in the Supreme Council of the Principal Allied and Associated Powers, including the United States [2].

The strongest statement to this effect was that made by Lord Balfour to the Council of the League while defending the Balfour Declaration on the Palestine Mandates. He said that mandates were neither made by the League, nor could they in substance be altered by the League. "Remember," he stated, "that a mandate is a self-imposed limitation by the conquerors which they obtained over conquered territories. It is imposed by the Allied and Associated Powers themselves in the interests of what they conceive the general welfare of mankind ; and they have asked the League of Nations to assist them in seeing that this policy should be carried into effect [3]."

However, as I have already noted, the Commission in 1930-1931, during its discussion of the general conditions for the termination of a mandate, accepted the view that the functions of the Principal Allied and Associated Powers had been completed with the establishment of the Mandate, and did not believe that their consent, as such, was essential to the termination of the Mandate. This view, however, is to be qualified by the fact that all the Principal Powers, with the exception of the United States, were represented on the Council of the League ; and with regard to the United States, some members were of the opinion that it had a special right to be consulted [4].

At this stage, I should like to recapitulate some of the principles which may be adduced from the practice of the League of Nations with regard to a change in status of a mandated territory during the active lifetime of the League.

First, the mandatory régime was considered temporary—to continue until such time as the mandated territory and its inhabitants were able to stand by themselves.

Second, the status of the Territory could be changed by concurrent action of the mandatory and the Council of the League, providing always that the change was consistent with the principles of the Mandates System as set forth in Article 22 of the Covenant.

Third, the granting of independence to a mandated territory at a time when the whole territory and its inhabitants are able to stand

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[1] See Minutes of the 31st session, pp. 113, 114, 116, 175, 192.

[2] See statements of M. Rappard, Minutes of second session, p. 46 ; Minutes of tenth session, p. 84 ; statement of Mr. van Rees, Minutes of third session, p. 222.

[3] League of Nations, *Official Journal*, 18th Session of Council (1922), pp. 546-548.

[4] Minutes of 20th session, pp. 201-202. In this same vein Lord Lugard in his note on the termination of a mandate expressed the opinion that the Council would be "acting on behalf of the Supreme Council which conferred the mandate".

by themselves was a change consistent with the principles of the Mandates System.

Fourth, the possibility of revocation in the event of a serious breach of obligation by a mandatory was not completely precluded. It was suggested that in the event of an exceptional circumstance of this kind it would be for the Council or for the Permanent Court or for both to decide.

Fifth, annexation was not considered compatible with the principles of the Mandate. It was accepted that independence could not be achieved until the whole territory and its population, and not merely a white minority, was able to stand by itself.

Sixth, the consent of the Principal Allied and Associated Powers, as such, to termination was not judged necessary. It is to be noted, however, that the approval of the Council of the League, on which all these Powers except the United States were represented, had been given, and the United States had entered into a separate treaty.

These principles, of course, although they reflect considered decisions taken by international organs on cases which arose during the life of the League, and the opinions of eminent experts do not in themselves solve the question of the modification of the present status now that the organs of the League are no longer in existence.

How, then, can we summarize the problem with which the Court is faced by the General Assembly's final question ?

B. *Competence to change the present status of the Territory*

As I mentioned earlier, the approach to the question of the modification of the present status will depend on the opinion reached with regard to what that status is.

In exploring the various possibilities, it will be necessary to assume alternative answers to certain of the questions which have been raised previously.

1. Assuming that the Court should be of the opinion that *there is an obligation to place the Territory under the Trusteeship System*, and that Chapter XII of the Charter is an internationally agreed substitute for Article 22 of the Covenant of the League, this in itself will constitute the answer to the question of modification. If, on the other hand, the Court is of the opinion that there is no obligation to negotiate and conclude a trusteeship agreement, it will be necessary to explore other possibilities.

2. Assuming that the Court should be of the opinion *that the Mandate and its obligations are no longer in force*, there will remain several alternative solutions as to the right to modify the present status, whatever it may be.

A first possibility would be that *the former mandatory, the Union of South Africa*, being in actual occupation of the Territory, will have the right to determine and modify unilaterally the present status. With the termination of the existence of the League, the mandatory, it may be argued, is the only remaining party having rights to the Territory.

A second possibility would be that the right to dispose of the Territory would revert to *the Principal Allied and Associated Powers*,

who might then once more determine the status of the Territory [1].

A third possibility would be that with the termination of the Mandate and the disappearance of the League of Nations, *the United Nations*, representing the international community as at present organized, might determine and modify the international status of the Territory. This would be consistent with the basic conception accepted internationally since the end of the First World War that the future of the former German colonies is a responsibility of the international community.

A fourth possibility is that the right to determine and modify the status of the Territory has passed to the *inhabitants* themselves and that, these inhabitants not having reached a stage of development enabling them to decide on that status, it is the international community, as represented by the United Nations, which is to act on their behalf and protect their interests until such time as they are in a position to act for themselves.

3. Assuming that the Court should be of the opinion that *the obligations of the Mandate continue in force*, it will have to consider alternative solutions, similar to the ones we have just enumerated, but these solutions will appear in a different form and with different reasons for their support.

There would first be the possibility that *the mandatory Power* might be the competent authority to determine and modify the status of the Territory. As just indicated, it was the normal practice under the Mandates System that the status of a territory was modified by the Council of the League in co-operation with the mandatory Power. It could perhaps be argued that, with the disappearance of the Council, the mandatory Power could by itself make the determination or modification which formerly could be made only with the consent and in accordance with terms adopted by the Council. But under this hypothesis it could be contended that the mandatory, remaining bound by the obligations of the Mandate, could only make a modification compatible with the principles of the Mandate.

The second possibility, that of the determination of the future status by *the Allied and Associated Powers*, would likewise remain to be considered. If the Mandate continues, the Council having disappeared, the Principal Allied and Associated Powers could now act at least in so far as the determination and modification of the status are concerned, possibly in the same capacity as the Council of the League, had it continued in existence.

The third possibility, that *the United Nations* has succeeded to the position of the League of Nations with regard to the mandates, must be taken into consideration also. I have already mentioned this possibility in presenting some considerations with regard to the final resolutions of the League of Nations. This possibility might be considered either from the viewpoint that the United Nations is the successor of the League of Nations or that the League in relation to the Mandates System served as the representative of the international community, and that this position has now been taken by the United Nations. As I mentioned earlier, the fate of the former German colonies

[1] It may be recalled that as a result of the Second World War, only the United States of America, the United Kingdom of Great Britain and Northern Ireland and France would be considered as having retained rights as "Principal Allied and Associated Powers" of World War One. See Articles 39 and 40 of the Treaty of Peace with Italy.

has been considered since the end of the First World War to be a matter of international concern.

The fourth possibility is again that it is *the inhabitants' right* to determine and modify their present status. If it is assumed that the Mandate continues, the view would be that *the status quo*, or an international régime compatible with the basic objectives of the Mandates System, must be maintained until such time as the inhabitants of the Territory are able to stand alone. Only at that time, under this hypothesis, could there be a modification.

4. Whether the Court is of the opinion that the Mandate does or does not continue, it will have to consider as a possible answer to the General Assembly's question that the determination and modification of the status of the Territory is to be brought about *by agreement*. This idea of agreement has frequently recurred, as it will have been observed, in various passages of my statement. I noted that in the practice of the League, as is shown by the case of Iraq, the normal method of modifying or terminating a mandate amounted to a proposal by the mandatory Power and agreed to by the Council. One of the possibilities to be considered in this respect is therefore that of *a solution agreed between the United Nations and the mandatory Power*. This requirement is emphasized in the last resolution of the League of Nations on the subject of mandates. This resolution, it will be recalled, while taking note of the express intention of the Members of the League administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned, in accordance with the obligations contained in the respective mandates, noted that this would be the case *until other arrangements have been agreed between the United Nations and the respective mandatory Powers*. Here is express reference to the idea that the status of these territories was to be determined and modified by agreement between the United Nations and the mandatory.

It has been noted that every mandated territory, with the exception of Palestine and South-West Africa, either attained independence with the consent of the League of Nations and of the mandatory Power, or was placed under the Trusteeship System by virtue of a trusteeship agreement approved by the General Assembly or the Security Council of the United Nations. While Syria, Lebanon and Transjordan achieved their independence at a time when the Council of the League was not able to meet, the League Assembly considered it appropriate in its final resolution formally to welcome the termination of the mandate status of these countries.

It will be recalled that in the case of Palestine, the mandatory Power submitted the question of its future status to the General Assembly of the United Nations [1] and invited it to formulate a solution, and that

[1] It will be noted that Resolution 181 (II) of the General Assembly of 29 November, 1947, recommended to the United Kingdom as the mandatory Power for Palestine, and to all other Members of the United Nations, the adoption and implementation of a plan of partition with economic union. The first paragraph of this plan stated : "The Mandate for Palestine shall terminate as soon as possible, but in any case not later than 1 August, 1948." Under paragraph 2, the mandatory Power was "to advise the commission established under the plan, as far in advance as possible, of its intention to terminate the Mandate and to evacuate each area." Official records of the Second Session of the General Assembly, Resolutions, pp. 131 *et sqq*.

in the case of South-West Africa the mandatory Power itself brought the question of the future status of the Territory before the General Assembly of the United Nations [1].

Let us recall, finally, that on five occasions the General Assembly of the United Nations recommended in its resolutions that a draft trusteeship agreement for South-West Africa should be submitted for its approval. Furthermore, we find in these resolutions two more general references to the idea of an agreed solution between the General Assembly and the Union of South Africa. In the preamble of the Resolution adopted at the second part of the first session [2], the General Assembly expressed itself as follows :

> "Desiring that *agreement* between the United Nations and the Union of South Africa *may hereafter be reached* regarding the future status of the mandated Territory of South-West Africa...."

In the operative part of the Resolution adopted at the first part of the third session [3], the following passage may be found :

> "Recommends, without prejudice to its Resolutions of 14 December, 1946, and 1 November, 1947, that the Union of South Africa, *until agreement is reached with the United Nations regarding the future of South-West Africa*, continue to supply annually information on its administration of the Territory...."

It appears therefore that the idea of a modification by agreement has been frequently advocated from all sides. We find it expressed again and again in the League of Nations, in the United Nations and in certain positions taken by the mandatory Power itself. Should the Court adopt such a point of view, it would mean that there exists an obligation *de contrahendo*—an obligation to come to an agreement. Such an agreement should obviously be reached within a reasonable time, so that the Territory of South-West Africa is not left indefinitely in its present unsettled position. In the absence of an agreement, further points might have to be elucidated. It may be recalled in this respect that the Mandate in its Article 7 referred not only to modifications with the consent of the Council of the League of Nations, but also to an action by the Permanent Court of International Justice in case of difficulties of interpretation or application. Could not the International Court of Justice be put into a position to play a constructive rôle ? Would the General Assembly of the United Nations not be responsible as the expression of the organized international community for such arrangements as may be necessary ?

Conclusion

Mr. President, Members of the Court, I have come to the end of my statement. The Covenant of the League of Nations has treated as a sacred trust the well-being and development of peoples who are not yet capable of governing themselves. The Charter of the United Nations has taken up this noble idea. You have now before you the difficulties

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[1] See Part I of this statement.
[2] Folder 16.
[3] Folder 34.

which have arisen in a special case particularly complicated and important. You may have noted in my statement and in the dossier that this case has occupied the Organization of the United Nations since the very inception of the Organization and that successive Assemblies have always clearly expressed their opinions. I am sure your Opinion will form a firm legal basis in the light of which a solid and rapid solution may be found.

I thank you, Mr. President.

2. STATEMENT BY M. JOSÉ INGLES

(REPRESENTATIVE OF THE REPUBLIC OF THE PHILIPPINES)
AT THE PUBLIC SITTINGS OF MAY 19th AND 20th, 1950

[Public sitting of May 19th, 1950, morning]

Mr. President, Honourable Members of the Court. My Government wishes to thank this august tribunal for according it the privilege of making an oral statement for the purpose of stating its position on such an important question as that submitted by the General Assembly Resolution of December 6th, 1949, for the advisory opinion of this Honourable Court.

The distinguished representative of the Secretary-General of the United Nations has presented a comprehensive factual background as well as a scholarly legal analysis of the problem with which the General Assembly has been seized since its first session. A number of governments have also submitted written statements. This wealth of material will be of assistance to this Honourable Court in its deliberations. For our part, they have made the task of Counsel easier and have considerably shortened the oral statement to be presented on behalf of our Government. We shall have to draw frequently, however, on material already made available by learned Counsel, but only for the purpose of emphasizing certain points or elaborating further on other matters. We shall follow the example of Dr. Kerno by submitting a list of our citations to the Registrar for insertion in the records and shall dispense with their reading in our oral statement.

I. *Introduction.*

We propose to enquire first into the international obligations of the Union of South Africa with respect to the Territory of South-West Africa under the Charter of the United Nations. This will involve a discussion of the applicability of pertinent provisions of the Charter like Chapters XI and XII, as well as an examination of the various Resolutions of the General Assembly pertaining to mandated territories, particularly to South-West Africa. Thereafter, we propose to take up the international obligations of the Union of South Africa under the Mandate. This will include an enquiry into the question as to whether those obligations still subsist in spite of the dissolution of the League of Nations, and, if the reply to the foregoing question is in the affirmative, to enquire further into the question as to who has the competence to terminate these obligations, or to determine or modify the international status of the Territory.

It will be seen that, while we do not limit our statement to the three questions particularized by the Resolution of the General Assembly, we do not go beyond the scope of the general question, which is : "What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom ?" That the Assembly did not expect this Honourable Court to be restricted to the three particular questions propounded

in its Resolution is evident from the statement of one of the proponents of the Resolution to the effect that the Court would undoubtedly understand that the Assembly expected from it full clarification of all the legal issues arising out of the problem of South-West Africa[1]. Another sponsor of the Resolution said that the time had come for the General Assembly to seek a final solution for the question of South-West Africa and that an authoritative statement on the legal aspects of the question should be sought from the International Court of Justice[2].

With the permission of the Court, we open our argument by discussing the applicability of Chapter XII of the Charter inasmuch as it has merited the special attention of the General Assembly and is, moreover, embodied in one of the specific questions addressed to this Honourable Court.

II. *Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa?*

It is our humble submission that the provisions of Chapter XII of the Charter are applicable to the Territory of South-West Africa, and we propose to demonstrate the validity of our contention by going directly into a discussion of the manner in which Chapter XII of the Charter applies to mandated territories in general, and to South-West Africa in particular.

We rely principally on the wording of Article 80, paragraph 2, of the Charter to support the proposition that Members of the United Nations administering mandated territories have an international obligation, which is tantamount to saying that they have a legal duty to negotiate and conclude agreements for the purpose of placing such mandated territories under the international Trusteeship System. Article 80 of the Charter provides as follows:

> "1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the Trusteeship System, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.
>
> 2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the Trusteeship System as provided for in Article 77."

Paragraph 1 of Article 80, known as the conservatory clause, was formerly clause 5 of Section B of the working paper submitted by the United States delegation at the fifth meeting of Committee II/4[3]. As approved at the tenth meeting of Committee II/4, clause 5 originally read as follows:

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[1] Statement of the delegate of Denmark, p. 529, Summary Record, Plenary Meetings, 4th Session of the Assembly.

[2] Statement of the delegate of Thailand, p. 434, *ibid.*

[3] U.N.C.I.O. Documents, Vol. X, pp. 677, 681; Document No. 323.

"Except as may be agreed upon in individual trusteeship agreements made under paragraphs 4 and 6[1] placing each territory under the Trusteeship System, nothing in this Chapter should be construed in and of itself to alter in any manner the rights of any States or any peoples in any territory *or the terms of any mandate.*"

The representative of the United States, who was largely responsible for this provision, wanted to have it placed on record that the above safeguarding provision was "intended to mean that all rights, whatever they might be, remained exactly the same as they existed : that they are neither increased nor diminished by the adoption of this Charter. Any change is left as a matter for subsequent agreements. The clause should neither add nor detract, but safeguard all existing rights, whatever they may be[2]."

Subsequently, however, during the 13th meeting, the representative of the United States, who was chairman of the Drafting Sub-Committee, supported by those of France and the United Kingdom, presented changes to the provisionally approved clause 5 so as to substitute the words "existing international instruments" for "mandates", and to add the following sentence, which subsequently became paragraph 2 of Article 80 : "This paragraph should not be interpreted as giving grounds for delay or postponement of the negotiations and conclusion of the agreements for placing mandated and other territories, as provided for in paragraph 3 under the Trusteeship System."

The statement presented on behalf of the Secretary-General has quoted at length the explanation made by the representative of the United States in proposing this amendment, but we should like to emphasize the last portion thereof, which is as follows :

"On the other hand, neither does paragraph 5 take away at all from the other paragraphs of this Chapter as to the method by which the negotiations of the subsequent agreements should be carried out. *We make it very clear in the new sentence that no one can point to paragraph 5 in the future and say, 'I refuse to negotiate. I simply stand on paragraph 5 and I insist we stay there for ever'*[3]. Bearing in mind that clause 5, as originally proposed and adopted by the tenth meeting, referred specifically to mandates, it is clear that the mandatory Power cannot refuse to negotiate a trusteeship agreement by relying solely on the first sentence of clause 5, that is, paragraph 1 of Article 80. The words "existing international instruments" were adopted because they had a broader meaning than mandates, but certainly mandate agreements were expressly intended to be covered by these words.

Prime Minister Frazer of New Zealand, Chairman of Committee II/4, speaking before the Fourth Committee of the first part of the first session of the General Assembly on January 21st, 1946, during the discussion of the draft resolution calling upon all the States administering mandated territories to negotiate trusteeship agreements for the said territories, said that "in San Francisco the Committee on Trusteeship, of which he had been Chairman, had attempted to avoid

[1] Document No. 323.

[2] Verbatim minute of Technical Committee (II/4), U.N.C.I.O. (unpublished), Vol. 69 (English), Running Nos. 39, 40, 41, 43, 46 (tenth meeting) ; see also U.N.C.I.O. Documents, Vol. X, p. 486.

[3] Verbatim minutes of Technical Committee (II/4), U.N.C.I.O. (unpublished), Vol. 70 (English), Running Nos. 23-26, Thirteenth Meeting. Underscoring ours.

all ambiguity ; although the Committee did not go so far as some would have liked, it had agreed that the Powers which held mandates under the League of Nations should and would, in the first instance, recognize the authority of the Trusteeship Council of the United Nations [1]".

Prime Minister Smuts of the Union of South Africa, Chairman of Commission II, which adopted the report of Committee II/4, shared the same view. In introducing the report of Committee II/4 to Commission II, he described Section B of the Committee draft, which later became Chapters XII and XIII of the Charter, as follows :

> "Section B deals to some extent with the old field already covered in the Covenant of the League of Nations, and the provision there is this : That with regard to certain types of dependent territories, old mandate territories, territories newly conquered and taken from existing Powers, and also colonies where the governing Power is prepared voluntarily to place them under trusteeship—all these various types of territories will fall under the Trusteeship System, which will impose stricter conditions than those prescribed in Section A [2]."

Prime Minister Smuts elaborated on this further when he reported to the Union of South Africa House of Assembly on March 15th, 1946. Questioned on the meaning of paragraph 2 of Article 80, he said :

> "That was to prevent a situation where the mandatory says : 'I do not want to make an agreement at all'. He takes this position, that the League of Nations having disappeared we are now free, that we can do what we like."

Continuing, Prime Minister Smuts pointed out that that position is in conflict with paragraph 2 of Article 80. On being asked whether the Union "must enter into an agreement", he said further :

> "No, you must take steps to enter into an agreement. You must be serious about it, but there is no compulsion laid on you to accept the terms. To my mind the position is quite simple. What Sub-Section 2 of Article 80 was intended to prevent was that a mandatory should say : the League of Nations is dead ; I am in this position ; I do not want to come under U.N.O. at all and I do not want to come under the Trusteeship Council at all. That position is precluded. That is how I understand it.... [3]"

It is our humble submission, therefore, that paragraph 2 of Article 80 establishes a positive obligation on the part of Member States administering mandated territories to negotiate and conclude agreements for the purpose of placing such mandated territories under the Trusteeship System. The duty to negotiate, as held by the Permanent Court of International Justice in its Advisory Opinion of October 15th, 1931 [4],

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[1] Official Records, Fourth Committee, First Part, First Session, General Assembly, p. 6.

[2] Pp. 679-680, Verbatim minutes of the Third Meeting of Commission II, June 20, 1945. U.N.C.I.O. Selected Documents (Washington, 1946).

[3] Union of South Africa, Debates of the House of Assembly, Third Session, Ninth Parliament (1946-1947), Vol. 56, p. 3675.

[4] P.C.I.J., Series A/B, No. 42. See also *Annual Digest of Public International Law Cases* 1923-1924, Spanish Zone of Morocco Claims, p. 20 ; *id.* 1924-1925, Tacna-Arica Arbitration, pp. 352-359.

"is not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements", although the Court also held that "an obligation to negotiate does not imply an obligation to reach an agreement" or to conclude an agreement in a special manner.

The Resolution of the Council of the League of Nations of December 10th, 1927, which was the subject of interpretation by the Permanent Court of International Justice, was couched in general terms and simply recommended the two Governments concerned "to enter into direct negotiations as soon as possible in order to establish such relations between the two neighbouring States as will ensure 'the good understanding between nations upon which peace depends' ".

Paragraph 2 of Article 80 of the Charter, on the other hand, is more specific in that it asks for a particular kind of agreement, namely : a trusteeship agreement. Besides, it contemplates not only the "negotiation", but, more than that, also the "conclusion" of agreements for placing mandated territories under the Trusteeship System.

The Government of the Union of South Africa in its Written Statement[1] alleges that paragraph 2 of Article 80 "can apply only where the State concerned has already decided to submit an agreement", and that "to hold that it could be applied in other circumstances as well, would not only be in contradiction to the voluntary nature of Articles 75 and 77, but would also lead to obviously unintended results". The contention of the Government of the Union of South Africa that paragraph 2 of Article 80 "can apply only where the State concerned has already decided to submit an agreement" is, we respectfully submit, contrary to the intention of the framers of the Charter.

Such contention of the Government of the Union of South Africa is contrary to the explanation of the representative of the United States at the United Nations Conference on International Organization at San Francisco when he proposed the adoption of paragraph 5 of Section B, which became paragraph 80 of the Charter ; and when he said "no one can point to paragraph 5 in the future and say 'I refuse to negotiate' ".

Such contention of the Government of the Union of South Africa is contrary to the testimony of the representative of New Zealand to the United Nations Conference on International Organization at San Francisco who was Chairman of Committee II/4 which drafted the trusteeship provisions of the Charter, when he said that the Committee "agreed that the Powers which held mandates under the League of Nations should and would, in the first instance, recognize the authority of the Trusteeship Council of the United Nations".

Such contention of the Government of the Union of South Africa is contrary to the understanding and interpretation of its chief representative to the United Nations Conference on International Organization at San Francisco, not only during the Conference, when he said that "all mandated territories .... will fall under the Trusteeship System" ; but also when he explained the Charter provisions on the floor of the Union Parliament in his capacity as Prime Minister of the Government of the Union of South Africa, when he said that under paragraph 2 of Article 80 the Government of the Union of South Africa "must take steps to enter into an agreement" and "must be serious about it" ; and when he said that the Government of the Union of South Africa is

[1] P. 80.

"precluded" from saying that "I do not want to come under U.N.O. at all and I do not want to come under the Trusteeship Council at all".

Such contention of the Government of the Union of South Africa, moreover, is inconsistent with the plain meaning of paragraph 2 of Article 80 to the effect that paragraph 1 of said Article does not give mandatory Powers, among others, any right to delay or postpone the negotiation and conclusion of agreements for placing mandated territories under the Trusteeship System. In the words of the Permanent Court of International Justice in its Advisory Opinion of October 15th, 1931, above quoted, an engagement to negotiate, standing alone, "is not only to enter into negotiations, but also to pursue them, as far as possible, with a view to concluding agreements". Certainly, the additional engagement to conclude an agreement makes it obligatory on the mandatory Power to reach an agreement.

We propose next to analyze the allegation of the Government of the Union of South Africa that paragraph 2 of Article 80 is in "contradiction" with Articles 75 and 77.

Article 75 provides as follows:

> "The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as 'trust territories'."

Article 77 provides as follows:

> "1. The Trusteeship System shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:
>
> (*a*) territories now held under mandate;
>
> (*b*) territories which may be detached from enemy States as a result of the Second World War; and
>
> (*c*) territories voluntarily placed under the System by States responsible for their administration.
>
> 2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the Trusteeship System and upon what terms."

The use of the words "such territories as may be placed thereunder" in Article 75 and in the first paragraph of Article 77 is, we respectfully submit, not indicative either of volition or compulsion on the part of anybody. The two Articles refer to the territories to be placed under trusteeship, but not to the parties who will place such territories under trusteeship. The plain meaning of the use of the words "such territories as may be placed thereunder" is that not all dependent territories will necessarily be placed under the Trusteeship System. But certainly, from those words, standing alone, one cannot deduce any obligation or lack of obligation on the part of anybody to place certain territories under the Trusteeship System.

