

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

STATUT INTERNATIONAL
DU SUD-OUEST AFRICAIN
AVIS CONSULTATIF DU 11 JUILLET 1950

1950

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

INTERNATIONAL STATUS
OF SOUTH-WEST AFRICA
ADVISORY OPINION OF JULY 11th, 1950

Le présent avis doit être cité comme suit :
« *Statut international du Sud-Ouest africain,*
Avis consultatif : C. I. J. Recueil 1950, p. 128. »

This Opinion should be cited as follows :
“*International status of South-West Africa,*
Advisory Opinion : I.C.J. Reports 1950, p. 128.”

N° de vente :
Sales number **42**

INTERNATIONAL COURT OF JUSTICE

YEAR 1950

July 11th, 1950

1950
July 11th
General List:
No. 10INTERNATIONAL STATUS OF
SOUTH-WEST AFRICA

Continued existence of the Mandate for South-West Africa conferred upon the Union of South Africa, and of the international obligations derived therefrom.—Article 22 of the Covenant of the League of Nations.—Article 80, paragraph 1, of the Charter.—International Mandates distinguished from the notions of mandate in national law.—Declarations by Union Government as to the continuance of its obligations under the Mandate. — Obligation of Union Government to accept supervision by the United Nations and to submit reports and petitions.—Competence of the General Assembly of the United Nations derived from Article 10 of the Charter.—Compulsory jurisdiction of the International Court of Justice.

Applicability of Chapter XII of the Charter.—Optional or compulsory nature of the placing of the Territory of South-West Africa under the Trusteeship System.—Articles 75, 77, 79 and 80, paragraph 2, of the Charter.

Competence to modify the international status of the Territory of South-West Africa.

ADVISORY OPINION

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.

THE COURT,

composed as above,

gives the following Advisory Opinion :

On December 6th, 1949, the General Assembly of the United Nations adopted the following resolution :

"The General Assembly,

Recalling its previous resolutions 65 (I) of 14 December 1946, 141 (II) of 1 November 1947 and 227 (III) of 26 November 1948 concerning the Territory of South-West Africa,

Considering that it is desirable that the General Assembly, for its further consideration of the question, should obtain an advisory opinion on its legal aspects,

1. *Decides* to submit the following questions to the International Court of Justice with a request for an advisory opinion which shall be transmitted to the General Assembly before its fifth regular session, if possible :

'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, in particular :

(a) 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 ?

(b) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa ?

(c) 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 ?'

2. *Requests* the Secretary-General to transmit the present resolution to the International Court of Justice, in accordance with Article 65 of the Statute of the Court, accompanied by all documents likely to throw light upon the question.

The Secretary-General shall include among these documents the text of Article 22 of the Covenant of the League of Nations ; the text of the Mandate for German South-West Africa, confirmed by the Council of the League on 17 December 1920 ; relevant documentation concerning the objectives and the functions of the Mandates System ; the text of the resolution adopted by the League of Nations on the question of Mandates on 18 April 1946 ; the text of Articles 77 and 80 of the Charter and data on the discussion of these articles in the San Francisco Conference and the General Assembly ; the report of the Fourth Committee and the official records, including the annexes, of the consideration of the

question of South-West Africa at the fourth session of the General Assembly.”

By letter of December 19th, 1949, filed in the Registry on December 27th, the Secretary-General of the United Nations transmitted to the Court a certified true copy of the General Assembly's resolution.

On December 30th, 1949, in accordance with Article 66, paragraph 1, of the Statute, the Registrar gave notice of the request to all States entitled to appear before the Court. In addition, as the question submitted to the Court for advisory opinion by the General Assembly concerned Chapter XII of the Charter, the Registrar, on the same date, informed all Members of the United Nations, by means of a special and direct communication as provided in Article 66, paragraph 2, of the Statute that the Court was prepared to receive from them written statements on the question. By an order of the same date the President, the Court not being in session, appointed Monday, March 20th, 1950, as the date of expiry of the time-limit for the submission of written statements, and reserved the rest of the procedure for further decision.

Written statements were received within the prescribed time-limit from the following States : Egypt, Union of South Africa, the United States of America, India and Poland.

On March 7th, 1950, the Board of Directors of the International League of the Rights of Man sent a communication to the Court asking permission to submit written and oral statements on the question. On March 16th, the Court decided that it would receive from this organization a written statement to be filed before April 10th and confined to the legal questions which had been submitted to the Court. On the same day, the League was notified accordingly, but it did not send any communication within the time-limit prescribed.