Taking Article 75 as a whole, we note that there is definitely an obligation on the part of the United Nations to establish under its authority an international trusteeship system. The further use of the words "subsequent individual agreements" does not detract from, but on the

contrary emphasizes, the obligation incumbent upon the United Nations to establish the Trusteeship System in the first instance. On the other hand, from the practical standpoint, it would be impossible for the United Nations to comply with its obligations in the absence of individual agreements. Indeed, as the Preparatory Commission found out, the Trusteeship Council could not be established at all without a certain number of "individual agreements" which had to precede and not follow the establishment of the international Trusteeship System. Therefore, the Preparatory Commission, having in mind that, of all the categories listed in Article 77, only the mandated territories have been previously subject to international supervision, and having in mind paragraph 2 of Article 80, found it advisable to recommend, and the General Assembly had to adopt, during the first part of its first session, a resolution calling upon all States administering territories under League of Nations mandate to undertake practical steps to implement the Charter provision for the conclusion of trusteeship agreements, for approval preferably not later than the second part of the first session of the General Assembly [1].

Coming to Article 77, we note that it applies to three categories, namely: (*a*) territories now held under mandate; (*b*) territories which may be detached from enemy States as a result of the Second World War, and (*c*) territories voluntarily placed under the System by States responsible for their administration.

Taken in connexion with the words "as may be placed thereunder by means of trusteeship agreements" used in the introductory paragraph of the Article, we have already indicated that the plain meaning of the Article with respect to category (*a*) is that not all territories held under mandate at the time the Charter came into force would necessarily have to be placed under the international Trusteeship System. This is so because of exceptions provided in the Charter itself.

For example, Article 78 provides that "the Trusteeship System shall not apply to territories which have become Members of the United Nations....". This applied to Syria and Lebanon, which, though participants in the Conference and signatories to the Charter, were still regarded by France to be technically subject to Class A Mandate of the League of Nations.

Again, the "conservatory clause", that is, paragraph 1 of Article 80 of the Charter, expressly safeguards "the rights of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties". This indicates, among other things, that the peoples of mandated territories who have fulfilled the conditions of the mandate, that is, having qualified for independence, were not to be placed under the international Trusteeship System. Hence, upon the acceptance by the League Assembly of the termination of the Mandate for Transjordan on April 18, 1946, and the consequent recognition of its independence subsequent to the coming into force of the Charter of the United Nations, Transjordan fell outside the operation of the international Trusteeship System.

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[1] Report of the Preparatory Commission of the United Nations, pp. 49 *et sqq.* Official Records, Plenary Session, First Part, First Session, General Assembly, p. 316.

The case of the former mandated Territory of Palestine may also be cited as another example, for in this case the General Assembly opted for independence rather than trusteeship of the Arab and Jewish States into which the Territory was partitioned.

The foregoing exceptions explain why it was necessary for subsequent agreements to determine which territories in category (*a*) will be placed under trusteeship and upon what terms as provided in paragraph 2 of Article 77. But it was not left to the arbitrary will of the mandatory Power to leave out from the operation of the international Trusteeship System a mandated territory which was not yet ready for independence. This is evident in the intention of the framers of the Charter, manifested during the preparatory work and reaffirmed by *them during the subsequent functioning of the Organization.* We allude merely at this juncture to the statements we have already quoted of the proponent of Article 80 of the Charter, of the Chairman of Committee II/4, which drafted the trusteeship provisions of the Charter, and even of the chief representative of the Union of South Africa who was Chairman of Commission II of the United Nations Conference on International Organization. The conclusion is inescapable that, in conformity with the Charter, the Mandates System of the League of Nations was to be replaced by the international Trusteeship System provided for in Chapters XII and XIII of the Charter [1].

Bearing in mind the distinctions which we have pointed out with respect to mandated territories which should be placed under the Trusteeship System and those mandated territories which should not be so placed, particularly those who have qualified for self-government or independence, the defeat of the Egyptian amendments in Committee II/4 of the San Francisco Conference loses the significance attributed to it by the Government of the Union of South Africa [2]. The Egyptian amendments would have made automatic the placing of all mandated territories under the Trusteeship System without the negotiation and conclusion of subsequent agreements. And the reason for the rejection of the Egyptian amendments was precisely because it was felt that the mandatory Power should not be compelled to subscribe to an agreement, the exact terms of which it had no means of knowing in advance. The objection of the Union of South Africa was couched in the following terms:

> "To delete the words, or the amendment rather, put forward by the delegate from Egypt, would, I submit Sir, create an absurd position. These Mandates are ordinary contracts which would have to be entered into by the Trusteeship Council on the one hand, and by the mandatory Power on the other. There must, in other words, be an agreement on the terms and not merely a bare acceptance of the Mandate without any terms being agreed upon beforehand [3]."

We should like to emphasize the fact that the first Egyptian amendment which was to delete mention of "subsequent individual agreements"

[1] See Oppenheim, 7th ed., Vol. I, sec. 1940, p. 193.

[2] Par. 31, p. 80.

[3] See verbatim minutes of Technical Committee (II/4), U.N.C.I.O. (unp.), Vol. 69 (English), Running No. 2, Eighth Meeting; this was also quoted as a footnote to the oral statement of the representative of the Secretary-General.

in what is now Article 75, was submitted and voted down during the *seventh meeting* of Committee II/4 on May 18, 1945[1]. The second Egyptian amendment which was to insert the word "all" before category (*a*) and to delete the words "subsequent agreements" in what is now Article 77, was defeated during the *eighth meeting* of the Committee on May 22, 1945[2]. On the other hand, the United States amendment to add paragraph 2 to what is now Article 80, was adopted at the *thirteenth meeting* of the Committee on June 8, 1945[3].

Assuming that the defeat of the Egyptian amendments showed an opposition to a "compulsory" trusteeship, we find a change of mind when the Committee adopted the United States amendment to Article 80, because here there is a definite concession to those who wanted "compulsory" trusteeship. Instead of providing for automatic trusteeship, however, as the rejected Egyptian amendments would have done, the new paragraph 2 of Article 80 creates an obligation to negotiate and conclude trusteeship agreements, particularly with respect to mandates with which paragraph 1 of Article 80 is chiefly concerned.

One writer opines that "it is clear from the San Francisco records that to placate opposition to the voluntary theory, the Conference deliberately accepted the compromise formula of Article 80 (2), which seems to contradict the optional language of Articles 80 (1), 75 and 77[4]". In the light of our exposition, however, we submit that the alleged "contradiction" is more apparent than real. We take it that the function of interpretation is not to look for contradiction in isolated phrases, but rather to look at the whole instrument in order to harmonize various provisions which constitute a composite and correlated whole[5]. We must assume that paragraph 2 of Article 80 was inserted in the Charter for a definite purpose; and therefore we should reject any interpretation which would render it without effect[6].

The reference in Articles 75 and 77 to subsequent agreements for placing territories under the Trusteeship System, is not inconsistent with the requirement in paragraph 2 of Article 80 that there should be no delay or postponement in the negotiation and conclusion of such agreements. It is also clear that no contradiction can be read into the terms of Articles 75, 77 and 80 by all the rules of logic and common sense. While the mandatory Power on the one hand, and the United Nations on the other hand, have to agree on the terms of the agreement, there is a clear obligation to negotiate and conclude such agreement. There is a *pactum de contrahendo* in the engagement to negotiate. More than that, there is an obligation to reach agreement in the very engagement to conclude an agreement.

Moreover, it should be borne in mind that, because the mandatory Power has to agree upon the terms of the agreement, it does not mean that the terms are left to the arbitrary will of the mandatory Power. For neither the mandatory Power nor the United Nations may agree upon terms inconsistent with the objectives of the international Trustee-

[1] U.N.C.I.O. Documents, Vol. X, p. 460.
[2] *Ibid.*, p. 469.
[3] *Ibid.*, p. 516.
[4] H. Duncan Hall, *The Trusteeship System and the case of South-West Africa*, B.Y.B.I.L., Vol. XXIV, p. 388.
[5] See P.C.I.J., Series B, No. 2, p. 23.
[6] See Hackworth, *Digest of International Law*, Vol. I, p. 715.

ship System as laid down in the Charter. As far as these principles with which the mandatory Power should conform in the agreement are concerned, there is no question of the mandatoryPower being compelled to agree to terms which it had no means of knowing in advance ; because these principles are embodied in the Charter which were agreed to unanimously, in Committee II/4, in Commission II, and in the Plenary Session of the Conference at San Francisco, and they constituted solemn engagements of all parties to the Charter.

We need not deal at length with categories (*b*) and (*c*) under paragraph 1 of Article 77. As far as paragraph 2 of Article 80 is concerned, the emphasis is on category (*a*), because "mandated" territories are expressly mentioned, while reference to categories (*b*) and (*c*) is only inferred from the words "and other territories" in paragraph 2 of Article 80. Indeed, the history of Article 80 shows that the future of mandated territories was the main preoccupation of its author and proponent. Moreover, the advisory opinion requested of this Honourable Court specifically concerns a mandated territory.

If we deal with categories (*b*) and (*c*), therefore, it is only in order to refute the argument advanced by the Union of South Africa in its written statement that the implication of a legal obligation from paragraph 2 of Article 80, and its application to all categories mentioned in Article 77, would lead to unintended results, and would be inconsistent with the expressly voluntary character of category (*c*) [1].

With respect to category (*b*), that is, territories detached from enemy States as a result of the Second World War, we need only repeat that not all such territories should necessarily be placed under the Trusteeship System. There is the qualification made in Article 107 that : "Nothing in the present Charter shall invalidate or preclude action, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the governments having responsibility for such action."

For example, Formosa, instead of being placed under trusteeship, was restored to China from whom it was "stolen" by Japan. And when the General Assembly was called upon to decide what should be done with Korea, it opted for independence instead of trusteeship. But certainly, where there is no disposition for the return of "stolen" territories or the granting of independence to other territories, the obligation to negotiate and conclude a trusteeship agreement for a territory detached from an enemy State is clear. This is also implicit in the Declaration by the United Nations of January 1st, 1942, subscribing to the Atlantic Charter, which pledged their countries not to seek territorial aggrandizement. Of course, independence, as we indicated, should be recognized as an alternative, for the principle of trusteeship is subordinated to the principle of self-determination of peoples, respect for which is enshrined as one of the purposes of the United Nations [2].

With respect to category (*c*), that is, territories voluntarily placed under the System by States responsible for their administration, the express use of the word "voluntary", which is not used in categories (*a*) and (*b*), shows that it is only in this category where discretion is

[1] Paras. 29 and 30, p. 80.
[2] Art. 1, para. 2, Charter.

vested in the administering Power to place or not to place any of its territories, that is, any of its colonies, under the Trusteeship System. There is no inconsistency between Article 77, category (c), and Article 80, paragraph 2. Clearly, there is no room for the *reductio in absurdum* argument advanced by the Union of South Africa that if paragraph 2 of Article 80 carries the implication of a legal obligation, it would mean that every State responsible for the administration of any colony is bound to submit a trusteeship agreement. Such administering Powers would be bound under paragraph 2 of Article 80 only from the moment they *"voluntarily"* place any of their colonies under the Trusteeship System. The same cannot be said with respect to administering Powers under categories (*a*) and (*b*), who have no option to refuse to negotiate and conclude a trusteeship agreement for such peoples and territories as do not fall under the exceptions of paragraph 2 of Article 1, paragraph 1 of Article 80 and Article 107 of the Charter—principally for such peoples and territories as do not qualify or have not yet qualified for independence.

Coming back to category (*a*) of Article 77, that is, to territories held under mandate, we note for the record, as evidence of contemporary practice, that, with the exception of South-West Africa, all mandated territories have either been emancipated or placed under the international Trusteeship System.

Good faith is of the essence of the obligation assumed by the mandatory Powers under paragraph 2 of Article 80 of the Charter to negotiate and conclude trusteeship agreements for the purpose of placing mandated territories under the international Trusteeship System. *Pacta servanda sunt.* The principle that the enforcement of international obligations rests primarily on good faith is as true to-day as it was when Grotius first postulated it in the seventeenth century. Field Marshal Smuts, chief delegate of the Union of South Africa to the United Nations Conference on International Organization at San Francisco, recognized this clearly when, in his valedictory address upon the completion of the Charter, he said :

> "Our work has been done in a spirit of goodwill, good comradeship, good faith, without which it could in fact never have been accomplished. Good will and good faith are written or implied in every provision of this great document. And in our faith in the future we expect that those who come after us, and who will have to carry our Charter in the generations to come, will show no less good will and good faith in this part of the great task of peace [1]."

The applicability of Chapter XI of the Charter to the Territory of South-West Africa

We propose to take up next the applicability of Chapter XI of the Charter to the Territory of South-West Africa. This point was taken up in the Written Statement submitted by the Government of the United States.

The Statement submitted on behalf of the Secretary-General points out that a specific question for inclusion in the request for advisory opinion as to whether Chapter XI is applicable, and in what manner, to

[1] U.N.C.I.O. Selected Documents (Washington, 1946), pp. 934-935.

the Territory of South-West Africa, was rejected by the Fourth Committee [1]. This would seem to indicate either that the General Assembly had no doubt about the applicability of Chapter XI to the Territory of South-West Africa, or that it did not consider such factor of decisive importance in the solution of the problem before it.

It appears from the proceedings at San Francisco that Chapter XI is intended to apply to all non-self-governing territories. Field Marshal Smuts, in introducing the report of Committee II/4 to Commission II, described Section A of the Committee proposal—which later became Chapter XI of the Charter—as follows:

> "*A* applies the trustee principle to all dependent territories, whether they are mandates, whether they are territories taken from defeated countries, or whether they are existing colonies of Powers. The whole field of dependent peoples living in dependent territories is now covered [2]."

What is important to note is that for the first time all Members of the United Nations administering dependent territories "recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost .... the well-being of the inhabitants of these territories". The administering authorities also undertook certain obligations to fulfil this end, among which is to develop self-government. These solemn commitments became immediately effective upon the coming into force of the Charter, as pointed out in the Resolution on non-self-governing territories, approved by the General Assembly on 9th February, 1946.

Although the principles postulated are more far reaching than those envisaged in Articles 22 and 23 of the Covenant of the League of Nations, no distinct machinery for international supervision is provided beyond the obligation assumed by the administering authorities under Article 73 (*e*) to transmit regularly to the Secretary-General information of a technical nature relating to economic, social and educational conditions. The General Assembly is gradually evolving a procedure for the examination of the information thus submitted by a special committee on non-self-governing territories appointed by it from time to time. It should be noted, however, that this obligation to transmit information is expressly made applicable only to territories other than those to which Chapters XII and XIII apply. With respect to these territories to which Chapters XII en XIII apply, there is a more comprehensive questionnaire to which the administering authorities are required to reply in the submission of their annual reports to the Trusteeship Council.

The obligations assumed under the Mandate System by the mandatory Power to safeguard international supervision of its administration of a mandated territory, on the other hand, are more strict than those assumed by administering authorities under Article 73 (*e*) of the Charter. The Statement presented on behalf of the Secretary-General alluded to the fact that the annual reports required of the mandatory Powers are more detailed. Moreover, the examination of the annual

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[1] Pp. 261-262, Summary Record, Fourth Committee, Fourth Session, General Assembly.

[2] P. 679, U.N.C.I.O. Selected Documents (Washington, 1946).

report involved a thorough questioning of the accredited representative of the mandatory Power.

We note further that the right of the inhabitants of mandated territories to petition an international agency, which was recognized by the League of Nations, is not guaranteed to the inhabitants of non-self-governing territories by Chapter XI of the Charter.

It is our humble view that these rights of the inhabitants of mandated territories have not been abrogated by Chapter XI of the Charter. On the contrary, they have been safeguarded by the conservatory provisions of paragraph 1 of Article 80 of the Charter. We shall discuss this matter more fully when we take up the international obligations of the Union of South Africa under the Mandate.

We should like to stress at this stage, however, that the applicability of Chapter XI of the Charter to the Territory of South-West Africa simply amounts to this : that pending the placing of the Territory of South-West Africa under the Trusteeship System by means of a trusteeship agreement, which the Government of the Union of South Africa is required, in good faith, to negotiate and conclude, without delay or postponement, the said Government is placed under direct accountability to the United Nations for the administration of the Territory of South-West Africa, by virtue of the provisions of Articles 73 and 74 which constitute Chapter XI of the Charter. This is, of course, apart from the international obligations which the said Government has assumed under the Mandate. Certainly, Chapter XI cannot be interpreted to the detriment of the interests of the inhabitants of the territories to which the said Chapter applies, in view of the categorical recognition in Chapter XI of the principle that "the interests of the inhabitants of these territories are paramount".

The alleged "reservation" to the Charter by the Union of South Africa

We should like to discuss next the claim made by the Union of South Africa before the General Assembly that South-West Africa was the only territory with respect to which a specific reservation was made at the San Francisco Conference [1]. We feel constrained to refute this claim because of references made in the Written Statement of the Government of the Union of South Africa which imply that the framers of the Charter did not intend or were not bound to expect the Trusteeship System to apply to South-West Africa and that therefore the Union of South Africa has no obligation to place the Territory under the Trusteeship System [2].

The Charter of the United Nations does not contain any provision similar to that of Article 1 of the Covenant of the League of Nations which expressly precludes the possibility of reservations. Article 110 of the Charter, dealing with ratification and signature, makes no mention of reservations.

It is our humble submission that reservations may not be made to the Charter of the United Nations, having regard to the "indivisible" character of all its provisions [3] and to its fundamental objective which

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[1] U.N. A.P./V. 105, Second Session, Plenary, 1947, pp. 187-190.
[2] Paras. 22-23, pp. 77-78.
[3] Report of Committee I, U.N.C.I.O. Documents, Document 944.

is to preserve the peace of the world. The Charter (to paraphrase what has been said by a writer [1]) contains provisions of great importance and diversity designed to accomplish its ends, and the heated debates at San Francisco show that not all of them were accepted with equal eagerness by the participants at the Conference. The whole has been considered as satisfactory, however, and its purposes would have been defeated if reservations were allowed, as for example, to such an important chapter as that establishing the international Trusteeship System which was recognized in the Charter to be of vital importance to the maintenance of international peace and security.

It is our humble submission that, if the Government of the Union of South Africa did not want to be bound by any provision of the Charter, its path of action was clear ; either to stay out of the organization if it could not in conscience accept any of the provisions of the Charter, or to come into the Organization by waiving all its initial objections to some of the provisions of the Charter. This, by the way, was a problem which was not peculiar to the Government of the Union of South Africa, but must have been considered by other governments as well when they signed the Charter ; and we respectfully submit that the Government of the Union of South Africa, when it signed and ratified the Charter, chose the latter course.

It may also be noted in passing that Switzerland, for example, could have joined the United Nations Organization if a reservation could be made respecting her traditional neutrality as was done when she joined the League of Nations. This is merely cited in passing to show that the Charter is not susceptible of reservations.

Nevertheless, even on the assumption that the Union of South Africa could have made a reservation concerning the applicability of Chapters XI and XII of the Charter to the Territory of South-West Africa, it is our humble submission that such a reservation should have been made either at the time of its signing or its ratification of the Charter. It appears from the record, however, that no reservation whatsoever was made by the Government of the Union of South Africa at the time of the signing of the Charter on June 26th, 1945, or at the time of the deposit of its ratification on November 7th, 1945.

The Government of the Union of South Africa, however, relies on statements made by its representative in Committee II/4 of the Conference on International Organization at San Francisco as having reserved its position with respect to the mandated Territory of South-West Africa. The paper read by its representative on May 11th, 1945, in Committee II/4 is in part as follows :

> "There is no prospect of the Territory ever existing as a separate State, and the ultimate objective of the mandatory principle is therefore impossible of achievement.
>
> The delegation of the Union of South Africa therefore claims that the Mandate should be terminated and that the Territory should be incorporated as part of the Union of South Africa.
>
> As territorial questions are, however, reserved for handling at a later Peace Conference where the Union of South Africa intends

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[1] Report of M. Renault on the Declaration of London of 1909, *A.J.I.L.*, Vol. 8, Supp., pp. 88, 142.

to raise this matter, it is here only mentioned for the information of the Conference in connexion with the Mandate question [1]."

The Chairman of Committee II/4, however, ruled "out of order" any reference to a specific territory except for purely illustrative purposes [2]. Again, on May 14th, 1945, the representative of the Union of South Africa warned against possible alteration of the terms of existing mandates without the consent of the mandatory Power, and when he reached the point where he said that the case of South-West Africa was brought to the attention of the League Council in 1925, the Chairman again ruled him out of order in this wise :

> "I think the delegate from South Africa is, in effect, endeavouring to get in what has been ruled out. It has been all right up to this point, but as far as the difficulties of South Africa are concerned, I am recommending that it be ruled out, unless the Committee states otherwise. I am not in the least concerned about the ambitions of South Africa; therefore, I rule that the reference to conditions of South-West Africa or claims for taking over the Mandate are out of order [3]."

It would appear from the foregoing that the alleged reservations of the Government of South Africa were not in the nature of reservations but were made for information purposes only, and with respect to portions thereof ruled out of order, the Union of South Africa never appealed from the ruling of the Chair.

Moreover, during the ninth meeting of Committee II/4 on May 23rd, 1945, the Chairman informed the Committee that he hoped that delegations would sign the documents drawn up at the Conference without reservation. He suggested that delegations who wished to record the position of their respective governments on a question before the Committee might send in a short statement which would appear in the Summary Record of the Committee meetings. He indicated that after a question had been voted upon in the Committee, a delegation would be at liberty to have an expression of its dissent from the Committee's action recorded in the Minutes [4]. At the tenth meeting, the representative of Ethiopia took advantage of this ruling to file a statement of its position with respect to the application of the Trusteeship System to territories which may be detached from enemy States, and it was recorded as a "reservation" at the eleventh meeting [5].

So did the representative of Guatemala object to the brief mention in the Rapporteur's report of his delegation's position that trusteeship should not be applied to territories in dispute, and the Committee agreed to have the Guatemalan position recorded as a "reservation" and not as a mere annex to the Rapporteur's report [6]. Argentina also

[1] Verbatim minutes of Technical Committee II/4, U.N.C.I.O. (unp.), Vol. 68 (English), Running No. 33, third meeting.

[2] *Ibid.*, Running No. 34, See also U.N.C.I.O. Documents, Vol. X, p. 434.

[3] Verbatim minutes of Technical Committee II/4, U.N.C.I.O. (unp.), Vol. 68 (English), Running Nos. 1-4, 4th meeting. See also U.N.C.I.O. Documents, Vol. X, p. 439.

[4] U.N.C.I.O. Documents, Vol. X, p. 475.

[5] *Ibid.*, Vol. X, pp. 485, 499.

[6] *Ibid.*, p. 602. See also verbatim minutes of Technical Committee II/4, U.N.C.I.O. (unp.), Vol. 70 (English), Running No. 27, 16th meeting.

made a "reservation" similar to that of Guatemala, but it is interesting to note that no reservation whatsoever was duly filed and recorded by the Union of South Africa in accordance with the ruling of the Chairman of Committee II/4. Unlike the "reservations"[1] of Argentina, Ethiopia and Guatemala, the alleged reservation of the Union of South Africa does not even appear in the Rapporteur's report[2].

We consider this formality of recording a reservation to be of the utmost importance, otherwise it may be claimed that all objections raised by any representative on any question during the discussions of the Conference should be considered as reservations. For example, the representatives of the United Kingdom and of the Netherlands, like the representative of the Union of South Africa, objected to the "open-door" policy, especially as it affects the former "C" Mandates (which include the territory of South-West Africa) as detrimental to the peoples of those territories[3]. It is interesting to note that the Governments of the United Kingdom and the Netherlands have never pretended that their objections to the "open-door" policy are in the nature of reservations.

Moreover, the chief representative of the Government of the Union of South Africa, Field Marshal Smuts, Chairman of Commission II of the Conference on International Organization, in presenting the report of Committee II/4 to Commission II, made an express admission that Chapter XI applies to all territories, including mandate territories, and moreover, that mandate territories "will fall under the Trusteeship System" as provided for in Chapters XII and XIII of the Charter[4].

Even granting for the sake of argument, but without in any way conceding it, that the Government of the Union of South Africa could, and did, actually make a reservation of its position with respect to the Territory of South-West Africa during the Conference, it is our humble submission that the failure of the Government of the Union of South Africa to renew it at any time during the signature or ratification of the Charter, or to secure the proper assent of other parties to the Charter, decisively invalidates such "reservation".

It is a general principle of international law that a reservation to an agreement made during a conference leading to an agreement is deemed waived by the party making the reservation if it subsequently ratifies the agreement without reservation[5].

It is also an established rule that it is essential to the validity of a reservation that all the other parties to the agreement should assent

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[1] The word "reservation" has been enclosed in quotations for reasons which will be obvious in our further discussion of the validity of reservations.

[2] U.N.C.I.O. Documents, Vol. X, pp. 601-613.

[3] U.N.C.I.O. Documents, Vol. X, pp. 433-434, 440. See also Verbatim minutes of the Technical Committee II/4, U.N.C.I.O. (unp.), Vol. 68 (English), Running Nos. 11-16, 17-18, 27-29, 3rd meeting.

[4] Pp. 678-680. Verbatim minutes of 3rd meeting of Commission II, June 20th, 1945, U.N.C.I.O. Selected Documents (Washington, 1946).

[5] Award No. I (second series) of the Arbitral Tribunal provided for in Article XV of the Agreement with Germany on January 20th, 1930, and referred to in the Final Act of the Hague Conference of 1929 and 1931, delivered on February 16th, 1933; *Reports of International Arbitral Awards*, U.N. Publication, Vol. III, pp. 1371, 1384-1385.

to the making of the reservation, either expressly or by implication arising from acquiescence [1].

There is also considerable authority for the view that, just as it is the full treaty-making authority of the State which must ultimately participate in the making of effective reservations on its own behalf, so it is the same authority which must, in the end, participate in the acceptance of, or consent to, reservations made by other States [2].

There is not on record any assent, tacit or implied, on the part of the other parties to the Charter to any "reservation" whatsoever and howsoever made by the Government of the Union of South Africa. On the contrary, repeated resolutions of the General Assembly by an overwhelming vote, ranging from more than the requisite two-thirds majority to unanimity, asking the Union of South Africa to negotiate and conclude a trusteeship agreement for South-West Africa, negates even the possibility of any implied assent by the other Members of the United Nations to the alleged reservations claimed by the Union of South Africa.

Leaving aside the question as to whether or not the Charter is susceptible of reservations, it is our humble submission that it follows from our exposition that whatever statements might have been made by the representative of the Union of South Africa in Committee II/4 of the United Nations Conference on International Organization at San Francisco, such statements do not have and cannot have the nature and effect of "reserving" the position of the Union of South Africa with respect to South-West Africa: *first*, because, in so far as they claim that the Mandate should be terminated and that the Territory should be incorporated into the Union, they were made for "information" purposes only; *second*, because, in so far as they might evidence any intention on the part of the Union of South Africa not to place South-West Africa under the operation of the Trusteeship System, they were ruled out of order by the Chairman of Committee II/4 and no appeal from the said ruling was made by the representative of the Union of South Africa; *third*, because those statements were not duly filed and recorded as a reservation either in the minutes or in the report of Committee II/4; *fourth*, because those statements were contradicted and hence repudiated by the chief representative of the Union of South Africa (incidentally, the Prime Minister of the said Government) when he presented the report of Committee II/4 to Commission II, of which he was Chairman; *fifth*, because those statements were not renewed at the time the Union of South Africa signed or ratified the Charter; and *sixth*, because the other parties to the Charter never assented to those statements, whether through their representatives to the Conference or through their respective treaty-making authorities.

The Government of the Union of South Africa is fully bound to comply, therefore, with the obligation it has assumed under paragraph 2 of Article 80 of the Charter, to negotiate and conclude a trusteeship agreement for the purpose of placing the Territory of South-West Africa under the international Trusteeship System.

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[1] McNair: *The Law of Treaties* (Oxford, 1938), p. 106; Hackworth: *Digest of International Law* (Washington, 1943), Vol. V, sec. 480, pp. 105 *et sqq.*, and sec. 482, pp. 130 *et sqq.*; Oppenheim: *International Law*, 7th ed., Vol. I, p. 822.

[2] Harvard Research on the Law of Treaties, *A. J. I.L.*, Vol. 29, No. 4, October, 1935, Supp. Sec. II, p. 851.

We propose next to take up the international obligations incumbent upon the Government of the Union of South Africa with respect to the Territory of South-West Africa in view of the repeated resolutions of the General Assembly asking the said Government to negotiate and conclude a trusteeship agreement for the said Territory.

III. *What are the international obligations of the Union of South Africa, if any, arising from the Resolutions of the General Assembly of February 9th, 1946, December 14th, 1946, November 1st, 1947, November 26th, 1948, and December 6th, 1949?*

During the first part of the First Session of the General Assembly, a Resolution on Non-Self-Governing Peoples was adopted on 9th February, 1946, in which it was provided among others that:

> *"With respect to Chapters XII and XIII of the Charter, the General Assembly:*
>
> . . . . . .
>
> 4. *Invites* the States administering territories now held under mandate to undertake practical steps, in concert with the other States directly concerned, for the implementation of Article 79 of the Charter (which provides for the conclusion of agreements on the terms of trusteeship for each territory to be placed under the Trusteeship System), in order to submit these agreements for approval, preferably not later than during the second part of the First Session of the General Assembly."

Mr. Dulles (U.S.A.), in moving the adoption of the foregoing Resolution, said:

> "By this resolution, the United Nations calls upon the mandatory States, in concert with the other States directly concerned, to conclude trusteeship agreements for subsequent submission to this Assembly, preferably not later than our next meeting [1]."

This Resolution was adopted unanimously, together with the affirmative vote of the Government of the Union of South Africa [2].

Mr. Nicholls, the representative of the Government of the Union of South Africa, participated in the deliberations of Committee 4 of the Preparatory Commission which recommended the foregoing Resolution, although he later reserved his position until the General Assembly met. At the tenth meeting on December 10th, 1945, he commented on the time-limit for the submission of trusteeship agreements which he considered insufficient. He preferred that the United Kingdom modification, reading "at the earliest possible opportunity thereafter", should take the place of the original Yugoslav wording which required submission of the trusteeship agreement by "the second part of the First Session of the General Assembly [3]".

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[1] P. 368, Official Records, Plenary Meetings, First Part, First Session, General Assembly.

[2] P. 376, *id.*

[3] P. 26, Summary Record, Committee 4. The U.N. Preparatory Commission.

The corresponding paragraph of the draft resolution, as favourably recommended by the Preparatory Commission to the first part of the Second Session of the General Assembly, provides :

> "The General Assembly of the United Nations calls on the States administering territories under League of Nations mandate to undertake practical steps, in concert with the other States directly concerned, for the implementation of Article 79 of the Charter (which provides for the conclusion of agreements on the terms of trusteeship for each territory to be placed under the Trusteeship System), in order to submit these agreements for approval preferably not later than during the second part of the First Session of the General Assembly [1]."

It is interesting to note that although in the general debate on the report of the Preparatory Commission, the representative of South Africa, on January 17th, 1946, "reserved" the position of his Government "concerning the future of the Mandate, together with its right of full liberty of action, as provided for in paragraph 1 of Article 80 of the Charter [2]", no reservation was made by the South-African delegation when subsequently, on February 4th, 1946, the vote was taken unanimously in the Fourth Committee [3], and on February 9th, 1946, when the vote was also taken unanimously in the General Assembly [4]. On the contrary, the Government of the Union of South Africa voted affirmatively for the Resolution, which was unanimously adopted. In connexion with the first statement made by the representative of the Union of South Africa on January 17th, 1946, for the purpose of reserving the position of the Government, it should be noted that this position of the Government of the Union of South Africa was immediately questioned by the representative of New Zealand and other representatives [5].

It is our humble submission that, by analogy with reference to our discussion of the validity of reservations to multipartite treaties, reservations to resolutions passed at international conferences should be formally recorded or reiterated at the time the vote on the resolution is taken. Moreover, we respectfully submit that the practice of making reservations to resolutions passed by international conferences, as observed in the United Nations, is to record such reservations at the time when a vote on the resolution is taken. We respectfully submit, therefore, that even if the representative of South Africa made a reservation in plenary session during the general debate even before the Fourth Committee commenced discussion of the draft resolution recommended by the Preparatory Commission with respect to mandated territories, that this should be regarded as waived or withdrawn, because it was not reiterated when the final vote on the Resolution

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[1] P. 49, Report of the Preparatory Commission of the United Nations.

[2] P. 185, Official Records, Plenary Sessions, First Part, First Session of the General Assembly.

[3] P. 35, Official Records, Fourth Committee, First Part of the First Session of the General Assembly.

[4] P. 376, Official Records, Plenary Meetings, First Part of the First Session of the General Assembly.

[5] Meetings of January 21st and 22nd, 1946, pp. 6 *et sqq.* Official Records, Fourth Committee, *ibid.*

was taken both in the Fourth Committee and in the General Assembly, and because the Union of South Africa voted affirmatively for the Resolution.

A Member of the United Nations who participates in the deliberations of the General Assembly and votes affirmatively for a particular resolution adopted by the Assembly, is legally bound by the terms of that resolution. I quote the following statement from the *Digest of International Law*, edited by Judge Hackworth [1]: "Resolutions of international conferences, depending upon their character, may be regarded as types of international agreements between States voting in favour of them." As held by the Permanent Court of International Justice in its Advisory Opinion of October 15th, 1931 [2]: "As the representatives of Lithuania and Poland participated in the adoption of the Resolution of the Council of December 10th, 1927, the two Governments were bound by their acceptance of the Council's Resolution, which constituted an engagement between them [3]."

We respectfully submit, therefore, that apart from its obligations under the Charter, particularly paragraph 2 of Article 80, the Government of the Union of South Africa is bound by its acceptance of the General Assembly Resolution of February 9th, 1946, to submit a trusteeship agreement for the Territory of South-West Africa for the approval of the General Assembly, in accordance with the terms of the said Resolution.

We do not consider it necessary to discuss at length the binding effect of the subsequent resolutions of the General Assembly which, among other things, merely reiterate the Resolution of February 9th, 1946, insofar as the Territory of South-West Africa is concerned. Suffice it for us to indicate that pending the conclusion of a trusteeship agreement for the Territory of South-West Africa, the General Assembly had recommended in its Resolution of November 26th, 1948, that the Union of South Africa continue to supply annually information on its administration of the Territory, in the same spirit as the Union of South Africa had transmitted to the General Assembly its report on its administration of the Territory for the year 1946. And when the Union of South Africa decided to discontinue the sending of such annual information, the General Assembly urged it to resume the submission of reports to the Assembly in a Resolution dated December 6th, 1949.

The resolutions of the General Assembly passed subsequent to that of February 9th, 1946, having been approved by at least two-thirds of the Members of the United Nations as required by Article 18 of the Charter, they are as much binding for those Members who voted against them as they are for those Members who voted for them. The obligation resting on Member States to carry out resolutions of the General Assembly is more than a moral obligation, because it is explicit in the Charter and is therefore in the nature of an international obligation. This obligation may well be regarded as the foundation stone of the Organization.

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[1] Vol. V, Sec. 466, p. 33.

[2] P.C.I.J., Series A/B, No. 42.

[3] Lauterpacht, *Annual Digest of Public International Law Cases*, 1931-1932 (London 1938), pp. 403-406.

In a communication to the Secretary-General of the United Nations dated July 23rd, 1947, the Government of the Union of South Africa informed him that it was not going to proceed with the incorporation of South-West Africa into the Union, which decision agreed in that respect with the terms of the General Assembly Resolution of December 14th, 1946. The Union of South Africa, however, would not comply with the Resolution insofar as it invited the Union to propose a trusteeship agreement for South-West Africa. By its partial compliance with the second Resolution of the General Assembly, the Union of South Africa has to that extent recognized the binding effect of Assembly resolutions passed by the requisite majority of the Members of the United Nations. This partial compliance, however, is not the full measure of the binding effect of General Assembly resolutions, inasmuch as it falls short of the obligation incumbent upon each and every Member of the United Nations to give "every assistance" to the Organization.

This august tribunal, in its Advisory Opinion of April 11th, 1949, had occasion to stress "the importance of the duty to render to the Organization 'every assistance' which is accepted by the Members in Article 2, paragraph 5, of the Charter", and to note "that the effective working of the Organization .... requires, that these undertakings should be strictly observed[1]".

[*Public sitting of May 20th, 1950, morning*]

May it please the Court.

We now come to an examination of the international obligations of the Union of South Africa under the Mandate, which is the first particular question asked by the General Assembly.

IV. *Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa, and if so, what are those obligations?*

It behooves us, in the first instance, to examine the contention of the Union of South Africa that the Mandate for South-West Africa has ceased to exist as a legally enforceable instrument and that, therefore, she has no more international obligations thereunder[2]. It is interesting to note that the Union of South Africa rests its case simply upon an attempt to disprove that "either the Principal Allied and Associated Powers, in favour of whom Germany renounced her overseas territories, or the United Nations, by virtue of succession to, or assumption of, the functions of the League of Nations, can claim legal rights in respect of the mandate[3]".

This line of argumentation is, we respectfully submit, negative in character. Evidently, the Union of South Africa intends to prove by this that it has a right to the Territory of South-West Africa, because in its view neither the Principal Allied and Associated Powers nor the United Nations can claim any similar right. We respectfully submit, however, that the burden of proof is on him who claims a right, and he who asserts a right over something must prove the existence of that right by a clear title and not by the mere circumstance that somebody else may have no such title.

[1] I.C.J. Reports, 1949, p. 174.
[2] Paras. 2-20, pp. 72-77.
[3] *Id.*

It was in favour of the Principal Allied and Associated Powers that Turkey and Germany renounced all rights with respect to their colonies which were later assigned as mandates to the mandatory Powers. It is clear that the mandatory Powers never acquired all the rights and titles of the Principal Allied and Associated Powers over those territories. This is evident from the fact that there were many things which the mandatories could not do at all in those mandated territories, which they could have done if they had acquired all the rights of the Principal Allied and Associated Powers. There were also many things which the mandatories could not do in those territories without the consent of the Council of the League of Nations. Examples may be obtained from the statement presented on behalf of the Secretary-General. Moreover, the mandatories never acquired sovereignty over those territories, as we shall show later in the course of our argument.

Starting with the premise that the Union of South Africa acquired a certain "right" over the Territory of South-West Africa by virtue of the obligations it has assumed under the Mandate Agreement and the Covenant of the League of Nations, the Union of South Africa must prove first that the Mandate Agreement and the Covenant have been terminated before it can exclude other "rights" to the Territory. There is more point, therefore, in the argumentation of the Union of South Africa in connexion with the third question asked by the Assembly as to who has competence to modify the international status of the Territory, to the effect that the dissolution of the League of Nations carried with it the abrogation of the Covenant, including Article 22, which is the foundation of the Mandates System, and consequently, of the Mandate Agreement [1].

We are, however, unable to share this point of view of the Union of South Africa. In the first place, we should like to stress that the Covenant of the League is not an ordinary contract. It is a law-making treaty in the full sense of the term. The ordinary rules on the termination of contractual obligations do not hold good for a great constitutional instrument of this kind.

As one writer has aptly observed, it is legally significant that, when by its Resolution of April 12th, 1946, the Assembly "dissolved" the League of Nations, it did not abrogate, denounce, declare null and void, or otherwise pronounce on the status of the Covenant. It is also observed that the Covenant contains no provision for its cessation either in itself or as Part I of the four Treaties of Peace [2].

It is even more significant that when the League Assembly adopted its resolution on mandates on the same day, it merely noted that "its functions with respect to the mandated territories will come to an end". Nowhere did the Assembly make any pronouncement that the Mandates System had thereby come to an end. On the contrary, the same resolution noted the declarations of all the mandatory Powers that they will continue to administer the territories entrusted to them "in accordance with the obligations contained in the respective mandates, until other arrangements have been agreed upon between the United Nations and the respective mandatory Powers". I shall not quote the declarations made by each of the mandatory Powers, including the Union of South

[1] Paras. 39-44, pp. 82-83.

[2] See Denys P. Myers, pp. 320, 331-332, *A. J. I. L.*, Vol. 42, No. 2.

Africa, inasmuch as they have already been reproduced in the oral statement presented on behalf of the Secretary-General.

In so far as the mandates are concerned, we are merely faced with a situation where the machinery for international supervision provided for in the Covenant has ceased to exist. But there is no reason to assume, in the absence of a positive agreement to that effect, that the international obligations arising from the Covenant have also ceased.

It cannot even be said that the dissolution of the League has extinguished the other party to the Mandate Agreement, because, as stated in the preamble of the Agreement, the Council of the League merely confirmed the mandate given by the Principal Allied and Associated Powers and the terms proposed by them. In the debates in the Union House of Assembly, which we had occasion to quote in the first part of our statement, Prime Minister Smuts, himself one of the framers of the mandate provisions of the Covenant, correctly stated the legal position of the mandatory vis-à-vis the Principal Allied and Associated Powers : "these five Allied Powers distributed these colonies under mandate to other countries and we to-day hold South-West Africa under mandate from the Principal Allied Powers, not from the League of Nations, but from the Allied Powers under the trust that we shall be accountable to the League of Nations for the carrying out of these trusts. That is the only point at which the League of Nations comes into the matter at all."

The following paragraphs of Article 22 of the Covenant constitute the constitutional justification and *raison d'être* of the Mandates System :

> "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them, and which are inhabitated by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
>
> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position, can best undertake this responsiblity and who are willing to accept it, and that this tutelage should be exercised by them as mandatories on behalf of the League."

How can it be argued that the dissolution of the League has also extinguished the "sacred trust of civilisation" entrusted to the mandatory Powers ? The purpose underlying the tutelage of "peoples not yet able to stand by themselves under the strenuous conditions of the modern world" is that those peoples should be brought into a condition necessary for independence.

The Permanent Mandates Commission, in a resolution which had been quoted by the distinguished representative of the Secretary-General, envisaged only two conditions for the termination of a mandate, which, we should like to emphasize, are conditions for emancipation, and the Council of the League in its Resolution of September 4th, 1931, approved the opinion of the Permanent Mandates Commission and decided : ".... that the degree of maturity of mandated territories which it may in

future be proposed to emancipate shall be determined in the light of the principles thus laid down, though only after a searching investigation of each particular case."

Moreover, the provisions of Article 22 of the Covenant and those of the Mandate Agreement clearly show that the peoples of the mandated territories are the main beneficiaries of the System. They may therefore be said to enjoy rights under international law correlative to the duties imposed by the Mandates upon the mandatories for their benefit[1]. Those rights have, moreover, been conserved by solemn engagement of the mandatory Powers, including the Union of South Africa, in paragraph 1, Article 80 of the Charter.

The mere dissolution of the League, therefore, cannot have the effect of abrogating those rights or obligations consecrated in the Covenant.

The rights of the peoples of the mandated territories are, we respectfully submit, capable of enforcement or at least of protection under international law. Although not signatories to the Covenant or the Mandate Agreement, the rights guaranteed them by those international instruments should be protected. The Permanent Court of International Justice has held that if it is shown that the parties intended to confer a right to enforce a treaty on a State not a party to it, there is nothing in international law to prevent effect being given to that intention[2]. While it is believed that mandated territories are not States but only States in the making[3], it may be possible to draw an analogy in order to protect the rights guaranteed the peoples of mandated territories and to enforce the obligations of the mandatory Power. At any rate, the United Nations, as the new guarantor of those rights, would be the proper agency to protect those rights and enforce the international obligations of the mandatory Power.

Chief among the international rights of the peoples of mandated territories is, of course, their right to be developed along the road to independence, and to be emancipated when they have fulfilled the conditions provided in the Resolution of the Council of the League of Nations of September 4th, 1931.

There are also the right of petition and the right to have the administration by the mandatory overseered by an international agency. The Union of South Africa has repeatedly asserted that their obligation to transmit petitions from the inhabitants, as well as to supply annual reports, has become inoperative because of the disappearance of the League and the Permanent Mandates Commission. But is it impossible for the Union of South Africa to transmit such petitions and annual reports to the United Nations, which has succeeded the League of Nations as the personification of the international community ?

With respect to annual reports, the Union of South Africa had already undertaken to submit them to the United Nations, although they discontinued the practice after rendering only one annual report. We shall merely refer to the argument in the Written Statement submitted by the Government of the United States which demonstrates

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[1] See Wright, *Mandates under the League of Nations* (Chicago, 1930), pp. 457, 497.

[2] Free Zones of Upper Savoy and the District of Gex, Series A/B, No. 46, p. 147.

[3] Hyde, *International Law*, 2nd rev. ed., Vol. 1, p. 102.

that by virtue of the authority assumed by the General Assembly under Section C of Resolution XIV—I (1), of February 12th, 1946, to exercise functions or powers entrusted to the League of Nations by international instruments of a political character, at the request of any party, the General Assembly of the United Nations has in fact assumed the function of examining annual reports from the Union of South Africa with respect to the administration of South-West Africa. These reports are by express undertaking of the Union of South Africa to be of the same nature as those it had heretofore rendered under the Mandate [1].

The same argument may be followed in the case of the examination of petitions from the inhabitants of the trust territories, in view of the Resolution of November 13th, 1949, passed by the 4th Committee during the last General Assembly, to grant a hearing to a representative of the indigenous population of the Territory [2]. If any members of the Court are interested, the testimony of the representative of the indigenous population is a matter of official record and forms an annex to the records of the Fourth Session of the General Assembly transmitted to this Honourable Court together with the request by the Assembly for an advisory opinion.

After having solemnly guaranteed under paragraph 1 of Article 80 not to alter the rights of the peoples of the mandated Territory of South-West Africa pending the negotiation of a trusteeship agreement, the next step required of the Union of South Africa is to enforce those rights, the most immediate of which is the submission of petitions from the inhabitants and of annual reports rendering an account of its stewardship, as it had done heretofore under the Mandate.

These are the more important international obligations of the Union of South Africa under the Mandate, which we have endeavoured to show still subsist in spite of the dissolution of the League of Nations. All the obligations of the Union of South Africa under the Mandate, all of which subsist in their entirety, have already been enumerated in the oral statement presented on behalf of the Secretary General. We shall not burden the Court with a repetition of what is, after all, a matter of official and historical record, but by way of footnote, we should like to add that those obligations include, in addition to the observance of the principles embodied in Articles 22 and 23 of the Covenant of the League, the observance of the specific obligations in all the articles of the Mandate Agreement.

V. *Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?*

The last particular question asked by the General Assembly, that is: "Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify

[1] See Written Statements, pp. 107-111.

[2] See pp. 258-267, Official Records, 4th Committee, 4th Session, General Assembly, and annexes.

the international status of the Territory ?", may best be answered by an enquiry, first, as to whether South-West Africa possesses sovereignty over the mandated Territory and, if not, as to how and by whom a Mandate may be modified or terminated. Obviously, if the Union of South Africa has full sovereignty over South-West Africa, then she alone has the competence to modify or determine the status of that Territory.

It is our humble submission that the Government of the Union of South Africa does not possess sovereignty over the Territory of South-West Africa under its Mandate from the Principal Allied and Associated Powers of the First World War and the League of Nations.

While, as pointed out by the distinguished representative of the Secretary-General, there has been no unanimous nor even a preponderant opinion among jurists as to where sovereignty really resides in the case of mandated territories, the authoritative interpretation of the law of mandates is to the effect that the mandatory is *not* sovereign of the mandated territory [1].

The majority opinion of the Appellate Division of the Supreme Court of South Africa in the case of Rex *v.* Christian (1924 A.D., p. 101) cited by the Government of the Union of South Africa in supporting its contention that the Principal and Allied Powers during the First World War divested themselves of whatever title they might have had over the Territory of South-West Africa the moment they assigned the Mandate to the Union of South Africa and the said assignment together with the terms of the Mandate were confirmed by the League of Nations, admitted that the mandatory was not fully sovereign over the Territory in the international sense.

Summarizing a study made on the practice of the Government of the Union of South Africa as mandatory Power for the Territory of South-West Africa, Professor Wright came to the conclusion that "In South Africa there thus seems to be a tendency greater than elsewhere for the legislature, the executive, and the courts to regard the mandated Territory as under the mandatory's sovereignty, but neither legislative, executive, nor judicial authorities have been unanimously or even in a majority of that opinion, and there has been unusual recognition of the limitations imposed by the Mandate." Going further, the same author concluded that "In general, the British Dominions have formally recognized in their legislation that their authority to administer the Territory flows not from sovereignty but from their designation as mandatories and have enacted the mandate limitations as law applicable by their courts [2]." The exposé made by the distinguished representative of the Secretary-General on the decisions by the various courts respecting the mandated territories serves but to confirm this view.

The League of Nations had emphasized that the legal relations between the mandatory and a territory subject to its mandate are not those as between a sovereign Power and one of its territories.

The question of the legal relationship between the Union Government and the mandated Territory of South-West Africa first came to a head in the League of Nations, when the Permanent Mandates Commission questioned, during its ninth session, the interpretation of

[1] Wright, *Mandates under the League of Nations* (Chicago, 1930), p. 407.
[2] *Id.*, pp. 427-428.

the "integral part" clause of the Mandate Agreement given in the Parliament of the Union of South Africa in July, 1925. The accredited representative of the Union Government then gave the formal assurance before the Permanent Mandates Commission that South-West Africa would never be actually annexed to South Africa, even if the Mandate were withdrawn; that the procedure would probably be for South Africa to come to the League with a request for the termination of the Mandate when South-West Africa was sufficiently advanced to govern itself; and that two parties were to be considered in addition to South Africa, one of them being the League of Nations and the other an independent South-West Africa which would eventually be associated with the Union [1].

In the report for its tenth session, the Permanent Mandates Commission called the attention of the League to a clause used in the Preamble of two agreements between the Government of South Africa on behalf of the mandated Territory of South-West Africa and the Government of Portugal on behalf of Angola. The Preamble said in part: "And whereas under a Mandate issued by the Council of the League of Nations in pursuance of Article 22 of the Treaty of Versailles the Government of the Union of South Africa, subject to the terms of the said Mandate, *possesses sovereignty over the Territory of South-West Africa*, lately under the sovereignty of Germany...."

The Commission doubted whether the term "possesses sovereignty", even when limited by such a phrase as that used in the Preamble, could be said correctly to define, having regard to the terms of the Covenant, the relations existing between the mandatory Power and the Territory placed under its mandate. The Commission felt in duty bound to bring to the notice of the Council its opinion that a mandatory is not in possession of sovereignty over a mandated area [2].

The Council instructed the Secretary-General to forward the relevant passage of the Commission's report to the Union Government. The Union Government, however, refrained from commenting on this passage of the report, reserving its right to express its views should there be further need [3].