By letter of January 23rd, 1950, the Secretary-General of the United Nations announced that he had designated Dr. I. Kerno, Assistant Secretary-General in charge of the Legal Department, as his representative before the Court, and that Dr. Kerno was authorized to submit any written or oral statements likely to furnish information to the Court on the question.

By letters dated March 1st and March 20th, 1950, filed in the Registry on March 8th and April 11th, respectively, the Secretary-General transmitted to the Registry the documents which he was instructed to submit according to the resolution of the General Assembly and Article 65 of the Statute. All these documents are enumerated in the list annexed to this Opinion.

By telegrams dated March 15th and April 29th, the Government of the Philippines announced its intention to present an oral statement. The Government of the Union of South Africa announced the same intention by letter of March 28th.

At public sittings held from May 16th to May 23rd, 1950, the Court heard oral statements submitted :

on behalf of the Secretary-General of the United Nations by Dr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department ;

on behalf of the Government of the Philippines by Judge José D. Ingles, member of the Philippine Permanent Delegation to the United Nations ;

on behalf of the Government of the Union of South Africa by Dr. L. Steyn, K.C., Senior Legal Adviser of the Ministry of Justice of the South-African Government.

* * *

The request for an opinion begins with a general question as follows :

“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 ?”

The Court is of opinion that an examination of the three particular questions submitted to it will furnish a sufficient answer to this general question and that it is not necessary to consider the general question separately. It will therefore begin at once with an examination of the particular questions.

Question (a) : *“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 ?”*

The Territory of South-West-Africa was one of the German overseas possessions in respect of which Germany, by Article 119 of the Treaty of Versailles, renounced all her rights and titles in favour of the Principal Allied and Associated Powers. When a decision was to be taken with regard to the future of these possessions as well as of other territories which, as a consequence of the war of 1914-1918, had ceased to be under the sovereignty of the States which formerly governed them, and which were inhabited by peoples not yet able to assume a full measure of self-government, two principles were considered to be of paramount importance : the principle of non-annexation and the principle that the well-being and development of such peoples form “a sacred trust of civilization”.

With a view to giving practical effect to these principles, an international régime, the Mandates System, was created by Article 22 of the Covenant of the League of Nations. A “tutelage” was to be established for these peoples, and this tutelage was to be entrusted to certain advanced nations and exercised by them “as mandatories on behalf of the League”.

Accordingly, the Principal Allied and Associated Powers agreed that a Mandate for the Territory of South-West Africa should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa and proposed the terms of this Mandate. His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, agreed to accept the Mandate and undertook to exercise it on behalf of the League of Nations in accordance with the proposed terms. On December 17th, 1920, the Council of the League of Nations, confirming the Mandate, defined its terms.

In accordance with these terms, the Union of South Africa (the "Mandatory") was to have full power of administration and legislation over the Territory as an integral portion of the Union and could apply the laws of the Union to the Territory subject to such local modifications as circumstances might require. On the other hand, the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled.

The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants.

It is now contended on behalf of the Union Government that this Mandate has lapsed, because the League has ceased to exist. This contention is based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself. The League was not, as alleged by that Government, a "mandator" in the sense in which this term is used in the national law of certain States. It had only assumed an international function of supervision and control. The "Mandate" had only the name in common with the several notions of mandate in national law. The object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law. The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law. The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations, including the Union of South Africa.

The essentially international character of the functions which had been entrusted to the Union of South Africa appears particularly from the fact that by Article 22 of the Covenant and Article 6 of the Mandate the exercise of these functions was subjected to the supervision of the Council of the League of Nations and to the obligation to present annual reports to it ; it also appears from the fact that any Member of the League of Nations could, according to Article 7 of the Mandate, submit to the Permanent Court of International Justice any dispute with the Union Government relating to the interpretation or the application of the provisions of the Mandate.

The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.

These international obligations, assumed by the Union of South Africa, were of two kinds. One kind was directly related to the administration of the Territory, and corresponded to the sacred trust of civilization referred to in Article 22 of the Covenant. The other related to the machinery for implementation, and was closely linked to the supervision and control of the League. It corresponded to the "securities for the performance of this trust" referred to in the same article.

The first-mentioned group of obligations are defined in Article 22 of the Covenant and in Articles 2 to 5 of the Mandate. The Union undertook the general obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants. It assumed particular obligations relating to slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and establishments, as well as obligations relating to freedom of conscience and free exercise of worship, including special obligations with regard to missionaries.