The matter was again brought up in the report of the eleventh session of the Permanent Mandates Commission, and in the fourth meeting of the Forty-sixth Session of the Council of the League of Nations, held on September 8th, 1927, Mr. van Rees, the Netherlands representative, read a report of the Permanent Mandates Commission which stated in part:

> "It seems to me that, from all practical points of view, the situation is quite clear. The Covenant, as well as other articles of the Treaty of Versailles, the mandates themselves, and the decisions already adopted by the Council on such points as the national status of the native inhabitants of mandated territories, the extension to mandated territories of international conventions which were applicable to the neighbouring colonies of the mandatory Powers, the question of loans and the investment of public and private capital in mandated territories, and that of State lands

[1] Minutes of the Ninth Session, P.M.C., pp. 33-35.
[2] Minutes of the Tenth Session, P.M.C., p. 182.
[3] League of Nations Doc. No. 292, 1927, VI, C.P.M. 570.

formerly belonging to the German Government, all have had their part in determining or in giving precision to the legal relationship between the mandatories and the territories under their mandate. This relationship, to my mind, is clearly a new one in international law, and for this reason the use of some of the time-honoured terminology in the same way as previously is perhaps sometimes inappropriate to the new conditions [1]."

The Council adopted the foregoing report on September 8th, 1927. This was noted by the Government of the Union of South-West Africa in a letter to the Secretary-General dated February 10th, 1928, without comment [2].

The question was raised again during the fourteenth and fifteenth sessions of the Permanent Mandates Commission, because the Commission regarded as unsatisfactory the replies received from the Union Government. Finally, the High Commissioner for the Union answered, in a letter dated July 23rd, 1929, that this matter appeared to have been finally disposed of by the Council of the League in its Resolution on September 8th, 1927.

Subsequently, Mr. Procope, representative of Finland, reported to the Council, during its session of September 6th, 1929, that the Union Government had no remarks to make on the report of the Netherlands representative. He stated: "There is no reason to modify, in any way, this opinion, which states implicitly that sovereignty, in the traditional sense of the word, doesn't reside in the mandatory Power." *This was approved by a Resolution of the League of the same date, September 6th, 1929* [3].

The matter was also taken up in the tenth session of the Assembly of the League of Nations, and the Sixth Committee adopted a report to the Assembly expressing the general opinion of all the members of the Committee who participated in the debate, except the representative of the Union of South Africa, that there was no reason to depart from the decision made by the Council on the question of sovereignty in mandated areas in its report adopted in September 1927, and reaffirmed at its meeting on September 6th, 1929 [4].

Finally, in a letter dated May 16th, 1930, the Union Government stated that it accepted the definition of the powers of mandatory contained in the report submitted to the Council by the Netherlands representative on September 8th, 1927, as well as in the report of the Finnish representative laid before the Council on September 6th, 1929, and confirmed by the Resolution of the Council on January 13th, 1930.

It is evident from the foregoing proceedings of the Permanent Mandates Commission and both the Assembly and the Council of the League of Nations, that the League of Nations was of the opinion that the Government of the Union of South Africa does not possess sovereignty over the mandated Territory of South-West Africa, and that the Government of the Union of South Africa itself has expressly acquiesced in that view.

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[1] Minutes of the Council, 45-47, Sessions, pp. 1119-1120.
[2] League of Nations Document No. 73, 1928, VI.
[3] P. 1467, *Official Journal*, League of Nations.
[4] Annex 2, p. 38, *Official Journal*, League of Nations, 1929.

It is respectfully submitted that an interpretation agreed upon by the parties to an instrument is conclusive and binding upon the parties both by the principles of law and by principles of good faith which the law enforces [1].

From the foregoing premises, the conclusion is irresistible that the Union of South Africa, not being sovereign over the Territory of South-West Africa, cannot, by itself and under its sole authority, modify the international status of the Territory.

The Union of South Africa claims, however, that the Mandate has lapsed, that there is no international legal document presently in force limiting its administrative powers with respect to the Territory of South-West Africa, and that therefore it has now the sole competence to determine and modify the international status of the Territory [2].

It is, however, our humble submission that if the Government of the Union of South Africa does not recognize any legal obligations under the Mandate, it cannot claim any legal rights whatsoever over the Territory of South-West Africa.

One cannot claim the lapse of an international agreement for the purpose of repudiating obligations arising thereunder, and at the same time claim rights arising under the same international agreement. The very essence of the terms "mandate", "tutelage" and "trust" used in Article 22 of the Covenant of the League of Nations, connotes obligations rather than rights. It has been aptly stated : ".... the mandatory's rights, like the trustee's, have their foundation in his obligations; they are the tools given him in order to achieve the work assigned to him; he has 'all the tools necessary for such end, but only those' [3]".

The terms and conditions of the Mandate indicate the measure of authority of the mandatories and emphasizes the obligations of each of them [4]. In other words, the Government of the Union of South Africa cannot claim rights under the Mandate, and at the same time repudiate the obligations arising thereunder. Neither can the Government of the Union of South Africa claim more rights than what is actually conferred upon it by the Mandate, or more than is necessary to carry out the obligations imposed upon it by the Mandate.

If, as the Government of the Union of South Africa claims, the Mandate has lapsed, under what right then does it now hold the Territory of South-West Africa ? If, as the Government of the Union of South Africa contends, there is no existing legal instrument limiting its powers with respect to South-West Africa, then under what legal instrument does it now claim authority to administer South-West Africa at all ?

The Government of the Union of South Africa can claim authority over South-West Africa only in virtue of the Mandate by which that Government was entrusted with the administration of the Territory in the first instance. If, as the Government of the Union of South Africa alleges, the Mandate has lapsed, then the Government of the Union of South Africa can have no more rights or authority over South-

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[1] John Basset Moore, *Collected Papers* (New Haven, 1944), Vol V, pp. 179-181; see also Crandall, *Treaties* (2nd ed., Washington, 1916), pp. 383-387.

[2] *P. 83 ; Written Statements.*

[3] J. L. Brierly: *B.Y.B.I.L.*, 1929, p. 219.

[4] Hyde, 2nd rev. ed., Vol. I, p. 102.

West Africa ; in short, whatever rights and authority it might have had over the Territory have, by the same token, also lapsed.

Mere possession of the Territory by the Government of the Union of South Africa cannot ripen into *de jure* title without the consent of the original granter, or unless and until it is recognized by the international community.

When the Principal Allied and Associated Powers assigned the mandate over South-West Africa to the Union of South Africa, they never intended that the title which they acquired from Germany should vest in the Union of South Africa. Otherwise, they would have made an outright cession of the Territory to the Union of South Africa, assuming they could do so under the terms of the Treaty of Versailles, which we contend they could not do. Since then, no affirmative act on the part of the Principal Allied and Associated Powers, either singly or collectively, may be cited to show that they have swerved from that intention. As a matter of fact, the Principal Allied and Associated Powers could not have changed their minds even if they wanted to, if we adopt the theory advanced by the Union of South Africa that they became *functi officio* the moment the Council of the League of Nations approved the Mandate Agreement.

The League of Nations, during its lifetime, either in its capacity of principal in whose behalf the Mandate was exercised by the Union of South Africa, or as quondam representative of the international community, never recognized that the Union of South Africa possessed sovereignty over South-West Africa or that the Union of South Africa had authority to annex the Territory.

And the United Nations, which represents the great majority of the members of the international community, has withheld recognition of any title or sovereignty on the part of the Union of South Africa by categorically refusing to accept its proposal for the incorporation of South-West Africa into the Union, and by reiterating in four Assembly resolutions its recommendation that the Union of South Africa should submit a trusteeship agreement for South-West Africa.

The Union of South Africa cannot even claim title or sovereignty by prescription, because of the lack of *animus* essential to adverse possession, firstly because of its recognition of the authority of the United Nations to approve or disapprove its proposal for the incorporation of South-West Africa into the Union, and secondly because of its decision communicated to the United Nations that it was not going to proceed with such incorporation in deference to the wishes of the General Assembly.

Accordingly, if we concede, as the Government of the Union of South Africa contends, that the Mandate has lapsed, and that the Principal Allied and Associated Powers have divested themselves of their title to the mandated Territory, then the Territory of South-West Africa must revert to the international community.

Therefore, the Government of the Union of South Africa cannot by a unilateral act presume to exercise authority over the Territory or to determine or modify its status as a ward of the international community, except by an act contrary to international law.

It is obvious that we have been proceeding all along on the proposition that the Territory of South-West Africa is a mandated territory and that it continues to be so until it is placed under the international

Trusteeship System established by the United Nations. This is the logical consequence of our affirmative reply to the first particular question asked by the General Assembly as to whether the Union of South Africa continues to have international obligations under the Mandate. This is also the logical consequence of our demonstration that it was never the intention of the framers of the Covenant, or of the League of Nations at the time of its dissolution, or of the framers of the Charter of the United Nations, that the mandated territories shall revert to the status of mere colonies.

The Union of South Africa argues that the Territory of South-West Africa "is not a colony, or an independent State or part of the territory of the Union of South Africa".

But does not its claim that it alone is competent to modify the status of the Territory indicate that the Territory has either become a colony or part of the Union ? The Union devises a new and anomalous category of territories and then says that the status of South-West Africa in international law is *sui generis* and that it is administering the Territory in accordance with a system which is *sui generis*[1]. We should like to know what is a territory *sui generis* in international law. How is it created ? What are its relations to the international community ? Who determines its status in international law ? At the present stage of the development of international law, we respectfully submit that no State may claim rights over any area "which is not a colony or an independent State or part of its territory", simply by calling it *sui generis*. Most certainly not with respect to territory with the international status of a mandated territory.

Who, then, has the competence to modify the international status of the Territory ? We respectfully submit that we have already given an answer in our reply to the second particular question asked by the General Assembly, and that is, that a trusteeship agreement should be negotiated and concluded by the Union of South Africa with the General Assembly for the purpose of placing South-West Africa under the Trusteeship System.

We have also indicated that in the League Assembly Resolution on Mandates of April 18th, 1946, passed on the eve of its dissolution, it contemplated that an agreement should be reached between the mandatory Powers concerned and the United Nations with respect to mandated territories. While the League did not specify what agreement should be reached between the mandatory Powers concerned and the United Nations, it noted the similarity in principles between the Mandate System and the Trusteeship System, and placed on record the fact that the mandatory Powers will continue to administer the mandated territories in accordance with the obligations contained in the respective mandates until such agreement was reached.

As the distinguished representative of the Secretary-General has also pointed out, the General Assembly has repeatedly urged the Union of South Africa to come to an agreement with respect to the future status of the Territory.

The obligation of the Union of South Africa to come to an agreement with the United Nations for the determination or modification of the international status of South-West Africa rests on three foundations,

[1] P. 83; Written Statements, Distr. 50/88.

namely : (1) the obligation it has assumed under paragraph 2 of Article 80 of the Charter to negotiate and conclude, without delay, a trusteeship agreement for the Territory ; (2) the injunction of the League of Nations which alone under the terms of the Mandate Agreement could consent to a modification of the terms of the Mandate ; and (3) the obligation of the Union of South Africa to comply with the will of the General Assembly as the representative of the international community which has expressly taken the Territory under its protection.

We respectfully submit, further, that the agreement to determine and modify the international status of the Territory of South-West Africa must be in the form of a trusteeship agreement as clearly contemplated by the Charter in view of the finding of the General Assembly, when it disapproved incorporation of the Territory into the Union of South Africa, that the inhabitants have not yet secured their political autonomy or reached a stage of political development enabling them to express a considered opinion on such an important question as to the future status of their Territory.

At this juncture, we should like to stress once again what a distinguished member of this august tribunal has often drawn attention to, and that is "the character of the international community and the place in it occupied" by the United Nations as "an institution within the universal international society" whose aims are "of a world-wide nature [1]".

The Preamble of the Charter embodies the quintessence of the aspirations of mankind for a better world. The "purposes" and "principles" in Articles 1 and 2 constitute in practice the test of the effectiveness of the Organization and the expected faithful compliance with the provisions of the Charter [2]. In the words of the International Law Commission, "a great majority of the States of the world have .... established a new international order under the Charter of the United Nations, and most of the other States of the world have declared their desire to live within this order [3]".

Surely this representative of the international community and guarantor of the new world order should have its voice heard in anything which concerns the disposition of mandated territories, especially in view of the recognition of the framers of the Charter that their administration and future status is vital to the maintenance of international peace and security. We hold the view, therefore, that the United Nations, acting under the Charter or in its capacity as representative of the international community, may, in a proper case, decide on the reversion of a mandated territory to the international community—that international community to which the supervision and guardianship of mandated territories were committed in the first place by those who had the authority to dispose of them. Moreover, the United Nations may at the proper time decide that the territory has fulfilled the conditions of the Covenant or of the Charter so as to entitle it to occupy its proper place in the family of nations.

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[1] Concurring opinion of Judge Alvarez, Advisory Opinion of May 28th, 1948, I.C.J. Reports, Vol. 1947-1948, p. 68.

[2] Report of Committee I/1, June 17, 1945, U.N.C.I.O. Doc. No. 944.

[3] Preamble of the draft declaration of Rights and Duties and States prepared by the International Law Commission.

VI. *Summation and conclusion*

Having stated our premises, we respectfully submit to the careful consideration of this honourable tribunal the following conclusions:

(1) That the Territory of South-West Africa is a mandated Territory and as such is under the protection of the international community.

(2) That the Government of the Union of South Africa has the following continuing international obligations towards the Territory of South-West Africa under the Mandate:

(*a*) to follow the principles embodied in Article 22 of the Covenant;
(*b*) to observe the provisions of the Mandate Agreement; and
(*c*) to comply with the terms of the Resolutions of the Council of the League of Nations and of the Permanent Mandates Commission with respect to mandated territories in general and to the Territory of South-West Africa in particular.

(3) That the United Nations, in accordance with the Resolution of the General Assembly of February 12th, 1946, has, by virtue of the Resolution of the General Assembly of November 1st, 1947, and November 26th, 1948, authorizing the Trusteeship Council to examine annual reports of the Union of South Africa, and of the Resolution of the Fourth Committee of November 13th, 1949, giving a hearing to the representatives of the indigenous population of the Territory of South-West Africa—that the United Nations, by virtue of these Resolutions, has in fact assumed the functions formerly exercised by the Permanent Mandates Commission to examine annual reports by the Union of South Africa on its administration of the Territory of South-West Africa and to receive and examine petitions from the inhabitants of the Territory.

(4) That the Union of South Africa cannot exercise more rights or authority over the Territory of South-West Africa, except as may have been entrusted to it by reason of, and in accordance with, the Mandate.

(5) That the Union of South Africa cannot renounce its international obligations towards the Territory of South-West Africa without renouncing whatever rights or authority it may have over the Territory by reason of its having been assigned the Mandate for the said Territory.

(6) That the Union of South Africa has the international obligation, in accordance with the Mandate, the Resolution of the Assembly of the League of Nations of April 18th, 1946, on mandates, the Charter of the United Nations, and the Resolutions of the General Assembly of February 9th, 1946, December 14th, 1946, November 1st, 1947, November 26th, 1948, and December 6th, 1949, not to modify the international status of the Territory of South-West Africa, except to place the said Territory under the international Trusteeship System, by agreement with the United Nations.

(7) That the Union of South Africa has the international obligation to observe the principles of Chapter XI of the Charter with respect to the Territory of South-West Africa.

(8) That the Union of South Africa has the international obligation pursuant to Chapter XII of the Charter—paragraph 2 of Article 80 in particular—in good faith to negotiate and conclude without delay or postponement a trusteeship agreement with the United Nations

for the purpose of placing the Territory of South-West Africa under the international Trusteeship System.

(9) And finally, that the United Nations, as the representative of the international community and as guarantor of the new world order, may, in a proper case, decide on the reversion of the Territory of South-West Africa to the international community, and at the proper time decide that the Territory has fulfilled the conditions for independence, whether under the terms of the original Mandate and the Covenant of the League of Nations, or under the terms of such trusteeship agreement as may be concluded under the Charter of the United Nations.

As we conclude our argument, we cannot but stress the fact that what will be decided here will affect the fate of the voiceless peoples of the Territory of South-West Africa, whose interests the Charter has recognized to be "paramount" and whose well-being the Covenant describes as a "sacred trust of civilization". We have appeared before this honourable tribunal, conscious of our limitations, but only in an endeavour to present a point of view which has been reiterated time and again by the overwhelming majority of the Members of the United Nations.

With the permission of the Court, we should like to make a few further observations to emphasize that the Charter, like the Covenant, is not an ordinary contract, but is a law-making treaty, and more than that, in the words of a great jurist[1], it is a great constitutional document and may require a broader approach than that usually adopted in the construction of international instruments.

The trusteeship provisions of the Charter have been characterized as the charter of human liberty, because the spirit of the formula is independence for all dependent peoples[2]. These provisions are, moreover, part and parcel of the Grand Design that is the United Nations. We humbly urge that in the interpretation of the Charter, the construction should incline against that interpretation which would nullify its great objectives or stultify the Organization and should be in favour of carrying out its provisions and making of the Charter what it is—a living instrument.

We realize that the Court is faced with a tremendous responsibility, for the task entrusted to it by the General Assembly is an extremely difficult one. But we are confident an equitable solution will be found in accordance with the principles of justice and international law.

In concluding our statement, we reiterate our thanks for the attention of the Court.

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[1] Judge Manley O. Hudson, *The Twenty-Seventh Year of the World Court*, A.J.I.L., Vol. 43, pp. 1, 8.

[2] Statement of General Carlos P. Romulo before Commission II, U.N.C.I.O. Documents, Vol. VIII, p. 137.

3. STATEMENT BY Dr. STEYN

(REPRESENTATIVE OF THE UNION OF SOUTH AFRICA)

AT THE PUBLIC SITTINGS OF MAY 20th, 22nd AND 23rd, 1950

[*Public sitting of May 20th, 1950, morning*]

1. Mr. President, on this our first acquaintance with this Court, you will permit me, on behalf of myself and my colleague, who is appearing with me, to express our appreciation of the high privilege of appearing before this Court—before *the* international tribunal to which the governments and the peoples of the world are looking for a dispassionate and objective exposition of the rule of international law, the rule of law which is only too often imperfectly understood and applied or even overlooked altogether in the heat of political debates and in political decisions in other places.

2. May I, at the same time, express our pleasure at being able to appear before this Court in this land of Grotius and Bijnkershoek and the other great jurists who have always placed this country in the forefront of legal science and legal practice, and from whom we in South Africa, under a kindred system of law, have always derived so much fruitful assistance.

3. In regard to the Written Statements before the Court, I propose, Mr. President, with your permission, to deal mainly with the Statement of the United States of America. I propose to do so not because I wish in any way to imply that the other Statements before the Court are less weighty or less worthy of consideration, but merely as a matter of convenience—a matter of convenience arising from the fact that the Statement of the United States is the most elaborate of the Statements placed before the Court by the other governments. With the exception of one or two matters with which I shall deal separately, it covers all the ground covered by the other Statements. If I can succeed in answering the Statement of the United States on those matters on which the Government of the United States do not agree with the Union Government, I feel that I may claim to have answered also the other Statements, except, as I have already said, on certain other matters which will still remain for separate attention.

4. But before I deal with the Written Statements, you will permit me, Mr. President, a passing reference to the very informative oral statement of my learned friend, Dr. Kerno, the representative of the Secretary-General of the United Nations. In regard to his statement, there is really very little that I wish to say. He has referred at some length to certain political discussions before the United Nations. In that, I do not desire to follow him, because I believe that those discussions are irrelevant to the purely legal questions before the Court, and because, I submit, this Court will not hesitate to treat them as such.

5. He has also dealt in some detail, as the distinguished representative of the Philippines has likewise done, with the question of sovereignty under the mandates. Now, also in this, I do not propose to follow

him. The location of sovereignty under the Mandates System has been investigated by many eminent jurists for many years. They have been unable to come to any agreement as to where it might be found. I would submit, Mr. President, that it would serve little purpose to pursue that enquiry further for the solution of the matters before this Court. Sovereignty—wherever it may have resided in the case of mandates—was something to be deduced *from the actual relationships under the mandates*. It was a conclusion to be drawn by jurists from the international rights and obligations under the Mandates System. The converse procedure, that is, to deduce the relevant international rights and obligations from the location of sovereignty, would have been both illogical and unrealistic. As sovereignty itself depended on these rights and obligations, these rights and obligations could not be deduced from sovereignty. It is not apparent, therefore, what purpose the consideration of these theories as to sovereignty can now serve. They were based upon the relationship existing under the mandates at a time when the League of Nations was still in existence. With the disappearance of the League, these relationships have undergone a radical change, so that conclusions drawn from them, as they existed before the dissolution of the League, cannot command acceptance to-day. We are faced with new relationships of which a definition has still to be given, and when the nature of these new relationships has been established, theorists will perhaps begin a new quest after this elusive location of sovereignty. But that, in my submission, is not the task of this Court. What the Court has been asked to do is to express an opinion upon the international obligations indicated in the Assembly Resolution before the Court. These obligations cannot be deduced from any preconceived ideas of sovereignty, based upon conditions which have undergone such important changes. It is the concept of sovereignty itself which would have to be deduced from these obligations or the absence of them. I do not believe, therefore, that it would be of any assistance to the Court if I were to enter into a discussion of sovereignty under the Mandates System.

6. The representative of the Secretary-General has touched also upon a number of other points with which I need not deal separately, however, as the views of the Union Government on these points will, I hope, appear from the general line of my argument.

7. May I now return, Mr. President, to the Written Statements.

In dealing, then, more particularly, with the very exhaustive argument put forward by the Government of the United States, there is a preliminary point (although perhaps not one of any great substance) which it is necessary to mention by way of clarification. On pages 92 and 93 of the Written Statement, there is a reference to the special position of the United States in regard to mandates. It is pointed out there that although the United States did not ratify the Treaty of Versailles, it was, by the Treaty of Berlin, accorded all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles. That is, of course, correct as far as it goes. There are, however, other facts which might be mentioned in this connexion. They are the following : The Treaty of Versailles (by Article 119 of which Germany renounced all her rights and titles over her oversea possessions) went into effect on January 10th, 1920. The Mandate for South-West Africa was confirmed and its terms were defined by the

Council of the League of Nations on December 17th, 1920. The Treaty of Berlin was signed only on August 25th, 1921, and ratifications were exchanged on November 11th, 1921. When the Treaty of Berlin came into force, therefore, South-West Africa had already been disposed of and Germany retained no rights in respect of this Territory which she could confer upon the United States. That Treaty could, accordingly, not affect the *locus standi* of the United States in relation to this Territory. As already pointed out in paragraph 9 of the Union Government's Written Statement, no subsequent agreement was entered into between the Union Government and the Government of the United States in regard to this Territory. It is not, however, the contention of the Union Government that these facts do in any way invalidate or weaken the mandatory dispositions made in respect of South-West Africa at the time. There would be no need, therefore, for me to elaborate this point any further.

8. Coming to the substance of the arguments by which the United States has endeavoured to show that the Union of South Africa has certain international obligations in respect of South-West Africa, it will be apparent that these arguments are to a very large extent based upon the contention—perhaps I should say the assumption—that the Mandate is still in force.

9. In dealing with the continued existence of the Mandate, the United States has put forward *inter alia* the propositions, firstly, that the Mandate has not expired according to its terms, inasmuch as it has not been terminated under Article 7 of the Mandate and inasmuch as South-West Africa has not been incorporated into any other country ; and secondly, that the Mandate was not terminated by the Second World War. These propositions the Union Government do not propose to refute. They have only one comment to make : in putting forward the contention that the Mandate was not terminated by the Second World War, the Government of the United States refer to the Mandate as a "multipartite" agreement. It is not quite clear what is meant by "multipartite" in this connexion. If by that expression it is meant to convey that every Member of the League was a party to the Mandate, the Union Government would wish to point out that that would be a proposition which could not be justified, either in fact or in law. The Mandate was not an agreement between the Union Government and every individual Member of the League, but between the Union Government and the League as a distinct international entity. Governments of States which were Members of the League did not sign the Mandate or signify in any other way their acceptance as individual parties to it, as they naturally would have done had they been such individual parties. Neither did they, as far as the Union Government are aware, observe the ordinary processes of ratification. The Union Government, at any rate, have never been notified of any such ratification by individual States. Their mere participation as Member States in the procedures of the League could not in itself make them separate parties to the Mandate. In fact, those who became Members of the League after the Mandate had been confirmed had no part at all in the procedures culminating in the Mandate. As Members of the League, they all had, of course, a certain *locus standi* in regard to the Mandate, but when they ceased to be members, as all of them eventually did, upon dissolution of the League, they lost also that *locus standi*. The

Union Government cannot agree, therefore, that the Mandate for South-West Africa was a multipartite agreement in the sense that Members of the League were individual parties to it who would then continue to be parties to it even after they had ceased to be Members.

10. There is, however, Mr. President, also a third proposition put forward by the United States, namely, that the dissolution of the League of Nations and the establishment of the United Nations did not end the Mandate.

11. In regard to the establishment of the United Nations, the Union Government do not propose to argue that that in itself had any effect upon the existence or otherwise of the Mandate. They nevertheless would draw attention to what appears to them to be the true meaning of the so-called "conservatory clause", that is, Article 80 of the Charter, which provides that until trusteeship agreements have been concluded, nothing in Chapter XII "shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties". There seems to be an impression that by this provision the United Nations ensured that the mandates, which were undoubtedly in force at the time, would continue in force until trusteeship agreements were concluded, whatever else might happen. In the submission of the Union Government, this impression is entirely erroneous.

12. Article 80, in so far as it relates to mandates, does not say any more, and cannot possibly mean any more, than that the provisions of Chapter XII—*and those provisions only*—should not be construed as altering the rights under the then existing mandates, or the terms of those mandates. Article 80 does *not* mean, and the United Nations were not competent to make it mean, that subsequent action taken by the then still existent League should not be construed as altering such rights or terms. Action taken by the League, within its *own* sphere of competence, could in no way be affected by any provision in the Charter of the United Nations. Article 80 operates, then, as a conservatory clause only in so far as it safeguards rights from being altered by the terms of Chapter XII itself, and no further. It cannot safeguard rights which depend upon the terms of other international instruments from alteration by the parties to those instruments. It would remain for those parties to decide whether or not, and to what extent, those instruments are to be altered as a result of the establishment of the United Nations and the adoption of the Charter. The United Nations had no authority to take that decision for those parties. Accordingly, by Article 80, they could not and did not purport to provide that mandates would continue in existence in spite of any subsequent action which might be taken by the League.

13. And that, Mr. President, brings us to the crux of the whole question, namely, the effect upon the mandates of the dissolution of the League. In considering this aspect of the matter, it is necessary to recall that the Principal Allied and Associated Powers were *functi officio* after the mandate had been conferred and confirmed. Between the Union Government and these Powers, in their capacity as such, there was no further relationship, affecting the position of the Union Government, in regard to South-West Africa. They had fulfilled their

function and had passed out of the picture, except of course as Members of the League. There were then left in the field of recognized international entities only the two parties, the League on the one hand, and on the other hand the Union Government. In terms of Article 22 of the Covenant, mandates were held on behalf of the League, and in terms of the Mandate for South-West Africa itself, the Union Government explicitly undertook to exercise the Mandate on behalf of the League. The League was the mandator; the Union Government the mandatory. From its very nature, this mandatory relationship, in which ever way we construe it, requires more than one party, one of whom must be the mandator. It could not stand with only a mandatory as a party to it. That, I would submit, would be a legal impossibility.

14. The mandate instrument, defining this relationship, is subject to the same limitation. If, during the lifetime of the League, the Union Government should have renounced the Mandate, or should have been deprived of it by the League (assuming that the League was competent to do so), then, of necessity, the Mandate would have lapsed, for the simple reason that it could not have remained in force without the mandatory named in it. And in the very same way, the Mandate must of necessity lapse upon the disappearance of the mandator, who is as essential as the mandatory to the existence of the mandatory relationship. With the dissolution of the League, without the effective substitution of another mandator, it was inevitable that also this relationship should automatically be dissolved. With the mandator occupying such an essential place in the whole arrangement, there was no way of avoiding such a result, except the substitution, before the Mandate lapsed, of another mandator, that is to say, if such a substitution could validly be made. As I will endeavour to show in more detail later on, such a substitution did in fact not take place. As between the League and the Union Government, the Mandate therefore came to an end, and that means that, as from the dissolution of the League, there has been no mandate.

15. If the Mandate is to be held to be still in force, the question would have to be answered: to which organization or to which States is the Union Government responsible under the Mandate, now that the League has been dissolved? While the League existed, the Union Government was, of course, responsible to the League. Article 22 of the Covenant, it is true, spoke of a "sacred trust of civilization". On page 29 of the Written Statement of the United States, there is also a quotation from what had been said by President Wilson, when he referred to the world as acting as trustee through a mandatory. Also the representative of the Secretary-General has referred to this concept of the world community as being the ultimate holder of the Mandate. Now, these phrases—"sacred trust of civilization", "the world acting as trustee through a mandatory", and "the world community as the ultimate holder of the Mandate"—are, I would submit, political phrases, from which I must confess I see no way of extracting any precise legal meaning.

16. Mandatories were never responsible to the world at large. The international community, i.e. the community of all recognized States, I would submit, is not a distinct legal entity, capable as such of having any rights or obligations. As such, it is no more than an unorganized collection of States, and it is only by a far-fetched legal fiction

that it could be transformed into a distinct, recognized international entity. Such entities, after all, do not spring automatically from nowhere, without any act or instrument by which they have been constituted, and without the general recognition of members of the world community. They have to be created in some way before they can qualify as juristic persons. The world community, therefore, could not be regarded as such an entity to which a mandatory could be bound, or which could have any rights, obligations or functions in regard to mandates. The League, moreover, could not be regarded as the organ, in any legal sense, of the international community. It was established, not by the international community, but by the more limited number of signatories of the Treaty of Versailles, and all recognized States did not subsequently become Members. In fact, there was no stage at which the League might have been said to represent the whole world. It was at all times the organization, not of the international community comprising all States, but of the Members of the League, a rather more limited category of States.

17. Mandatories, then, were responsible not to this vague fictional entity, the world community, not to each and every recognized State, but only to the League, and only Members of the League were recognized to have any *locus standi* to question the manner in which a mandatory fulfilled its obligations under the Mandate.

18. When, for instance, Germany, before she became a Member of the League, claimed a voice in mandate matters, that claim was not admitted, and the League refused an official answer to the German complaints. The application of Article 22 of the Covenant and of the mandates themselves was regarded as something within the exclusive competence of the League. The right to intervene belonged only to Members of the League.

19. It must follow, therefore, that with the dissolution of the League no State would be left with any such right unless effective measures were taken to preserve that right or to revest it in the former Members of the League, or in those Members together with other States. The world community as such could certainly not claim to intervene in regard to such matters or to be the holder of any rights which would continue notwithstanding the dissolution of the League. Neither could the United Nations *ipso facto* claim to vindicate any such rights, had they existed, as the new organ of the world community. Also, the United Nations is not in any legal sense the organ of the international community of States, and for the same reasons as I have mentioned in the case of the League. The United Nations was established by some only of the recognized States of the world, and as yet, Mr. President, does not represent all of them.

[*Public sitting of May 22nd, 1950, morning*]

20. Mr. President, when the Court rose, I had dealt with the disappearance of the League of Nations, an essential party to the existence of the mandatory relationship, and had pointed out that the concept of the world community as the possible ultimate mandator could not serve to ensure the continued existence of the mandatory relationship upon any valid basis.

21. The legal inevitability in these circumstances of the lapsing of the Mandate and of the rights and obligations arising from it is not dealt with directly in any of the Written Statements before the Court. Apart from this concept of the world community, no Government has attempted to explain how a mandatory relationship is to be continued without a mandator or to whom the obligations of the mandatory would in such a case be owing, or by whom or how these obligations could be invoked against the mandatory. And yet, Mr. President, these are the questions which must needs be answered if the Mandate is to be regarded as still being in force. All that we have in this regard is, firstly, the broad contention that the parties never intended the mandates to lapse, and secondly, that the functions of the League have been transferred to the United Nations.

22. Now, to say that the parties never intended the mandates to lapse could in itself not change the legal position. All that that would amount to, in the absence of effective measures to avoid this result, would be that the parties acted under a misapprehension as to what the legal results of their action would be ; that is to say, of course, if they actually did have the intention ascribed to them.

23. As to that, it is true that at the first part of the First Session of the General Assembly and at the final session of the League, various mandatories spoke in terms of their obligations under the Mandate. It must be borne in mind, however, that when they spoke, also at the final session of the League, the mandates were still in force. The moment of dissolution had not yet arrived. It was perfectly natural, therefore, at that juncture to speak of the present mandated territories, the existing mandates, and the obligations under the mandates. The delegates, after all, were not speaking as lawyers expressing themselves in exact legal terminology, describing the legal position as it would be after the dissolution of the League. They were not attempting to define the legal situation which the dissolution would create. Without analyzing the legal results, they were describing their intentions in language which was perfectly well understood, although no more exact than the phraseology, for instance, of Article 22 of the League Covenant. What they intended to convey, I would submit in more precise legal terms, was that on the dissolution of the League they would continue, as far as the altered circumstances allowed, to honour the obligations of their mandates which had existed before the dissolution.

24. The assurance which they desired to give was that in their actual conduct of the affairs of the mandated territories there would be no change. They would, within the limits of the new situation created by the dissolution of the League, continue to act as if their obligations still existed. In giving this assurance, they were quite evidently not concerned with precise legal terminology, and one should therefore not read into their words a legal construction which they may or may not have had in mind. In any case, even if they had a particular legal construction in mind, that would not prove that that construction is the right construction, nor would the fact that they may have had a particular legal construction in mind be a reason for adopting that construction if it is the wrong construction.

25. In the result, it is submitted, Mr. President, that from the statements of intention here in question, no clear inference can be drawn to the effect that the parties concerned had in fact decided by a mere

declaration of intention to achieve the extremely difficult and elusive result of continuing the mandates as valid legal instruments in spite of the dissolution of the League and the consequent disappearance of an essential part of it.

26. I would submit that a matter of such great difficulty and importance would never have been left to a doubtful inference from general statements of future intentions, nor could it, with any legal efficacy, have been left to such statements. These statements, Mr. President, be it remembered, were made to the expiring League. They could not have been made with the intention of entering into a binding arrangement with the League. Such an arrangement would have been impossible with an organization about to be dissolved. The dissolution would immediately have put an end to the arrangement. Nor were these statements made with the intention of entering into a binding arrangement with the United Nations, and they were not accepted by the United Nations as offers to enter into such an arrangement. Nor were they made to individual Members of the League with any such intention or accepted at any time by Members of the League on that basis. They were not couched in terms conveying any legal binding undertaking and were not noted by the League as conveying any such undertaking, but merely as expressions of intention. Nowhere in these statements is a new mandator mentioned.

27. One is at a loss to discover by what precise legal construction these statements could be said to have resulted in the continuance of the mandates upon a legally valid basis or in the creation of legal obligations towards any State or international organization. There is no indication of the identity of the future parties to such obligations, that is, the parties who would take the place of the League or of Members of the League, the only parties with any *locus standi* in regard to mandates. It is submitted, therefore, that these statements did not have the effect of continuing the mandates on a legally valid basis, or of creating any obligations in terms of the mandates, towards substituted parties.

28. As a corollary, apparently, to the proposition that the mandatories and the Members of the League never intended the mandates to lapse, the Court's attention is also drawn, in the Written Statement of the United States, and also in the oral statements, to the fact that certain Members of the United Nations, and also the United Nations itself in certain resolutions, have accepted the continued existence of the mandates. Now that again, Mr. President, does not seem to take the matter any further. In fact, I find it difficult to understand why these views are referred to at all in this connexion. At the most, they are mere expressions of opinion. These expressions of opinion cannot change the realities of the legal situation. They cannot make new law. If in law the mandates lapsed upon the dissolution of the League, a contrary opinion, however often it may be expressed in the United Nations, could not alter the law, and revive the mandates. Or is it to be supposed that the underlying idea is that where the United Nations have expressed an opinion, the Court should not differ, except for very good reasons? That the United Nations could always load the dice, as it were, by expressing definite convictions beforehand? That, Mr. President, it is submitted, would be an approach which this Court would reject in no uncertain terms. And that, I hope, will also

serve as an answer to the reference which the representative of the Secretary-General has made, in the concluding portion of this satement, to the intentions of the United Nations in this connexion.

29. But apart from this, it does appear to be somewhat anomalous to quote to the Court, in a matter submitted to the Court for an advisory opinion, the opinion of the United Nations, which is itself asking for an opinion. It is not apparent what persuasive force the opinions of the United Nations could have, in a matter in which it is itself seeking the Court's guidance. For it must be obvious that the Court has been asked for its opinion, on a matter with regard to the legal aspects of which there is no general certainty in the United Nations. It cannot now be contended, therefore, that the Mandate continues to exist, because individual Members of the United Nations have said so, or because the General Assembly was, or perhaps still is, under that impression. It is accordingly submitted that the opinions expressed on this question in the United Nations are hardly relevant, that they should not carry any persuasive weight with the Court in regard to the issues before it, and that the Court will not allow them, conditioned as they are by political motives, to prejudice the decision of a purely legal question.

30. With your permission, Mr. President, I come, then, to the further contention that the functions of the League with respect to mandates have been transferred to the United Nations. In connexion with this contention, it is necessary to point out that the continued existence of the Mandate for South-West Africa can only be saved by a transfer to the United Nations, if the United Nations, by such transfer, in fact became the mandator in the place of the League. In order that this might happen, it would be essential for the transfer to have taken place either before or *pari passu* with the dissolution of the League. The reason for saying this is that a new mandator could only, if at all, in the circumstances which obtained at the time, have been substituted by the League itself, acting with the consent of the other party, i.e. the Union Government. If the League was dissolved before such transfer had been effected, the transfer would become impossible, as the only possible transferor would then have disappeared, the Mandate would have lapsed, and no transfer of functions under a non-existent mandate could possibly take place.

31. In their Written Statement, the Union Government have already dealt with the possible succession of the United Nations to the League in regard to mandates. In view of the fact that so much of the arguments advanced in other Written Statements and in the oral statements stands or falls with this concept of a succession or transfer, it is necessary that I should deal with it more fully. To this end, it is necessary to examine more closely, first of all, the relative resolutions passed by the United Nations and the League, and thereafter to examine the subsequent events in the United Nations.

32. The relative resolution passed by the United Nations is Resolution XIV, of 12th February, 1946. A perusal of that Resolution will show, Mr. President, that the word "transfer" does not occur anywhere in it. All that the United Nations did by that Resolution was to express its *willingness in principle*, after due *examination*, and without any obligation, to *assume* the exercise of certain functions and powers previously entrusted to the League of Nations. Certain functions were specifically

detailed in paragraphs A, B and C of Part I of the Resolution. These were :

(1) Functions relating to the custody of the original signed texts of certain instruments, the receipt of additional signatures and of instruments of ratification, accession and denunciation, and such like matters.

(2) Functions and powers of a technical and non-political character, under instruments intimately connected with activities which the United Nations, will or may continue. It was necessary to examine these carefully, and the matter was referred to the Economic and Social Council.

(3) Functions and powers under instruments having a political character. Here it was decided that the General Assembly would itself *examine,* or submit to the appropriate organ of the United Nations, any *request* from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by such instruments. In view of certain submissions made to the Court, it is important to note here that before the assumption of any such functions there was to be a *request* by the parties, which would be *examined* by the General Assembly. Mandates as such are nowhere referred to.

33. By Part II of this Resolution, it is stated, *inter alia*, that the Economic and Social Council should, "on or before the dissolution of the League", assume and continue provisionally the work hitherto done by the Economic, Financial and Transit Department, the Health Section, and the Opium Section of the League, and the secretariats of the Permanent Central Opium Board and Supervisory Body. There is no mention of the Mandates Commission. The Resolution then goes on to deal with such matters as the taking over of the library and archives, and other assets of the League.

34. There are two things in Part II of this Resolution which are, in my submission, of particular significance. The one is that, while the Resolution deals expressly with the assumption of certain functions of specified departments of the League, there is no mention of mandates as such, of any League functions relating to mandates, or of the department of the League dealing with mandates. The other is that, in dealing with the functions of these specified departments of the League, the United Nations directs the Economic and Social Council to make arrangements for the assumption of these functions "on or before the dissolution of the League". In all other cases, the Resolution seems to contemplate action *after* the dissolution of the League. It is only in the case of the functions of these departments of the League that the precaution is taken to provide for their assumption *on or before* the dissolution. Now, why this special precaution ? One can only presume that the United Nations realized that they were here dealing with functions exercised by the League, under the Covenant of the League ; that with the dissolution of the League the Covenant would cease to be operative ; that these functions would accordingly lapse, and that, if they were to be taken over by any organ of the United Nations, they would have to be taken over on or before the dissolution of the League. They seem to have been alive, therefore, to the possible legal complications to be expected upon the dissolution of the League and the cessation of its functions. And yet, in regard to mandate functions, we look in vain for any similar precaution calculated to ensure that *those* functions would pass to the United Nations by an unquestionable procedure. There is certainly no evidence here of any contemplated substitution of the United Nations,

as mandator in the place of the League, or of any transfer of functions, on or before the dissolution of the League.

35. Let us now turn to the final resolutions of the League. The Assembly of the League had before it Resolution XIV of the United Nations, and proceeded to deal with the assumption by the United Nations, in terms of that Resolution, of certain functions and powers of the League. It adopted certain corresponding resolutions, in regard to the custody of the original texts of international agreements, and in regard to its functions and powers of a technical and non-political character. It made provision for the transfer of certain rights of property to the United Nations, and appointed a Board of Liquidation to wind up its affairs. Nowhere was any provision made, in regard to mandates, for any direct substitution of the United Nations for the League, or for any transfer to the United Nations of any function of the League. Unlike the United Nations, the League dealt specifically with mandates, but in the Resolution dealing with the mandates, there is not even a reference to the possible assumption by the United Nations, in terms of Resolution XIV, of any function of the League. In substance, the League did three things only:

(1) It recognized that its own functions would come to an end.

(2) It noted that the Charter embodies principles corresponding to those declared in Article 22 of the Covenant.

(3) It *took note* of the *expressed intentions* of the Members of the League then administering territories under mandate.

None of these things, I would submit, Mr. President, could effect any substitution or transfer.

36. From an examination of the relative resolutions of the United Nations and of the League, therefore, one can only conclude that it was not thought necessary to arrange for the immediate substitution of the United Nations as mandator, or for the immediate transfer of any mandate functions to the United Nations, or to take any steps corresponding to those taken in the case of other League departments, to ensure that mandates would be kept alive. If it is right to say, as I submit it is, that a mandatory relationship, without a mandator, is something juridically impossible, it must follow that the mandates lapsed when the League disappeared. Both Organizations were content to rely, instead, upon the expressed intentions of the mandatories, and their good faith in carrying out those intentions.

37. In any case, even the most ardent supporters of such a substitution or transfer would no doubt concede that no arrangement having any such effect could validly have been made without the consent of the mandatories. The Union Government is not aware of any such arrangement having been made, and did not at any time consent to it. It is with some surprise, therefore, that the Union Government learns from the Written Statement of the United States (p. 97) that the Union, together with the other remaining Members of the League and other States, has generally (i.e. also in regard to mandates) entrusted the United Nations with functions formerly exercised by the League. Only the functions of specified departments, other than the Mandates Department, could be said to have been so entrusted. As to the rest, that was left to subsequent action, where such action would be both possible and expedient.

38. Mr. President, that brings us to the subsequent events in the United Nations. The question which is here raised in the Written Statements is whether the United Nations have at any time after the dissolution of the League, in terms of Resolution XIV, paragraph 1 (*c*), assumed any of its functions in regard to mandates. This question could really only be examined on the assumption that the Mandate for South-West Africa has not lapsed. If it ceased to exist, there would be no functions to assume under it. What Resolution XIV contemplates, I submit, Mr. President, is not the assumption of functions under agreements which have lapsed, but the assumption of functions under agreements which continue in force, notwithstanding the dissolution of the League. Let us suppose, therefore, for the sake of argument, that the Mandate did not lapse. Has the United Nations, then, assumed any such functions?

39. As already pointed out, Resolution XIV-1 (*c*) postulates a request by the parties and an examination of that request by the General Assembly. The Government of the United States have advanced the argument that the furnishing of a report on South-West Africa for the year 1946, by the Union Government, was such a request. They say, at page 109 of the Written Statements: "it would seem that the Union of South Africa has taken the necessary steps to place the matter before the General Assembly, and that the Assembly has provided for assumption of the League of Nations function in mandate reporting".

40. The Union Government are sure that other Members of the United Nations would be as surprised as they themselves are to learn now, for the first time, that a request has been addressed to the General Assembly, in terms of Resolution XIV-1 (*c*), that that request has been examined by the General Assembly, and has been granted by it—all this without a single word of reference to the Resolution itself and without any indication whatsoever that Members of the United Nations (including the United States of America) were purporting to act in terms of that Resolution. There certainly has never been a specific request, or an examination of any such request, or any resolution by the General Assembly assenting to any such request.

41. It is very significant, moreover, that in the Statement of the Government of the United States the exceedingly wide proposition on page 97, that the United Nations has generally been entrusted with functions formerly exercised by the League, should, on pages 109 *et sqq.*, be qualified to this extent, at any rate, that, allegedly in terms of Resolution XIV-1 (*c*), the function actually entrusted was only the function to examine reports.

42. In view of the United States contention, it becomes necessary to reiterate what was stated by the South-African Government in the past in connexion with reports, and to show that the furnishing of information on South-West Africa to the United Nations, although it arose out of the desire to give effect to the expressed intention of administering the Territory in the spirit of the Mandate, did not imply in any way that the United Nations was being requested to invest itself with the supervisory functions of the League.

43. At the 19th meeting of the Fourth Committee, Field Marshal Smuts stated that "the Union would, in accordance with Article 73, paragraph (*e*), of the Charter, transmit regularly to the Secretary-General of the United Nations for information purposes, subject to

such limitations as security and constitutional considerations might require, statistical and other information of a technical nature relating to economic, social and educational conditions in South-West Africa[1]". That, Mr. President, was the first statement made by a South-African representative, before the United Nations, on the subject of reports.

44. Now, for reasons which are readily apparent, this statement could not qualify as a request to the United Nations to invest itself with the supervisory functions which the League exercised in respect of mandates. In the first place, the reports to be submitted would be "for information purposes", not for any supervisory purpose, such as was served by reports to the League. In fact, the limitation contained in the words "*for information purposes*", *in their context*, is entirely irreconcilable with anything in the nature of the supervisory function exercised by the Permanent Mandates Commission and the Council of the League in respect of mandates. In the second place, the reports were to contain only statistical and other information of a technical nature relating to economic, social and educational conditions in the Territory, and no more. Such reports, Mr. President, would of necessity be quite inadequate for the exercise of any supervisory function. The reports to be made to the League, on the other hand, related to all possible aspects of the administration of the Territory, as indeed they had to if the supervisory functions of the League were to have any real meaning. Both in regard to scope and in regard to purpose, the reports contemplated in the statement made by Field Marshal Smuts, and the reports to the League, differ *toto cælo*. There is no room here, therefore, for any construction by which it might be said that the Union Government, by this statement, requested the United Nations to assume the functions of the League, in regard to reports under the Mandate. It is only by ignoring the essential differences that such a construction could be made to appear at all plausible.

45. But, however that may be, this so-called request (if it is this statement which the Government of the United States have in mind) was not examined at all at the 1946 session. It was made to the Fourth Committee, which was not the competent organ for the assumption of any League function, and it was not repeated in the Assembly. The Resolution passed by the General Assembly in that year made no mention of reports. The 1946 session, therefore, leaves us with no evidence at all of any assumption of any League function in regard to mandates.

46. Mr. President, in a communication dated 23rd July, 1947 (Doc. A/334), the Union Government informed the United Nations that the Union Parliament had adopted a resolution *inter alia* expressing the opinion that the Union Government should continue to render reports to the United Nations Organization, as it had done heretofore under the Mandate. In expressing, in this communication, their confidence that their continued administration of the Territory in the spirit of the Mandate would merit the satisfaction of the United Nations, the Union Government added that, "to that end, they had already undertaken to submit reports on their administration for the information of the United Nations". Perhaps it is this statement which the United States has in mind.

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[1] Official Records, General Assembly, Fourth Committee, 1946, p. 102.

47. If so, it will be observed that the expression of opinion by the Union Parliament was not in this letter followed up by any new approach to the United Nations on the subject of reports. All the Government did was to refer to the undertaking which had already been given, i.e. to the statement made to the Fourth Committee in 1946, and to which I have already referred. This communication, therefore, added nothing which could turn that statement to the Fourth Committee into a request for the assumption of League functions. As far as that was concerned, it left the matter exactly where it had been in 1946.

48. Before the 1947 session of the United Nations, a report on South-West Africa was in fact submitted. The relevant resolution adopted at that session (Resolution 227 (III)) referred, in its Preamble, to this letter of 23rd July, 1947, and to the statement in this letter that the Union Government had undertaken to submit reports. It expressed the hope that the Union of South Africa might find it possible to submit a trusteeship agreement in time for consideration at the 1948 session, and authorized the Trusteeship Council, *in the meantime*, to examine the report and to submit its observations thereon to the Assembly.

49. Here, it may be argued, we at last have, in fact, at any rate, the assumption by the United Nations, in terms of its Resolution XIV-1 (*c*) of the supervisory functions of the League in regard to this Territory. But, Mr. President, what are the facts?

50. Before this Resolution was adopted by the General Assembly, the representative of the Union of South Africa had made a further statement in regard to reports. He reminded the Assembly that the Union Government had expressed their readiness to submit *annual* reports for the information of the United Nations, and added that that undertaking still stood. He then went on to say this: "Although these reports, if accepted, will be rendered on *the basis that the United Nations has no supervisory jurisdiction in respect of this Territory*, they will serve to keep the United Nations informed, in much the same way as they will be kept informed in relation to non-self-governing territories under Article 73 (*e*) of the Charter." This, Mr. President, was, of course, nothing new. What was said here was already clearly implied in the statement made to the Fourth Committee in 1946. The important point is that we have here an express reservation in regard to any supervisory jurisdiction which the United Nations might attempt to exercise in connexion with reports on South-West Africa. Instead of a request, therefore, to assume the functions of the League in regard to this Territory, we have here the clearest possible request *not* to assume those functions. In the face of this, Mr. President, one is at a loss to understand how it could be contended that this Resolution of 1947 constitutes the assumption by the United Nations, at the request of the parties concerned, of the supervisory functions of the League.

51. Such a contention is contradicted not only by this specific reservation in regard to supervisory jurisdiction, but also by the terms of the Resolution itself. The Resolution makes no mention of any function of the League, or of Resolution XIV of 1946, or of *annual reports*, that is, reports for an indefinite period. It mentions only the one report, which was then before the Assembly, and no other. That, surely, Mr. President, could not, by any known precept of logic or reason, pass as an assumption by the United Nations of the *regular functions* of the League, to be exercised in respect of each and every annual report. And

that, according to the contention of the United States, if I understand it correctly, is the function which the United Nations is supposed to have assumed. It is submitted that there is not a trace of any evidence upon which the Court could hold that we have here, in this 1947 Resolution, an assumption of the regular League functions, in pursuance of Resolution XIV.

52. Now, what other evidence is there of such an assumption of functions? Before the next session of the Assembly, that is, before the 1948 session, the Union Government, in forwarding their answers to the questionnaire on this Territory issued by the Trusteeship Council, while they were considering the report submitted by the Union Government, made the following observations in paragraph 2 of the covering letter dated May 31st, 1948, addressed to the Secretary-General: "The Union Government, in forwarding these replies, desire to reiterate that the transmission to the United Nations of information on South-West Africa in the form of an annual report or any other form, is on a voluntary basis, and is for purposes of information only. They have on several occasions made it clear that they recognize no obligation to transmit this information to the United Nations, but in view of the widespread interest in the administration of the Territory, and in accordance with normal democratic practice, they are willing and anxious to make available to the world such facts and figures as are readily at their disposal, and which can be collated and co-ordinated, without placing excessive burdens on staff resources, to the detriment of urgent tasks of administration."

53. In paragraph 3 of this letter of May 31st, 1948, the Union Government recalled that, in offering to submit a report on South-West Africa, they did so on the basis of the provisions of Article 73 (*e*) of the Charter, which calls for statistical and other information of a technical nature and makes no reference to information on questions of policy. The Union Government then proceeded to make it clear that the replies which they were nevertheless giving on certain matters of policy "should not be construed as a commitment as to future policy or as implying any measure of accountability to the United Nations on the part of the Union Government".

54. After this letter, Mr. President, with its specific rejection of any obligation to submit reports, and its equally specific rejection of accountability, that is, of any supervisory jurisdiction, there could hardly have been any question of a request to the United Nations to assume the supervisory functions of the League. The exercise of those functions would of necessity imply an obligation to submit regular annual reports, as well as accountability, the very things which the Union Government had rejected in express terms. The Union Government did not at any time abandon the position taken up in this letter, and there is no evidence of any nature indicating that they have done so. It could not be alleged, therefore, that the Assembly, at the subsequent sessions of 1948 and 1949, had any request of the nature in question before it. The resolutions passed in those years in regard to this Territory certainly do not give the slightest indication of the assumption of any function of the League.

55. I submit, therefore, that there is no ground whatsoever for any such alleged assumption of functions.

56. But if, Mr. President, in spite of the considerations which I have advanced, it should nevertheless be held that the Mandate has continued to exist, I would submit that there could scarcely be found a more appropriate set of circumstances on the basis of which the doctrine of *rebus sic stantibus* could be invoked. It being clear that the United Nations has neither succeeded to, nor assumed, the functions of the League of Nations relating to the Mandates System, certain essential elements of that System must necessarily have ceased to exist in consequence of the dissolution of the League. Even if the Mandate still exists, there is now no international organ competent to exercise the supervisory functions and control of the League. There is no international organ to which the Union Government are obliged to submit reports. There is no international organ whose consent is legally required for modifications of the terms of the Mandate. The League having expired, there are no Members of the League who can claim rights in respect of the administration of the Territory. And finally, there is no State legally competent to refer disputes relating to the interpretation or the application of the provisions of the Mandate to the International Court of Justice, the competence to do so having been limited by Article 7 of the Mandate to Members of the League. All these circumstances indicate a change of so radical a nature in the application of, and in the method of implementing, the Mandates System, that the Union Government would, in my submission, be fully justified in claiming that they are no longer bound by the terms of the Mandate.

Rights of the peoples of South-West Africa

57. It may also be argued, as the representative of the Secretary-General has pointed out, that even though the Mandate has lapsed as between the Union of South Africa and the League of Nations, it nevertheless continues to exist as between the Union and the peoples of South-West Africa. With your permission, I shall now deal with that argument.

58. In order that the peoples of South-West Africa should continue to possess such international legal rights as they may have had under the Mandate, or, conversely, in order that the Union should continue to have any international legal obligations under the Mandate towards these peoples, it is essential that these peoples, as a community, should either have become party to Article 22 of the Covenant or to the Mandate itself, or have accepted what might be regarded in Article 22, and in the Mandate, as a stipulation in favour of a third party, namely, themselves.

59. There is, however, nothing to show that either of those essential requirements has been met. South-West Africa was not a party to the Peace Treaty, or the Mandate, nor could it have become a party to the Treaty or to the Covenant itself or to the Mandate lacking, as it does, the necessary capacity to enter into an international agreement. For the same reason, even if it is admitted that Article 22 and the Mandate contained a stipulation in favour of the peoples of the Territory, that stipulation could not be, and never was, accepted by the peoples concerned in such a manner as to give rise to international legal rights and obligations. That left the League and the Union of South Africa as the only parties to the Mandate.

60. In this connexion, Article 22 of the Covenant would itself appear to provide an adequate answer to the contention that the peoples of South-West Africa were, or are, competent to acquire international legal rights the implementation of which they, as a community, could claim on the international plane. Paragraph 4 of that Article, which refers to the A Mandates, speaks of "certain communities", formerly belonging to the Turkish Empire, which have reached a stage of development where their existence as "independent nations can be provisionally recognized". The word "communities", coupled with the statement that they, the communities, can be provisionally recognized as independent nations, while not necessarily meaning "States", does, however, seem to imply entities to which may be attributed legal personality. And it is only necessary to refer to the Treaty of 1922 between Great Britain and Iraq and to the various treaties to which Palestine was an original party, in order to confirm the legal personality of the A Mandate communities. The next paragraph of Article 22, relating to the B Mandates, refers to other "peoples". The word "peoples" does not, in itself, necessarily imply an international entity, so that factual considerations are to be taken into account in determining whether, in any former B mandated territory, the peoples thereof form a community corresponding to the communities mentioned in paragraph 4 of Article 22. In paragraph 6, however, where we come to C Mandates, the emphasis is placed on the word "territories", and the words "communities" and "peoples" are not mentioned at all.

61. The C Mandates are described as territories which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the mandatory, and other circumstances, can be best administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards provided in the interests of the indigenous population. In so far as South-West Africa is concerned, it would have been entirely inappropriate to have described its population as a community, or as peoples in the sense of a more or less homogeneous entity. The population, Mr. President, consisted of separate collections of tribes of divergent racial origins, having very little in common with each other and in some cases representing what are really primitive survivals of the human race. It could not be said, therefore, that there was anything approaching a nation in this Territory which could claim to represent all the peoples thereof in a broad sense, and which might be regarded as having an international legal personality. The Mandate, moreover, was not accepted by the peoples of South-West Africa, but was imposed upon them from without ; and the rights which they acquired under the Mandate they acquired as individuals and not as a legally competent community. That this is so is confirmed by the circumstance that in paragraph 6 of Article 22 of the Covenant relating to C Mandates, there is no provision corresponding to the provision in paragraph 4, relating to the A Mandates, that the wishes of the communities concerned must be a principal consideration in the selection of the mandatory.

62. While the League of Nations was in existence, third States, if they were Members of the League, had legal rights in respect of mandated territories. The procedure envisaged in Articles 11 (2) and 19

of the Covenant could be invoked in case a mandatory failed to implement its obligations. Moreover, any dispute between a mandatory and another Member of the League relating to the interpretation or the application of the provisions of the Mandate could be submitted to the Permanent Court of International Justice. The League of Nations itself, as an organization, had supervisory powers in respect of the administration of mandated territories and granted to the inhabitants the right to petition in a prescribed manner.

63. It must be clear, however, Mr. President, as I have already pointed out, that with the disappearance of the League, the rights of third States who were Members of the League must necessarily have ceased to exist. Obviously, also, the rights of the League itself must have disappeared with it. At the moment of dissolution of the League, as I have already endeavoured to show, the mandates lapsed and the Covenant itself ceased to be a legally valid document. It follows, therefore, that such international legal rights as the inhabitants of mandated territories might have claimed during the existence of the League, *ceased to exist upon the dissolution of the League. The League itself* was no longer there to exercise its supervisory functions, and third States who were Members of the League had lost their *locus standi* when the League dissolved itself. It was only in their capacity as Members of the League that third States were competent to uphold the rights of the inhabitants of mandated territories or to claim rights for themselves in those territories. Thus when Germany—if we may once more refer to that example—not yet a member of the League, protested that the Belgian law organizing Ruanda-Urundi as a part of the Congo was contrary to the Covenant and stated that "as a signatory of the Treaty of Versailles, the German Government may claim the proper application of Article 22", the Belgian Government correctly replied that "all functions relating to the application of Article 22 of the Covenant are within the exclusive competence of the League of Nations, and so long as Germany is not a member of the League she has no right or title to intervene in such questions[1]". The League itself refused to answer German complaints officially.

64. As I have already pointed out, Mr. President, the United Nations has not assumed any of the functions of the League relating to the Mandates System. The United Nations has, therefore, no supervisory jurisdiction in respect of South-West Africa and is not in a position to claim the enforcement of these rights of the inhabitants, the enforcement of which could have been claimed during the existence of the League. Nor have individual Members of the United Nations any *locus standi* in respect of the administration of South-West Africa. They could have had such a *locus standi* only as Members of the League.

65. It must be concluded, therefore, that the dissolution of the League had the effect of extinguishing all international legal rights and obligations under the Mandates System. The peoples of South-West Africa, not being a community with international legal personality, derived no rights from the Peace Treaty. The Permanent Mandates Commission ruled that petitions from the inhabitants of mandated territories alleging incompatibility of the Mandate with Article 22

[1] League of Nations, *Official Journal*, VIII, 316, 317.

would not be received, but that petitions alleging violation of the Mandate would, thus apparently recognizing that the inhabitants acquired rights only through the latter document.

66. But if the Mandate has lapsed, which we contend is undoubtedly the case, then all the rights and obligations to which it gave rise, including the right of individuals to petition, which was recognized by the League although not provided for in the Mandate, have lapsed with it. There can, therefore, be no force in the contention that the Union of South Africa continues to have international legal obligations *under the Mandate* towards the peoples of South-West Africa. That, of course, you will allow me to emphasize, Mr. President, does not mean that the Union Government do not recognize any obligations at all towards these peoples. What we submit is that there are no obligations which are international legal obligations under the Mandate.

67. With your permission, Mr. President, I now come to the second specific question, the question whether or not there is a legal obligation upon the Union of South Africa to submit a trusteeship agreement in respect of this Territory. There is little that could be usefully added to what is already before the Court in the Written Statements of the Governments of the United States, Egypt and the Union of South Africa. The Government of Poland, in supporting such an obligation to enter into a trusteeship agreement, seems to rely upon the spirit of the Charter and the resolutions taken by the General Assembly. The *terms* of the Charter, in my submission, Mr. President, afford the best evidence of its spirit. They leave no doubt that there is no such obligation. As to the resolutions of the General Assembly, they cannot create a legal obligation where the Charter imposes none. A recommendation of the General Assembly is no more than a recommendation. To say, as the representative of the Philippines has done, that a vote in favour of a resolution creates a legal obligation to comply with that resolution, would be to make a binding convention of every resolution. The representative of the Philippines goes even further. He says that the vote given by the Union Government in 1946 in favour of a *general invitation* to submit trusteeship agreements, created a legal obligation to accept the invitation, and this notwithstanding the fact that it must have been clear from a previous statement made by the Union Government at the time that they did not themselves intend to accept the invitation. That surely, Mr. President, is so startling a proposition as hardly to require any refutation on my part. A resolution of the General Assembly is not, and has never been understood to be, a binding convention or an act of a legislative nature, creating legal obligations, and cannot become such a convention or act by the mere process of repetition. These resolutions, however much they might be calculated to prejudice the consideration of the purely legal issues, cannot change the Charter, the only authority which the United Nations has for taking any resolution at all.

68. The Government of India and the representative of the Philippines also support an obligation in the nature of a legal duty. They seem to rely mainly upon Article 80, paragraphs 1 and 2, of the Charter. That Article has been fully dealt with in the Written Statements of the Governments of the United States, Egypt and the Union of South Africa. These Statements, in my submission, dispose effectively of the Indian Government's contention, and I do not feel that I could take the matter any further, except perhaps to point out that the contention of the represent-

ative of the Philippines that Article 80 (2) contains a *pactum de contrahendo*, seems to proceed from a wrong reading of that Article. In arriving at this *pactum de contrahendo*, the representative of the Philippines seems to read Article 80 (2) as laying down in general that there shall be no delay or postponement in the negotiation and conclusion of trusteeship agreements. It is only by reading it in such a general way that such a *pactum* becomes plausible. But that is not what Article 80 (2) says. It does not say in general terms that there shall be no delay or postponement in the negotiation and conclusion of trusteeship agreements. All it says is that paragraph (1) of Article 80, i.e. the so-called conservatory provision, with which I have already had occasion to deal, shall not be interpreted as giving grounds for such delay or postponement. In other words, having made this conservatory provision, the Charter goes on to say that this conservatory provision is not to be used as an excuse for not negotiating or concluding a trusteeship agreement when such an agreement would otherwise have been concluded. This does not, of course, preclude delay or postponement *on grounds other than the conservatory provision*, and is something far removed from a general *pactum de contrahendo*.

69. Apart from this, this contention by the representative of the Philippines finds a complete answer in the very clear words of Article 77 (2). That Article, by providing that it will be a matter for subsequent agreement *as to which territories* in the categories mentioned in Article 77 (1) will be brought under the trusteeship system, and upon what terms, makes it abundantly clear that it is not merely the *terms* which are to be agreed upon, as would be the case here with such a general *pactum de contrahendo*, but also the identity of the territory to be selected from the categories in question. Subsequent agreement is to determine not only the terms, but also the particular territories to be brought under the system.

70. The representative of the Philippines tries to meet this by saying that there are certain exceptions to the territories which can be brought under trusteeship, and that that explains this provision in Article 77 (2). One class of such exceptions is provided for in Article 78 and another, he says, is to be deduced from the provisions of Article 80 (1). But these exceptions, Mr. President, would be territories which fall outside the Trusteeship System altogether. Article 77 (2) would not apply to them at all. What the representative of the Philippines is now asking the Court to do, is to interpret Article 77 (2), not in the light of the territories to which it does apply, but in the light of the territories which fall outside its scope altogether. Article 77 (2) does not apply to these exceptions. Its meaning cannot therefore be ascertained from these exceptions. The words "subsequent agreement as to which territories in the foregoing categories will be brought under the Trusteeship System" can have a bearing only upon such territories as can be brought under that system, and it is in relation to such territories that these words have to be interpreted, and not in relation to territories which are by the Charter itself placed outside the scope of the Trusteeship System. These exceptions, therefore, cannot serve the purpose for which they have been invoked by the representative of the Philippines. They cannot give Article 77 (2) the meaning put forward by him. Indeed, Mr. President, this alleged *pactum de contrahendo* cannot be

maintained in regard to any of the territories mentioned in Article 77 (1), without doing violence to the clear words of Article 77 (2).

71. The representative of the Philippines seeks to support this contention also by a quotation from a speech made by Field Marshal Smuts in 1946 in the Union Parliament. In regard to this quotation, I would merely observe that its value to the representative of the Philippines becomes somewhat problematic if it is read in the light of the statement made at San Francisco, i.e. the so-called reservation in regard to South-West Africa, which had preceded it, and the subsequent statement by Field Marshal Smuts at the 1946 session of the United Nations, to the effect that the Charter imposes no obligation to submit trusteeship agreements. In any event, Mr. President, I take it that the representative of the Philippines would not want to contend that a statement by a Prime Minister of the Union could possibly have the effect of changing the plain meaning of Article 77 (1), or of any other provision of the Charter.

72. In regard to this so-called reservation, to which the representative of the Philippines has devoted quite a considerable time, I may add that I do not claim that any such reservation was made, in the legal sense. Indeed, with Chapter XII so clearly phrased in explicit permissive language, a reservation, in the legal sense, would have been altogether superfluous. What I do claim is that the San Francisco Conference, at the time it considered the position of mandates, had been informed and knew very well of the intention of the Union Government not to submit a trusteeship agreement, but to take the necessary steps for the incorporation of South-West Africa. It is true that on occasion the statement made at San Francisco was referred to as a reservation. But that was in the course of political debates, and was intended to convey no more than that, at a time when other mandatories intimated their readiness to submit to trusteeship agreements, the Union Government reserved their position in regard to this territory.

[*Public sitting of May 22nd, 1950, afternoon*]

73. Mr. President, having dealt with the first and the second specific questions before the Court, I now come to the third specific question before the Court, the question as to the competence to modify the international status of the Territory. In this connexion, the Government of the United States have raised two contentions, which seem to call for some comment. The first (to be found at p. 133 of their Written Statement) amounts to this, that in terms of a common understanding it is necessary for the Union of South Africa to reach agreement with the United Nations before the status of the Territory can be modified. This contention, if I understand it correctly, seems to be based upon the declaration made by the representative of the Union of South Africa at the final session of the League, and the subsequent action taken in the United Nations in regard to the incorporation of South-West Africa. I take it that in referring to a common understanding, the United States has in mind some binding arrangement, in the nature of an international agreement, and will deal with this contention on that basis.

74. Now, also this contention seems to ascribe to the declaration made to the League in regard to this Territory, and the noting of it by the League Assembly, a legal significance which, in my submission, it does not bear. As I already endeavoured to show, in dealing with the continued existence of international obligations under the Mandate, *that declaration made to the League did not entail any legal commitment* to the United Nations as to any such obligations. I need not take up the time of the Court by repeating the same arguments here. It is necessary, however, to refer more particularly to that part of the declaration which has a direct bearing on this contention.

75. The representative of the Union of South Africa said in that part of his declaration that : "It was the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according to South-West Africa a status under which it would be internationally recognized as an integral part of the Union." He concluded this part of his statement by saying that the Union Government would continue to discharge their obligations under the Mandate "until such time as other arrangements were agreed upon concerning the future status of the Territory".

76. What the Union Government proposed to do, therefore, was "to formulate its case for according to South-West Africa *a status under which it would be internationally recognized* as an integral part of the Union". The emphasis here is upon international recognition. The statement was not intended to imply any admission of incompetence on the part of the Union of South Africa to alter the status of the Territory. After the dissolution of the League, at any rate, the Union would be fully competent to change the status of the Territory, more particularly where the change should be made in order to give effect to the wishes of the population. Even before the dissolution, the status of Syria, the Lebanon and Transjordan had been changed without the League's co-operation or consent. It is true that in its final Resolution the League "welcomed" this change of status. But, Mr. President, is anybody going to say that these States only became independent as from the date of this Resolution, or by reason of the fact that the League "welcomed" their new status ? They had been internationally recognized as independent States before then. Syria and Lebanon had actually already signed the Charter of the United Nations. Or is it to be supposed that their independence had been in a state of suspension in the meantime, and was retroactively established by being "welcomed" by the League, *ex post facto ?* That, it is submitted, would be much too artificial a construction. In fact, they had already become independent by international recognition of their altered status, and the resolution of the League added nothing to this. In the same way, the Union of South Africa would have been competent, more particularly after the dissolution of the League, to implement the wishes of the inhabitants of the Territory, by incorporating it into the Union. But it would, of course, more especially in view of the international concern for mandated territories, desire international recognition of such a step. And it was a formulation of its case for such international recognition which the Union Government were referring to in this statement. As a matter of policy, they did not intend to change the status of the Territory until such time as they would be assured of international recognition of what they proposed to do. In their context, the words "until such time as

other arrangements are agreed upon concerning the future status of the Territory", can refer only to this international recognition which the Union Government intended to seek. Also the Resolution of the League, in so far as it must be taken to note the expressed intentions of the Union Government, has to be interpreted in the same sense. It cannot be said, therefore, that by this declaration to the League of Nations the Union Government sought to place any limitation, or admitted any limitation, upon the Union's competence to alter the status of the Territory.

77. Shortly after this declaration to the League, the Union Government did approach the United Nations in connexion with the incorporation of the Territory. There was nothing in that approach to suggest an admission of legal incompetence to act without the concurrence of the United Nations. The League had been dissolved, and nothing whatsoever had been done at that stage by which the United Nations might have become invested with the relative function of the League under Article 7 of the Mandate. In his statement before the Fourth Committee, the Prime Minister quoted the passage here in question from the statement made by the Union representative at Geneva. It was evident that the Union Government were seeking international recognition for incorporation and not the co-operation of the United Nations as a legal requisite. Neither were they, by the mere fact of this approach, making any offer to enter into any binding arrangement not to act without the consent of the United Nations.

78. The Resolution adopted by the General Assembly, in response to the approach made by the Union Government, gives striking evidence that the General Assembly neither claimed that any binding arrangement had at that stage been entered into, limiting the competence of the Union Government or conferring any right upon the United Nations in regard to any alteration in the status of this Territory, nor purported to accept any binding arrangement in that regard. In that Resolution the General Assembly, while dissenting from incorporation, noted with satisfaction, in the second paragraph of the Preamble, "that the Union of South Africa, by presenting this matter to the United Nations, recognizes the *interest and concern* of the United Nations in the matter of the future status of territories now held under mandate". What we have here, Mr. President, is not an expression of satisfaction that the Union recognizes or seeks a binding arrangement not to act without the concurrence of the United Nations, nor do we have an expression of readiness, on the part of the United Nations, to play its part under any proposed binding arrangement in the determination of the future status of the Territory. There is nothing of that nature in this paragraph of the Preamble. All it refers to is *the interest and concern* of the United Nations in the future status of mandated territories. Even if the declaration made by the Union Government at Geneva had been intended to result, which is not the case, in a binding arrangement with the United Nations, and even if the mere approach made to the United Nations in the circumstances to which I have referred could be construed as the necessary offer to enter into such an arrangement, then this surely could not serve as the necessary acceptance by the United Nations. The wording of such an acceptance would, I submit, have been very different.

79. That no such acceptance was intended is shown by the reference in the penultimate paragraph of this Preamble to the further assurance

which the delegation of the Union of South Africa is there said to have given in regard to the administration of the Territory, pending agreement as to its future status, in the spirit of the principles laid down in the Mandate. Had such an acceptance, with the resulting binding agreement, been intended in the second paragraph of the Preamble, the reference to such a further assurance would surely have been quite redundant.

80. Let us now examine this alleged further assurance. All that was said in this regard is contained in the following sentence in the statement made by Field Marshal Smuts to the Fourth Committee (which, incidentally, would not be the competent organ to enter into any binding arrangement) : "If, however, the Assembly did not agree that the clear wishes of the inhabitants should be implemented, no other course is left the Union Government but to abide by the declaration it made at Geneva, that it would continue to administer the Territory as heretofore as an integral part of the Union, and to do so in the spirit of the principles laid down in the Mandate." This does not purport to make any new offer or to give any new undertaking. It merely takes us back to the declaration of policy made at Geneva, with which I have already dealt. Neither does it purport to repeat the whole of the relevant portion of that declaration. In particular, it makes no mention of any future agreement as to the status of the Territory, and cannot be read to give any undertaking or as accepting any legal limitation in that regard. The Prime Minister limited himself in this statement to the continued administration of the Territory in the spirit of the Mandate. There is no assurance here which could possibly be regarded as a statement intended for acceptance by way of establishing a binding legal relationship in terms of which the Union of South Africa would not be free to act without the concurrence of the United Nations.

81. Before the Assembly, on this occasion, all that was said by the Union representative in the same connexion was the following : "The South-African delegation will report back to the peoples of South-West Africa and will acquaint them with the contents of any resolution passed. For the rest (and this, Mr. President, I submit, is important), the Union Government reserves the position on behalf of the peoples of South-West Africa, as it does its own position as the administering authority. In the meantime, as our leader, the Prime Minister of the Union of South Africa, stated on the Fourth Committee, the Union Government will continue to administer the Territory in the spirit of the Mandate." It will be observed, Mr. President, that the words "in the meantime" do not refer to any period which may elapse before agreement is reached with the United Nations. The possibility or prospect of such an agreement is not here referred to at all. These words follow on the specific reservation of the position of the Union Government, which shows that, in this context, they refer to the period preceding such subsequent steps as the Union Government, having reserved their freedom of action, may decide to take, after having reported back to the peoples of the Territory. They are not connected in any way with the period which may elapse before the Union arrives at any agreement with the United Nations.

82. It follows from this that the statement in the penultimate paragraph of the Preamble to this Resolution to the effect that the Assembly

had been assured by the delegation of the Union of South Africa that, *pending agreement with the United Nations as to the future status of the Territory*, the Union Government would continue to administer the Territory in the spirit of the principles laid down in the Mandate, is incorrect. In fact, no such assurance had been given. No reference had been made at all to any prospective agreement with the United Nations. Also this statement, in the Preamble, therefore, incorrect as it is, cannot serve as an acceptance of any statement made with the intention of entering into a binding arrangement. No such statement had been made. On the contrary, Mr. President, the Union Government had explicitly reserved their freedom of action in regard to incorporation *before* the Resolution had been adopted. If at any time before the adoption of this Resolution any statement had been made, whether at Geneva or in the United Nations, which *could* be construed as an offer to enter into a binding arrangement with the United Nations, then it was withdrawn, before acceptance, by this reservation.

83. It is significant, Mr. President, that in subsequent debates in which it was alleged by some that the Union had, to all intents and purposes, incorporated the Territory, no reliance was at any time placed by anybody upon any alleged binding arrangement between the Union and the United Nations. The alleged incorporation *was* criticized, but it was criticized rather as a breach of the Mandate than as a violation of any agreement with the United Nations, from which one can only conclude that the United Nations, like the Union Government, were at no time aware of any such agreement.

84. There is a further fact which argues against the existence of such an agreement. Had it come into existence, it should, I would submit, Mr. President, have been registered, as required by Article 102 of the Charter. In terms of that Article, every international agreement entered into by a Member of the United Nations is to be registered with the Secretariat and published by it. This applies also to agreements between Members and non-members, or between Members and international organizations, including the United Nations. In fact, in terms of the detailed rules laid down by the first General Assembly in 1946, concerning the registration of treaties, the United Nations itself is required to register *ex officio* every treaty or agreement to which it is a party. It may be argued that this does not apply to purely verbal agreements. But the terms of this agreement, Mr. President, if it exists, are to be found in the recorded statements and resolutions. It would therefore not be a purely verbal agreement, and would, I submit, fall within the terms of this Article. No steps have been taken to have it registered. And that, I would submit, shows that it was not regarded as a binding agreement, either by the Union of South Africa or by the United Nations itself.

85. Even if it exists, therefore, it could in terms of Article 102 (2) not be invoked by any party to it before this Court, which is an organ of the United Nations. It could not be invoked by the United Nations or by the Union of South Africa. It would be anomalous if it could nevertheless be invoked by a Member of the United Nations in connexion with an advisory opinion sought by the one party, the United Nations, in a matter in which the other party, the Union of South Africa, has a particular concern. The adoption of such a procedure would mean that while the parties themselves cannot invoke such an agreement, a third

party which may for some reason have a *locus standi* in a dispute between the parties, could always do so, and the effect, as between the parties, would be the same as if they had themselves been allowed to invoke their unregistered agreement.

86. It is accordingly submitted, Mr. President, that on a proper construction of the facts, the contention made by the United States Government that there is a common understanding, as alleged, in the nature of a binding agreement, cannot be supported. The Court will not impose upon the United Nations and the Union of South Africa, the parties to this alleged understanding, a binding agreement of which both have at all times been unaware. If the Court should not agree with this submission, it is further submitted that because of non-compliance with Article 102, this alleged agreement cannot be invoked before this Court.

87. The second contention of the United States in connexion with modifications in the status of this Territory on which I have to comment is to be found on page 137 of the Written Statement. The contention there is this: "that the General Assembly, upon request from South Africa and other parties, has assumed the exercise of the League of Nations function of consenting or withholding consent to the modification of the South-West Africa Mandate, pursuant to Resolution XIV-1 (1) of the Assembly". We come back, therefore, to Resolution XIV, and to Article 7 of the Mandate, the Article which required the consent of the League Council for any modification of the terms of the Mandate.

88. As I have already explained, when dealing with a similar contention in connexion with supervisory functions, a contention of this nature can only be examined on the assumption that the Mandate did not lapse upon the dissolution of the League. There certainly was no transfer or assumption of the function here in question *before* the dissolution of the League, and if the Mandate did lapse (as in my submission it did), then there would be no function left under the relevant paragraph of Article 7 of the Mandate, which could be assumed in terms of this Resolution XIV, which, insofar as it is here relevant, is a resolution dealing with international agreements which continue in force after the dissolution of the League, and not a resolution which deals with agreements which went out of existence with the League.

89. The assumption that this paragraph of Article 7 of the Mandate continued in force after the dissolution of the League is a particularly precarious assumption to make, inasmuch as this paragraph deals only with the requirement of the consent of the League Council to modifications of the Mandate, and with nothing else. Without the League Council, it becomes meaningless. But let us make this assumption, impossible as it seems, and examine the contention which has been raised.

90. Let me say at once that also here the Union Government have no knowledge of any request for the assumption by the United Nations of the League's function in regard to modifications of the Mandate ever having been made, either by themselves or by any other party. Neither is there, as far as I have been able to ascertain, any scintilla of evidence that the United Nations have at any time been made aware of any such request, or have betrayed any knowledge of the assumption of any such function, in pursuance of this Resolution.

91. As already pointed out, a similar contention was advanced in connexion with an alleged assumption of the supervisory functions of

the League. The arguments which I put forward in that connexion also apply here. But let us again examine the steps by which such an assumption might be said to have taken place.

92. There would be, then, first of all, the presentation of the Union's case for international recognition of incorporation. That, we take it, would have to qualify as the request. The strange thing would then be, here as also in the case of the supervisory functions, that Resolution XIV was never mentioned, and that no function of the League was ever referred to in the whole debate. The Union Government were seeking international recognition for what they proposed to do, not the assumption by the United Nations of any League function. The function in question, moreover (in so far as it may be said to have existed), was by its very nature a continuous function, to be exercised whenever a modification of the status of the Territory was to be effected, by whatever stages, in whatever direction. What was put before the United Nations was a single *ad hoc* proposal. A decision was sought only in regard to the particular question of incorporation. The desirability of assuming the relative alleged function of the League, *ad hoc* or to be exercised as and when occasion may require, was never examined or discussed.

93. The Resolution which was passed (and which, I take it, would have to qualify as the assumption of the function in question) did not mention the League or any of its functions, or Resolution XIV. In fact, Mr. President, before the Resolution was passed, the Union Government had, as I have pointed out in another connexion, reserved its freedom of action in regard to incorporation. That, surely, is conclusive proof that anything in the nature of such a request, if it was ever made, was withdrawn before the request could be granted. If anything, the Assembly had before it, after the Union Government had reserved their whole position in connexion with incorporation, a very positive intimation that the Union Government did not desire any assumption of any such function by the Assembly, and was making no such request. Here also, therefore, one is rather at a loss to find any facts which will bear the construction which the United States is asking the Court to place upon them. It is accordingly my submission, Mr. President, that the Court will dismiss also this contention, as entirely unfounded.

Chapter XI (Procedural)

94. So far, Mr. President, I have confined myself to what appear to the Union Government to be the matters before the Court.

In the Written Statements submitted by the Government of the United States and by the Government of Poland, and also in the oral statements made by the representatives of the Secretary-General and the Philippines, there are references also to the applicability of Chapter XI of the Charter. These Governments to which I have just referred have arrived at the conclusion that this Chapter applies to the Territory of South-West Africa.

95. In regard to this aspect of the matter, the Government of the Union of South Africa assumed that Chapter XI would not be before the Court. The reasons for this assumption were the following :

(*a*) The Resolution by which the Court is being asked for an advisory opinion contains a very specific reference to Chapter XII of the Charter,

and requires the Secretary-General to include amongst the documents to be submitted to the Court the texts of Articles 77 and 80 of the Charter as well as the data on the discussion of these Articles in the San Francisco Conference and the General Assembly. This Resolution makes no reference at all to Chapter XI, or to the text of Article 73, or to the discussion of that Article in the San Francisco Conference. There seemed to the Union Government to be a pointed difference here, to which some significance had to be attached. The representative of the Philippines explains the omission to mention Chapter XI by saying that the Assembly either had no doubt in regard to that Chapter or did not think it of sufficient importance.

(*b*) The proceedings before the Fourth Committee and before the General Assembly, which culminated in this Resolution, seem to show that the omission to refer to Chapter XI was not accidental but intentional. The Fourth Committee had before it a joint draft resolution proposed by the delegations of Denmark, India, Norway, Syria and Thailand (A/C. 4/L. 64). Paragraphs 1 (*b*) and (*c*) of that draft resolution posed the following questions :

"(*b*) Is the Union of South Africa under the obligation to negotiate and conclude a trusteeship agreement for placing the Territory of South-West Africa under the Trusteeship System ?

"(*c*) In the event of a negative reply to the question under (*b*) : Is South-West Africa a territory to which the provisions of Chapter XI of the Charter apply ?"

The delegation of Brazil proposed the deletion of these questions from the draft resolution. This Brazilian proposal was adopted. Accordingly, the draft resolution submitted to the General Assembly contained no reference at all either to Chapter XII or to Chapter XI. Before the General Assembly, however, an amendment was proposed by seventeen delegations (including Brazil) (Doc. A/1197), by which the question now appearing as sub-paragraph (*b*) of the Resolution before the Court was inserted. This sub-paragraph refers to Chapter XII only, and significantly omits any mention of Chapter XI. It is difficult, Mr. President, to avoid the conclusion that the reference to Chapter XI was omitted not by inadvertence but by deliberate design.

(*c*) The discussions before the Fourth Committee and the General Assembly seem to confirm the view that it was never the intention to include this Chapter amongst the matters on which the Court's advisory opinion was desired. In the Fourth Committee, the delegate of France pointed out that the inclusion of Chapter XI would open the very wide question of what constituted a non-self-governing territory. In order to reply to question (*c*) of the joint draft resolution before the Fourth Committee which contained the reference to Chapter XI, the Court would have to determine the meaning of the term "non-self-governing territory", in other words, to give a definition which did not occur in the Charter. If the Court were to give such a definition, the delegate of France contended, that would probably lead to a revision of the list of these territories and the inclusion of territories not at present included.

At a later stage, in explaining his vote against a Philippine amendment which contained a reference to Chapter XI, he stated that Chapter XI had nothing to do with the question.

The delegate of Brazil raised the following objection: The administering Powers considered that they alone were competent to determine which territories were non-self-governing. If, therefore, Chapter XI should be held to apply in respect of South-West Africa, the Union of South Africa would be entirely free to furnish or not to furnish information on South-West Africa. Before the General Assembly, the Brazilian delegate, in expressing his satisfaction at the deletion of the reference to Chapter XI, said the following: "Paragraph (c) (that is, the paragraph referring to this Chapter) appeared to us to be extremely dangerous since, after all, in referring to Chapter XI of the Charter, the General Assembly would practically arrive at the recognition for the Union of South Africa of a right of sovereignty which it has never possessed over the mandated Territory of South West Africa."

The representative of the Dominican Republic (also one of the joint sponsors of the amendment in the General Assembly), introducing the specific reference to Chapter XII, contended, before the Fourth Committee, that the Charter does not provide that former mandated territories should be turned into colonies. He did not think that Chapter XI was applicable, and agreed that paragraph (c) of the joint draft resolution before the Fourth Committee should be deleted.

Now, these discussions, Mr. President, seem to show that for various reasons—on the one hand, the contention that only the colonial Powers are competent to decide whether or not a territory is non-self-governing for the purposes of Article 73; on the other hand, the reluctance to have a former mandated territory classified amongst colonial possessions—for these various reasons it was decided not to include any reference to Chapter XI. The Union Government could only conclude that the object of this decision was to exclude this Chapter from consideration by the Court. Its inclusion would have raised other major contentious issues, more particularly the competency of the colonial Powers to determine the territories in respect of which reports are to be made under Article 73 (e). These issues, apparently, the United Nations did not want to raise for decision by the Court in connexion with the matter of South-West Africa.

(d) The Union Government were also influenced by the fact that on the information to be submitted to the Court, the Court would in any case, even if it were the competent organ for that purpose, hardly be in a position to determine whether or not South-West Africa enjoys a full measure of self-government. In order to determine that question, the Court would require detailed information in regard to the manner in which the constitution of the Territory functions in practice and also in regard to the legislation affecting the measure of self-government enjoyed by local communities of the indigenous inhabitants in their reserved areas and the extent to which, in the actual application of this legislation, they are left to govern themselves. As far as the Union Government are aware, the Court is not in possession of this information, and without it, the Court could not come to any conclusion as to the applicability of Chapter XI to South-West Africa. In this Chapter, moreover, we have to do exclusively, or at any rate—even if it applies to mandated territories—then mainly, with colonies. It has to be interpreted, therefore, with due regard to the relationship between colonies and their metropolitan Powers. That relationship, Mr. President, in my submission, is a domestic relationship of undisputed

sovereignty. The interpretation of that relationship—that is, the question whether or not a colony enjoys a full measure of self-government—would, it is respectfully submitted, be a matter for the metropolitan Power, and not for the General Assembly or even for the Court. And if this Chapter is to be applied also in respect of a former mandated territory, that principle in regard to the interpretation of the relationship would have to be extended to cover also the case of such a former mandated territory.

It would then be for the administering authority to decide whether or not the territory enjoys a full measure of self-government. It is respectfully submitted that the Court would, in any case, not attempt to define the relationship between an administering authority and a mandated territory except upon the fullest information regarding all aspects of that relationship.

(*e*) But even, Mr. President, if the Court should regard the information before it as sufficient for the purpose of determining whether or not South-West Africa is a non-self-governing territory, there would still remain the question whether or not the Union Government, if this Chapter applies, would be bound to transmit reports under Article 73 (*e*). Also this question, it is my respectful submission, would be a question for the Union Government to decide, and not for the Assembly or the Court, on the issues at present before the Court. I make this submission for the following reasons:

In the first place, it will be noticed that the transmission of reports under Article 73 (*e*) is made "subject to such limitation as security and constitutional considerations may require". Of these considerations, security considerations would certainly fall to be determined by the administering authority concerned. That, I take it, could not be disputed. And that being so, it would follow that also constitutional considerations, which are mentioned in the same breath in the same context, would fall to be determined in the same way. The administering authority must be recognized to be the best judge of the extent to which economic, social and educational matters are in actual constitutional practice—which, Mr. President, may be something very different from constitutional theory—left to the local legislature and administrative authorities, whatever the theory of the constitution of the territory concerned may be. Where these matters are by law or in practice left to the local government, it would be constitutionally inappropriate to report on such matters to the United Nations. Indeed, such reports would imply a derogation from the measure of self-government enjoyed by the territory concerned. These are matters of which the administering authority would be the best judge, matters concerning which the administering authority is, accordingly, just as in the case of security considerations, not required by Article 73 (*e*) to defer to the views of other States or of the United Nations.

In the second place, the question of reports on South-West Africa under Article 73 (*e*) would involve a further question which, in my submission, is quite clearly not covered by the Resolution before the Court, the question, namely, whether or not the Union Government would be entitled, on the assumption of the applicability of this Article, to withhold reports because of the manner in which the report transmitted in 1947 has been dealt with by the United Nations.

It would, Mr. President, be the contention of the Union Government that in dealing with that report the United Nations exceeded its authority under Article 73 (*e*) by using the report not for information purposes, as provided in that Article, but for the wholly unauthorized purpose of exercising a supervisory jurisdiction in respect of this Territory ; and that by reason of this unauthorized use of this report, the Union Government would in any case not be bound to transmit any further reports.

There is nothing in the Resolution before the Court to indicate that the Court is asked for its views also on this issue, which is an issue between the United Nations and the Union Government arising from proceedings within the United Nations and not from the status of the Territory as such.

(*f*) There is, Mr. President, also the further consideration that in terms of Article 65 (2) of the Statute of the Court a request for an advisory opinion must contain an exact statement of the question upon which an opinion is required. The very general question, "What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom", did not appear to the Union Government to be such an exact statement. This general question is so wide in its scope that, in itself, it gives no indication as to which of the many possible questions which might be raised, the Court is desired to answer. The exact statements are contained in paragraphs (*a*), (*b*) and (*c*), in which the specific questions are formulated. The Union Government took it, therefore, that the Court would desire to answer the general question by reference exclusively to the specific questions, which are the only questions put in accordance with Article 65 (2) of the Statute, and that for this reason also no comment on Chapter XI was called for.

In all these circumstances, the Union Government refrained from making any such comment in the Written Statement which they have submitted. They assumed that Chapter XI would not be before the Court. I do not propose to deal with Chapter XI, therefore, unless the Court wishes me to do so. If the Court does wish me to do so, I shall, of course, be happy to place before it the views of the Union Government on the applicability of this Chapter.

96. There is also another matter of a similar nature, which I have to mention. In the Written Statement of the Government of India there is the contention in paragraph 26, page 150, that the Union Government, having agreed to submit reports on their administration of South-West Africa for the information of the United Nations, were incompetent to withdraw this undertaking and are obliged to continue supplying such reports. That raises another distinct question, unconnected with the specific questions formulated in the Resolution of the General Assembly.

97. This question seems to be unconnected, moreover, also with the general question regarding the status of South-West Africa. It is not apparent how the alleged obligation to submit reports, if it is to be based upon a separate undertaking, and not upon the Mandate, could be said to affect the status of the Territory. Such an undertaking could be given in regard to any territory, whatever its status might be, and can in itself give no indication of what that status is. The resulting obligation would certainly not be an obligation arising from the status of the Territory. *Ex confesso* it would arise from an alleged undertaking

which cannot be withdrawn. In my submission, therefore, this further question does not fall within the scope either of the specific questions or of the general question.

98. Also in connexion with this question, the Union Government would contend that, even if such an agreement did exist (which, it is submitted, is not the case), the Union Government would be entitled to resile from it, because the United Nations have used the report transmitted in 1948 in a manner which would be contrary to the clear stipulations of this alleged agreement. Also the consideration of this contention as to an agreement, therefore, would lead to this further question, in that way extending the scope of the matters before the Court in a manner not contemplated by the Resolution. Here, Mr. President, as in the case of the applicability of Chapter XI, I accordingly do not propose to enter into the merits of the contention of the Government of India, unless it is the wish of the Court that I should do so.

99. As I have said, I do not propose to deal with the applicability of Chapter XI or with this contention of the Government of India, unless the Court wishes me to do so, in which case I should be happy to place the views of the Union Government before the Court. If the Court does not, I have no further submissions to make, and would close my argument by thanking you, Mr. President, and the members of the Court, for the patient and attentive hearing the Court has given me.

[*Public sitting of May 23rd, 1950, morning*]

Chapter XI (Applicability)

100. In compliance with your invitation, I come now to the applicability of Chapter XI to former mandated territories. The submission I would make here is that Chapter XI does not apply in respect of such territories.

101. It is true, of course, that Article 73 is framed in wide terms. It refers to "territories whose peoples have not yet attained a full measure of self-government". Literally, this would include even territories within metropolitan areas which are inhabited by peoples who have not yet attained such a degree of advancement as to be able to participate fully in the government of the metropolitan areas concerned. (Such territories may be found in various parts of the world.) It is obvious, however, that it could not have been intended to include such territories, and obvious, therefore, that the words "territories whose peoples have not yet attained a full measure of self-government" cannot be given their literal meaning. The generality of these words has to be cut down to exclude at least these territories within metropolitan areas. This already shows that a literal construction could not be maintained and that we have to start with a meaning which is not quite the literal meaning.

102. Chapter XI also cannot, of course, be construed in an isolated compartment, unrelated to the other provisions of the Charter. Originally in the draft which was before Commission II at San Francisco, the present Chapters XI and XII appeared as Sections A and B of a general scheme, comprised within one chapter, each section giving expression to a different aspect of what was basically the same conception. At the

least, therefore, Chapter XI cannot be isolated from Chapter XII. In order to ascertain its true meaning, it has to be read with Chapter XII, and more particularly for our present purposes with Article 77. If that is done, Mr. President, it will be apparent, I submit, that the generality of the opening words in Article 73 has to be cut down further than has already been indicated in connexion with metropolitan areas.

103. Article 77 (1) refers to three categories of territories:

(1) territories held under mandate when the Charter was signed;

(2) territories which may be detached from enemy States as a result of the Second World War;

(3) territories voluntarily placed under the Trusteeship System by States responsible for their administration.

The Charter itself, in Article 77 (2), refers to these as "categories". They are separate and distinct categories. In this Article, the founders of the United Nations were at pains to enumerate, with no possibility of misunderstanding, all the categories of territories which could be brought under the Trusteeship System. No such enumeration is to be found in Article 73. Now, Mr. President, if in Article 73 they had in mind precisely the same territories as in Article 77, this omission becomes difficult indeed to explain, especially in regard to such obvious and important categories as the former mandated territories and the ex-enemy territories which are so specifically mentioned in Article 77. There certainly was no lesser need for clarity in Article 73.

As was perfectly well known at San Francisco, the Trusteeship System is a voluntary system, dependent upon subsequent agreements. There was the obvious possibility, therefore, that some of the mandated territories and some of the territories detached from enemy States might not be brought under the Trusteeship System. In fact, the Conference had before it the most unequivocal intimation that it was not the intention to bring South-West Africa into the new system of trusteeship. There were compelling reasons, therefore, had it been the intention to bring also mandated territories and ex-enemy territories into Article 73, for enumerating the different categories as specifically in Article 73 as was done in Article 77. In fact, not to say so would be to invite dissension if not confusion. In the face of such cogent reasons, it becomes inexplicable why the same committee—if in these two Articles it had in mind the identical categories—should resort to such different terminology in dealing with the self-same territories. From this difference in wording, where such strong considerations clearly called for a scrupulous avoidance of textual divergencies, one can only conclude—indeed, Mr. President, one must conclude—that there is in fact a difference in meaning.

104. Which territories, then, are referred to in Article 73? To this question, Article 77 (1) (*c*) seems to provide the answer: The category there referred to is described as "territories voluntarily placed under the System (i.e. the Trusteeship System) *by States responsible for their administration*". I would like to draw special attention to the words "States responsible for their administration". They are, I submit, of particular significance. If one reads with these words the opening words of Article 73—"Members of the United Nations which have or assume *responsibilities for the administration of territories*"—the connexion between the territories in the third category mentioned in Article 77 and the territories dealt with in Article 73 becomes apparent. Article 77

describes the third category by reference to *States responsible for the administration of certain territories*. Article 73 describes the single category of territories dealt with in that Article by reference to Members which have or assume *responsibilities for the administration of certain territories*. We have here, Mr. President, the two phrases—"States responsible for the administration of certain territories" in Article 77 and "Members which have or assume responsibilities for the administration of certain territories" in Article 73. This similarity of wording cannot be merely accidental. Basically the description is the same. The conclusion must be that the territories dealt with in Article 73 are the territories referred to in Article 77 (1) (*c*) and as the latter constitute a category quite different, both from territories held under mandate when the Charter was signed and from territories which may be detached from enemy States, it follows that these latter categories, namely, the former mandated territories and the ex-enemy territories, are not included in Article 77 (1) (*c*) and do not fall to be dealt with under Chapter II, inasmuch as the category there dealt with coincides with the category mentioned in Article 77 (1) (*c*).

105. That this, Mr. President, is the right conclusion to draw from the text is supported by certain inferences which may be drawn from Article 74. That Article distinguishes between territories to which Chapter XI applies, *on the one hand, and, on the other hand, the* metropolitan areas of the responsible Members of the United Nations. Now, the expression "metropolitan area", Mr. President, in its ordinary and natural meaning, rather suggests the mother country of a colony. It rather implies a relationship such as exists between a State and its dependencies and possessions, a relationship which is closer than that between a mandatory and a mandated territory, or between any State and an ex-enemy territory, which has not been incorporated in its metropolitan area or attached as a colony. In relation to a mandated territory, or such an ex-enemy territory, the expression "metropolitan area" could hardly be regarded as quite appropriate, and would, it is submitted, ordinarily not be used, for the simple reason that it might be said to carry with it implications of a type or measure of sovereignty on the part of the responsible State which is generally not admitted to exist in the case of such territories. Because of this, it is not to be supposed that Members of the United Nations, who have shown such a meticulous regard for the niceties of sovereignty, especially where a mandated territory is concerned, would have wanted to use *such an expression in relation to territories amongst which mandated* territories or unincorporated ex-enemy territories would be included. The fact that they did use this expression—and used it, as far as one can gather from the discussions at San Francisco, without the slightest hesitation—is some indication that they did not have such territories in mind. It is submitted that from the ordinary meaning of the expression "metropolitan areas" and from the fact that, in all the circumstances, it is not likely to have been used in relation to such territories, it may fairly be inferred that the conclusion arrived at by a comparison of the phraseology of Articles 73 and 77 is the right conclusion.

106. Against the view that Article 73 applies only in respect of the territories described in Article 77 (1) (*c*), it may be argued that Article 77 (1) merely breaks down the general category of territories contemplated in Article 73 into its three component parts. Article 77 (1),

however, affords no evidence whatsoever of any such breaking down. It deals with the three categories of territories not as sub-heads of a more general category, but as entirely separate categories. Had there been any such breaking down, paragraph (*c*) of Article 77 (1) would, I submit, undoubtedly have read very differently. It would then, I suggest, have been phrased somewhat as follows: "other territories for the administration of which States are responsible and which may voluntarily be placed under the System". The words "*other* territories for the administration of which States are responsible" would then have given the necessary indication that also the categories in paragraphs (*a*) and (*b*) are conceived of as territories for the administration of which States have responsibilities in the sense contemplated in Article 73. In the absence of some such wording, there is no justification, *ex facie* Articles 73 and 77, for identifying the territories described in Article 73 with all the categories detailed in Article 77.

107. Where the founders of the United Nations intended to provide for territories then held under mandate, or for territories which may be detached from enemy States, they did so specifically, as was done in Article 77. It must be presumed, therefore, that where they did not do so, as in Article 73—where, as already explained, there was every reason to do so—they had no intention of referring in that Article to any such territories.

108. The Government of the United States have advanced another textual argument for including former mandated territories in Article 73. The argument is that such an inclusion "is demonstrated by the careful exception in Article 73 (*e*) to the obligation to transmit information thereunder where Chapters XII and XIII apply, in order to avoid duplication of reporting". This argument, it is submitted, is entirely fallacious. The applicability of the exception in Article 73 (*e*) does not depend in any way, or in any degree, upon the inclusion of former mandated territories within the ambit of Chapter XI. That exception was necessary not in order to avoid duplication of reporting in regard to mandated territories, but in order to avoid such duplication in regard to colonial territories which may be placed under trusteeship in pursuance of the provisions of Article 77 (1) (*c*). As I have already pointed out, there is a clear identity of subject matter in Article 77 (1) (*c*) and Article 73. It is this identity which called for an exception in Article 73 (*e*). Even if mandated territories had nowhere been referred to in the whole Charter, the general scheme for colonial territories would still have required this exception. The fact, therefore, that such an exception has been provided for in Article 73 (*e*) cannot possibly justify the conclusion which the Government of the United States seek to draw from it. The exception was necessary in the general framework for colonial territories. The exclusion of mandated territories from Article 73 would not render this exception redundant or any the less intelligible. In regard to mandated territories, therefore, Mr. President, this careful exception does not demonstrate anything at all.

109. The Government of the United States also contend that "by reason of the continuing existence of the Mandate, South-West Africa is a non-self-governing territory within the meaning of Chapter XI". In this connexion, they seem to put forward the following proposition:

(*a*) South-West Africa is a mandated territory whose people cannot stand by themselves.

(*b*) It is therefore *ipso facto* a territory "whose peoples have not yet attained a full measure of self-government".

It is submitted, Mr. President, that this is quite evidently a *non sequitur* based, in part at any rate, upon false premises. The Government of the United States accept for the purposes of this proposition that the Mandate is still in existence. As I have endeavoured to show, this is incorrect. The Mandate has lapsed, and to the extent to which this proposition rests upon the continued existence of the Mandate, it cannot be supported. It is admitted, however, that the peoples of this territory cannot stand by themselves. But it would *not* follow from that that they do not enjoy a full measure of self-government and that the Territory on that account falls to be dealt with under Article 73. A full measure of self-government does not necessarily mean independence. Even with the fullest self-government, the material resources, the manpower, the geographic situation and the other circumstances of a territory may be such as to make it impracticable, or impossible, for its people to stand by themselves. It was for that very reason that independence was not conceived of as the only possible goal of the Mandates System. It was realized that self-government could also be achieved by voluntary integration with the mandatory State. That, in fact, was the future envisaged for South-West Africa. It must have been realized at the time that administration of this Territory, situated as it is and being what it is, as an integral part of the Union of South Africa, would inevitably tend to develop in fulfilment of the Mandate—in fulfilment of the Mandate, Mr. President—towards self-government by way of the ultimate total integration of the Territory with the Union. In all the circumstances, it was obvious that that would be the natural tendency. The argument, therefore, that a full measure of self-government necessarily presupposes, under the Mandates System, the ability of the people concerned to stand by themselves, or that, conversely, the inability of the people concerned to stand by themselves postulates the absence of a full measure of self-government, cannot be maintained, and does not support the conclusion sought to be drawn from it, namely, that Article 73 applies in respect of South-West Africa.

110. Finally, the Government of the United States, and also the distinguished respresentative of the Philippines, invoke the history of Chapter XI in order to prove that it applies also in respect of the former mandated territories. They quote a statement made by Field Marshal Smuts at San Francisco as President of Commission II. That statement does, presumably, reflect the Field Marshal's understanding of the position at the time. But it is by no means clear that it also reflects the understanding of the other members of the Commission or of the majority of them. On the same occasion, Mr. Forde, the then Deputy Prime Minister of Australia, referred to Section A of the draft before the Commission, that is, the present Chapter XI of the Charter, as "the most important and far-reaching joint *declaration of colonial policy* in history". If Field Marshal Smuts was right, then this description by Mr. Forde was incorrect. In analyzing the provisions of the present Article 73, Mr. Forde pointed to the "healthy competition between *colonial Powers*" in which it was designed to result. Also Mr. Fraser, who was Chairman of the committee responsible for the draft, and who,

it may be supposed, had as good a knowledge as anybody else of its intentions, consistently mentioned only the colonial Powers whenever he was speaking of Section A. Lord Cranborne, the delegate of the United Kingdom (who submitted the original paper upon which the final text of Chapter XI was based, and who was therefore in a position to speak with some authority), when he explained to Commission II why that paper had been submitted, said the following: "Out of our experience and that of *other colonial Powers*, there has been gradually evolved certain general principles of *colonial government*. We believed that the time had come when these principles ought to be codified in a general declaration for the guidance of ourselves, of other *colonial Powers* and for the information of the world .... these broad principles have been incorporated in the first part—Section A—of the Chapter which is now before you." He went on to say that "in every area, whether backward or advanced, there must be a duty on *colonial Powers* (again colonial Powers) to train and educate the indigenous peoples to govern themselves". He made it clear, therefore, that he, at any rate, understood the present Chapter XI to be a declaration by *colonial Powers* of their *colonial policies*. In fact, no delegate other than Field Marshal Smuts made any mention whatsoever in this connexion of mandated territories or ex-enemy territories. If they had in mind that Section A was to apply also in respect of such territories if not placed under trusteeship, their silent disregard of so important a factor in the application of Chapters XI and XII would be somewhat remarkable. It is submitted that, taking into consideration the general trend of the discussions before Commission II, there is really little reason to suppose that all the other delegates, or even the majority of them, accepted the statement made by Field Marshal Smuts, as a correct interpretation of what had been done.

111. But, Mr. President, even more remarkable would be the subsequent events, had that been the general understanding. For what happened *after San Francisco*? Was any suggestion ever made, during the quite considerable period between San Francisco and the conclusion of trusteeship agreements in respect of former mandated territories, that reports should be made in respect of these territories under Article 73 (*e*)?

112. It will be recalled that the Trusteeship Agreement for the territory of Nauru was entered into as late as November 1947 and that the United Kingdom withdrew from Palestine only as from 15th May, 1948. As far as the Union Government are aware, no suggestion as to such reports was ever made. And yet, it could not be contested that, if Article 73 (*e*) applies to such territories, the question of reports should surely have arisen, pending the conclusion of trusteeship agreements, except, of course, where a full measure of self-government had already been attained. It would then only have been by the conclusion of such agreements that non-self-governing mandated territories would have been taken out of the provisions of Article 73. Until these agreements were concluded, those provisions would have applied. In fact, when the Union Government submitted a report on South-West Africa, that report was referred not to the special committee established for the specific purpose of considering reports under Article 73 (*e*), as one would have expected had that Article applied, but to the Trusteeship Council. South Africa, also, was given no place either in the first *ad hoc* committee or in the later special committee, established for the purpose of considering

reports under Article 73 (*e*). That, surely, was a clear recognition either that South-West Africa had already then attained a full measure of self-government, or of what had consistently been assumed in the debates on this Territory, namely, that it did not fall to be dealt with under Article 73. In all those protracted debates, the applicability of Article 73 was raised only by one or two delegates, more particularly the Philippine delegate, and only by way of an almost startling exception to the general trend of these debates. These occasional references to Article 73 were not received with any agreement by other delegates, nor were they pressed upon the consideration of other delegates. Everybody accepted that South-West Africa could not be brought into the same category as colonial possessions. Mr. Dulles, the representative of the United States, for instance, pointed out before the Fourth Committee in 1947, in regard to the information on South-West Africa, that that information seemed precluded from coming under the Trusteeship Council, since South-West Africa was not a trust territory, or under Article 73 (*e*), because it was not a typical non-self-governing territory, and for that reason suggested that the information be referred to the Fourth Committee. Before the Fourth Committee, therefore, in 1947, also the representative of the United States seems to have accepted the position that Article 73 (*e*) does not apply in respect of this Territory. This attitude was consistent with what Mr. Dulles had said in 1946, at the 27th Plenary Meeting of the United Nations [1].

In dealing, on that occasion, with a resolution on Chapter XI also, he consistently referred only to the colonial Powers. "By this resolution", he said, *inter alia*, "the United Nations will implement the provisions of Chapter XI requiring reports from *all colonial Powers*." He gave no indication of any understanding that Chapter XI might require implementation by any Power other than a colonial Power. So also the Soviet representative, before the Trusteeship Council, in 1948, when the report on South-West Africa was under consideration, was emphatic in his view that South-West Africa is not a non-self-governing territory of which Chapter XI speaks. The general acceptance of this position, so shortly after San Francisco—it will be remembered that already at the 1946 session of the United Nations, South-West Africa was one of the prominent features of the agenda—this general acceptance, so shortly after San Francisco, would indeed be remarkable, if at San Francisco it was generally understood that Article 73 is applicable also in respect of mandated territories not placed under trusteeship.

113. In regard to ex-enemy territories, Mr. President, one is faced with exactly the same situation. Who has ever suggested that in respect of these, reports should be made under Article 73 (*e*) ? Insofar as any of these territories have definitely and in accordance with international law been incorporated in the metropolitan areas of the victorious States, no reports could, of course, be required under that Article. But where that has not been the case, why have no reports been asked for or made ? Why has no Member of the United Nations ever raised the question, in any shape or form, that reports should be submitted in respect of Lybia, of Somaliland or of Eritrea, to mention only some instances ? These territories have been detached from an enemy State as a result of the Second World War. They are territories referred to in Article 77

[1] See p. 357 of verbatim record for 10 Jan.-14 Feb., 1946.

(1) (*b*). If Article 73 covers all the territories mentioned in Article 77 (1), why, then, has not a single report been made in respect of a single territory in this category? The answer cannot lie in Article 107 of the Charter. That Article provides that "nothing in the present Charter shall *invalidate or preclude* action, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the governments having responsibility for such action". Article 107 does no more, therefore, than to provide that nothing in the Charter will *invalidate or preclude* certain actions by certain governments. The Charter, therefore, cannot invalidate or preclude any disposition of ex-enemy territories. But it is by no means apparent how any action by which any such territory is not incorporated in a metropolitan area could possibly be invalidated or precluded by the mere fact that reports are to be made in respect of that territory under Article 73 (*e*). Such reports would not affect the action taken in respect of any such territory in any way. Article 107 does not, for instance, preclude the conclusion of trusteeship agreements in respect of ex-enemy territories. Specific provision is made for that in the Charter. Why then should it preclude the application of Article 73, and the submission of reports under that Article? One is faced, therefore, by the fact that for no reason to be found in Article 107, no report in respect of any one of these territories has ever been made or requested. It is submitted, Mr. President, that the real reason lies not in the remissness of the United Nations, not in a lack of vigilance on their part in the application of Chapter XI, but in the full realization that this Chapter was never intended to apply, and does not apply, to ex-enemy territories, except where they become colonial possessions of a Member State, in which case this Chapter would apply, not because they are ex-enemy territories, but because they have become colonial territories, the only category of territories to which this Chapter was intended to apply.

114. Also this attitude in regard to these territories is incompatible with a general understanding at San Francisco that they fall within the scope of Article 73. The non-application of this Article in respect of mandated territories before the conclusion of trusteeship agreements and in respect of ex-enemy territories so soon after San Francisco seems to demonstrate that there was no such general understanding. In the absence of clear proof of such an understanding, pointing to a failure on the part of the United Nations to apply Chapter XI in accordance with its true intent and meaning, such an understanding cannot be accepted, especially not where there are such strong indications of a contrary intention in the text of the Charter itself. The single statement of a single delegate, however distinguished, cannot, in these circumstances, be regarded as adequate proof of any such understanding.

115. In the result, the Union Government would submit that the contention advanced by the Government of the United States in regard to the general applicability of Chapter XI in respect of former mandated territories cannot be upheld. The contention of the Government of the United States is refuted by an examination of the text of the Charter itself, and no sufficient reason has been put forward why the Court should not give this Chapter the effect which, according to all the textual indications, it was plainly intended to have.

116. It is further submitted that the Court could in any case not hold that this Chapter applies in respect of South-West Africa in particular. In the first place, that would, for the reasons which I gave yesterday, be a matter for the administering authority to decide; and the Court, as I have already endeavoured to show, is not in possession of all the information which would be essential for a decision on the question whether or not the peoples of South-West Africa have attained a full measure of self-government. In the second place, also the question whether or not there is an obligation in a particular case to transmit a report is not one which could properly be submitted to the Court for decision. Also that would be a question for the administering authority to decide and would, in the case of South-West Africa, involve the further question as to the use which was made by the United Nations of the 1947 report, a further question which, in *my submission, Mr. President, is not before the Court.*

117. It is accordingly respectfully submitted that the Court, if it should decide to deal with Chapter XI, would in any event refrain from expressing any opinion as to the applicability of this Chapter to South-West Africa in particular, and would limit itself to the broader question whether or not this Chapter applies to former mandated territories in general, subject to such considerations as might, in a specific case, take a particular territory out of the provisions of this Chapter.

Agreement to submit reports

118. That brings me to the contention of the Government of India, in paragraph 26 of their Written Statement, that the Union of South Africa, having agreed to submit reports on their administration of South-West Africa for the information of the United Nations, was incompetent to withdraw this undertaking and is obliged to continue supplying such reports.

119. What is here put forward is an obligation arising from an agreement. I take it, therefore, that what the Government of India have in mind is an offer, made *animo contrahendi* by the Union Government, to submit reports to the United Nations, and an acceptance of that offer by the United Nations.

120. Now, as I have already had occasion to point out in another connexion, the first reference to such reports was made by Field Marshal Smuts in a speech before the Fourth Committee in November, 1946. He there stated that if the General Assembly did not agree that the clear wishes of the inhabitants should be implemented, the Union Government could take no other course than *to abide by* the declaration it had made to the last Assembly of the League of Nations, to the effect that it would continue to administer the Territory, as heretofore, as an integral part of the Union, and to do so in the spirit of the principles laid down in the Mandate. He then went on to say that *in particular* the Union would, in accordance with Article 73 (*e*) of the Charter, transmit *regularly* to the Secretary-General of the United Nations, *for information purposes*, subject to such limitations as security and constitutional considerations might require, statistical and other information of a technical nature, relating to the economic, social and educational conditions in South-West Africa.

121. What was here envisaged was that the Union Government would, as part of their intended administration of the Territory in the spirit of the principles laid down in the Mandate (and not, therefore, as an obligation under Article 73 (*e*)), regularly submit the information described in the statement. This is shown by the words "*in particular*", following, as they do, upon the reference to the continued administration of the Territory in the spirit of the principles laid down in the Mandate. It was part and parcel, therefore, of the voluntary understanding in regard to mandated territories which the parties had in mind at the dissolution of the League, the understanding contemplated in the expression of intentions made on that occasion by the representative of the Union Government. As I have already endeavoured to show, when dealing with the question whether or not the Mandate had lapsed, that understanding entailed no legal commitments. It would follow, therefore, that this statement to the Fourth Committee, connected as it was with an entirely voluntary understanding, was itself intended to be no more than that. It conveyed no more, and should have conveyed no more, to the members of the Fourth Committee, than a further statement of intentions to be voluntarily carried out.

122. It is also necessary to bear in mind that this statement was made to the Fourth Committee. It was not repeated in the General Assembly. Also this shows that it could not have been made with the intention of entering into any legal commitment. Had such a commitment been contemplated, it would surely have been repeated in the General Assembly. The General Assembly, after all, would have been the only proper organ to approach. The Fourth Committee had no authority to enter into any legally binding arrangement on behalf of the United Nations. All it could do was to recommend acceptance to the General Assembly, and that it did not do.

123. The General Assembly itself did not react to this statement which was made to the Fourth Committee. No proposal was put forward in connexion with it, and no reference was made to it in the Resolution which was passed by the Assembly in 1946. If, in spite of these indications to the contrary, it is to be construed as an offer made with the intention of entering into a binding agreement, it certainly was not accepted during that session, so that no such agreement could have come into existence at that session.

124. Some time after that session, in the communication addressed by the Union Government to the United Nations on 23rd July, 1947 (Doc. A/334), the Union Government again referred, *inter alia*, to their continued administration of the Territory in the spirit of the Mandate, and added: "To that end, the Union Government have already undertaken to submit reports on their administration for the information of the United Nations." As I have already pointed out in another connexion, this could only have referred to the statement made by Field Marshal Smuts to the Fourth Committee; and as already explained, that statement was not an offer to enter into a binding agreement. The passage quoted from this communication of 23rd July, 1947, stands in the very same context. It equally clearly connects these reports with the voluntary understanding in regard to the administration of the Territory. In fact, as pointed out in this communication, the Union Parliament had expressed *the opinion* that the Union Government should continue

to render reports to the United Nations as it had done heretofore under the Mandate. It will be noted, however, that this opinion was not given effect to by the Union Government by way of a new offer or undertaking to the United Nations. In this communication of 23rd July, 1947, the Union Government did purport to convey any such new offer or undertaking. All it did was to confirm the statement made to the Fourth Committee in 1946. That statement was confined to reports given for information purposes only and limited to statistical and other information of a technical nature.

125. Following this communication, the Union Government did, on 12th September, 1947, in pursuance of the statement made to the Fourth Committee, submit a report on South-West Africa to the United Nations. In the light of what went before, the submission of this report cannot but be regarded as nothing more than a voluntary, co-operative act, designed to carry out the Union Government's intention of administering the Territory on an entirely voluntary basis in the spirit of the principles laid down in the Mandate.

126. This report had to be dealt with in the 1947 session. At that session, the representative of the Union Government, in the debate on South-West Africa before the General Assembly, referred to the fact that the Union Government had, during the previous session, expressed their readiness to submit *annual* reports for the information of the United Nations, and stated that that undertaking still stood. In this context, and having regard not only to the circumstances in which the previous statement was made, but also to the fact that the Union Government had acted upon that statement at a time when there could have been no question of a binding agreement—in this context, I say, and having regard to these matters, this meant that the previous undertaking to submit reports as a voluntary co-operative act still stood. The representative of the Union Government, however, added a most important qualification. This is what he said : "Although these reports, if accepted, will be rendered *on the basis that the United Nations has no supervisory jurisdiction in respect of this Territory*, they will serve to keep the United Nations informed, in much the same way as they will be kept informed in relation to non-self-governing territories under Article 73 (*e*) of the Charter." This stipulated a basis for the rendering of reports, the basis, namely, of no supervisory jurisdiction on the part of the United Nations. This stipulation was made before there was any sign of any acceptance of the suggestion—before, therefore, any binding arrangement could possibly have resulted. This stipulation, moreover, was clearly inherent in the statement made by Field Marshal Smuts to the Fourth Committee during the previous session. He had then stated that the reports would be supplied for *information purposes*. That meant information purposes and not supervisory purposes. He had also indicated that the reports would be restricted to statistical and other information of a technical nature, the kind of information, in other words, which was contemplated by Article 73 (*e*) with reference to colonial territories. The obvious inadequacy of such information for the purposes of exercising any supervisory jurisdiction confirmed the clear implication, already conveyed by the words "information purposes", that the reports were not to be used for establishing any accountability on the part of the Union of South Africa, or any supervisory functions on the part of the United Nations. The express reservation made in

1947 merely put into clear words, therefore, what had already been implicit in the statement made in 1946. Any subsequent acceptance, whether by way of a binding agreement or otherwise, would of necessity have had to be subject to this reservation.

127. The 1947 Resolution, passed after this statement by the South African representative, did contain a reference to reports. The last paragraph of the Preamble stated "that the Union Government have undertaken to submit reports on their administration for the information of the United Nations", and the substantive part, after firmly maintaining previous recommendations, and after expressing the hope that the Union of South Africa may find it possible to submit a trusteeship agreement in time to enable the General Assembly to consider it at the 1948 session of the Assembly, went on to authorize the Trusteeship Council *in the meantime* to examine the report which had been submitted, and to submit its observations thereon.

128. Even assuming that a firm offer was made in 1947, or was understood to be made, could this Resolution be construed as an acceptance of the offer? In deciding this question, it has to be borne in mind that the offer (if there *was* an offer made *animo contrahendi*) was to submit *annual* reports. Now "annual reports" would clearly postulate a more or less permanent arrangement. "Regular reports" and "annual reports", the expressions used in 1946 and 1947 respectively, implied an arrangement which would continue indefinitely. That would have been of the essence of the whole proposal. In addition, there was the basic reservation to which I have already referred. There is no evidence in this Assembly Resolution of 1947 of any acceptance either of a permanent arrangement or of any reservation. The whole context of the Resolution, as well as the surrounding circumstances, are against the acceptance of any permanent arrangement. The Assembly was pressing for a trusteeship agreement. It desired an agreement to be submitted in time for the 1948 session. *In the meantime,* the Trusteeship Council was to examine the report which had been submitted, that is, the particular report which was then before the Assembly. It is apparent from all this that the Assembly did not want to prejudice its own objectives in regard to a trusteeship agreement of the nature suggested. Such an acceptance would too clearly have implied acquiescence in the refusal to submit such an agreement. That is why the Assembly was careful to confine the Resolution to examination *in the meantime* of the one report which had been submitted. It did not authorize the Trusteeship Council to examine the annual reports, that is, all reports which might be submitted by the Union Government, but only this one report.

129. Contrast with this the Assembly Resolution of 1948. In that Resolution the Assembly recommends, *without prejudice* to previous resolutions, that the Union of South Africa, *until agreement is reached with the United Nations regarding the future of South-West Africa,* continue to supply annual information on its administration of the Territory. The difference is obvious. The supply of *annual* information, that is, the more permanent basis, is here recommended only subject to express reservations as regards previous resolutions and duration. The fact that there is nothing of the kind in the 1947 Resolution is clear evidence that the Assembly was dealing only with the one report, and was not committing itself to any more permanent scheme. In the 1947 Resolution, moreover, the reservation made by the Union Govern-

ment in regard to supervisory jurisdiction was not even mentioned, either directly or by implication. Even, then, on the unjustifiable assumption of a firm proposal, therefore, this Resolution could not serve as an acceptance of any offer to enter into a permanent arrangement with such a reservation, as so clearly conveyed by the statement in question. Up to this stage, therefore, there could have been no binding agreement. At no time had the parties been *ad idem*.

130. The next step to be considered is the letter of 31st May, 1948, by which the Union Government forwarded to the United Nations their replies to the questionnaire which they had received from the Trusteeship Council. That letter contained a further clarification of previous statements made by the Union Government on the subject of reports. Paragraph 2 of that letter reads as follows:

> "The Union Government, in forwarding these replies, desire to reiterate that the transmission to the United Nations of information on South-West Africa, in the form of an annual report or any other form, is *on a voluntary basis* and is *for purposes of information only*. They have on several occasions made it clear that they recognize no obligation to submit this information to the United Nations, but in view of the widespread interest in the administration of the Territory, and in accordance with normal democratic practice, they are willing and anxious to make available to the world such facts and figures as are readily at their disposal, and which can be collated and co-ordinated without placing excessive burdens on staff resources to the detriment of urgent tasks of administration."

131. This communication made it perfectly clear that the United Nations, at no time, and certainly not as from the date of this communication, had any offer before them to enter into a binding agreement. The submission of reports was definitely stated to be on a voluntary basis. If, by previous statements, the impression had in some way been created that an offer of such a nature had been made, that impression could no longer continue. As from the date of this communication, at any rate, a binding agreement could no longer come into existence, no matter what subsequent resolutions might be passed by the United Nations. That, we would submit, is something about which there could be no dispute.

132. It is not necessary, therefore, to scrutinize the 1948 and 1949 Resolutions for the purpose of ascertaining whether they contain an acceptance of any offer or undertaking. As from the date of this communication, there quite clearly was no offer or undertaking to accept by way of arriving at a binding agreement. All that need be noted here is that in the 1948 Resolution there is not the slightest suggestion of a binding agreement.

133. The 1949 Resolution, passed after the United Nations had been informed that there would be no further reports, affords even less evidence that the United Nations were relying upon any binding agreement. Also on that occasion, the Assembly did not refer to any binding relationship, or insist that any legal obligations be complied with, as one would be entitled to expect, more especially after the withdrawal of the undertaking to submit reports, had the Assembly had in mind any arrangement of that nature. The Assembly contented itself

by expressing regret at the withdrawal, and by inviting the Union Government to resume the submission of reports.

134. Now, if anything, this attitude seems inconsistent with a binding arrangement, or with any insistence on any rights derived from such an arrangement. It rather seems as if the Assembly accepted the fact of the withdrawal, without laying claim to any legal rights which had been violated, and at the same time thought to persuade the Union Government to reconsider the position and to resume submission of reports. In all the circumstances, the Assembly could legally not have gone further than that. If, in 1946 and 1947, any offer had been made which they were entitled to construe as an offer made *animo contrahendi* (which I submit is clearly not the case), they had not accepted that offer, and by the letter of May 31st, 1948, it had been made clear that there was no such offer to accept. Consequently, the Assembly could not purport to effect a binding agreement by the Resolutions of 1948 and 1949, and these Resolutions could not be based upon any legal obligations arising from the 1947 Resolution.

135. It is accordingly submitted that there is no basis, in fact or in law, for the contention of the Government of India that there has been a binding agreement from which the Union Government cannot resile. All there has been was a voluntary undertaking, given with a specific reservation and with no binding commitments for the future, and a subsequent withdrawal of that undertaking.

136. If the Court should nevertheless hold that an agreement has been entered into as alleged, there is a further submission which I would have to make. It is the submission in regard to non-compliance with Article 102 of the Charter, which I have already made in regard to the other alleged agreement, that is, the agreement not to modify the status of the Territory without the consent of the United Nations. Also in this case, there has been no registration or publication of any agreement. Here also, we would submit firstly that non-registration, more especially where the United Nations would itself be a party, is strong evidence that not only the Union of South Africa, but also the United Nations, was unaware of the existence of any agreement, and secondly that, because of non-registration, the alleged agreement can, for the reasons which I have mentioned in the other connexion, not be invoked before this Court.

Mr. President, I thank the Court.