These obligations represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon.

This view is confirmed by Article 80, paragraph 1, of the Charter, which maintains the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the Trusteeship System. It is true that this provi-

sion only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments. But—as far as mandated territories are concerned, to which paragraph 2 of this article refers—this provision presupposes that the rights of States and peoples shall not lapse automatically on the dissolution of the League of Nations. It obviously was the intention to safeguard the rights of States and peoples under all circumstances and in all respects, until each territory should be placed under the Trusteeship System.

This view results, moreover, from the Resolution of the League of Nations of April 18th, 1946, which said :

“Recalling that Article 22 of the Covenant applies to certain territories placed under Mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization :

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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 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.”

As will be seen from this resolution, the Assembly said that the League’s functions with respect to mandated territories would come to an end ; it did not say that the Mandates themselves came to an end. In confining itself to this statement, and in taking note, on the other hand, of the expressed intentions of the mandatory Powers to continue to administer the mandated territories in accordance with their respective Mandates, until other arrangements had been agreed upon between the United Nations and those Powers, the Assembly manifested its understanding that the Mandates were to continue in existence until “other arrangements” were established.

A similar view has on various occasions been expressed by the Union of South Africa. In declarations made to the League of Nations, as well as to the United Nations, the Union Government has acknowledged that its obligations under the Mandate continued

after the disappearance of the League. In a declaration made on April 9th, 1946, in the Assembly of the League of Nations, the representative of the Union Government, after having declared his Government's intention to seek international recognition for the Territory of South-West Africa as an integral part of the Union, stated: "In the meantime, the Union will continue to administer the Territory scrupulously in accordance with the obligations of the Mandate for the advancement and promotion of the interests of the inhabitants as she has done during the past six years when meetings of the Mandates Commission could not be held." After having said that the disappearance of the Mandates Commission and of the League Council would "necessarily preclude complete compliance with the letter of the Mandate", he added: "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."

In a memorandum submitted on October 17th, 1946, by the South-African Legation in Washington to the Secretary-General of the United Nations, expression was given to a similar view. Though the League had at that time disappeared, the Union Government continued to refer to its responsibility under the Mandate. It stated: "This responsibility of the Union Government as Mandatory is necessarily inalienable." On November 4th, 1946, the Prime Minister of the Union, in a statement to the Fourth Committee of the United Nations General Assembly, repeated the declaration which the representative of the Union had made previously to the League of Nations.

In a letter of July 23rd, 1947, to the Secretary-General of the United Nations, the Legation of the Union referred to a resolution of the Union Parliament in which it was declared "that the Government should continue to render reports to the United Nations Organization as it has done heretofore under the Mandate". It was further stated in that letter: "In the circumstances the Union Government have no alternative but to maintain the *status quo* and to continue to administer the Territory in the spirit of the existing Mandate."

These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable

probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court.

* * *

The Court will now consider the above-mentioned second group of obligations. These obligations related to the machinery for implementation and were closely linked to the supervisory functions of the League of Nations—particularly the obligation of the Union of South Africa to submit to the supervision and control of the Council of the League and the obligation to render to it annual reports in accordance with Article 22 of the Covenant and Article 6 of the Mandate. Since the Council disappeared by the dissolution of the League, the question arises whether these supervisory functions are to be exercised by the new international organization created by the Charter, and whether the Union of South Africa is under an obligation to submit to a supervision by this new organ and to render annual reports to it.

Some doubts might arise from the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United Nations nor expressly assumed by that organization. Nevertheless, there seem to be decisive reasons for an affirmative answer to the above-mentioned question.

The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System. It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions.

These general considerations are confirmed by Article 80, paragraph 1, of the Charter, as this clause has been interpreted above. It purports to safeguard, not only the rights of States, but also the rights of the peoples of mandated territories until Trusteeship Agreements are concluded. The purpose must have been to provide a real

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

The Assembly of the League of Nations, in its Resolution of April¹ 18th, 1946, gave expression to a corresponding view. It recognized, as mentioned above, that the League's functions with regard to the mandated territories would come to an end, but noted 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. It further took note of the intentions of the mandatory States to continue to administer the territories in accordance with the obligations contained in the Mandates until other arrangements should be agreed upon between the United Nations and the mandatory Powers. This resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations.

The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations. This competence was in fact exercised by the General Assembly in Resolution 141 (II) of November 1st, 1947, and in Resolution 227 (III) of November 26th, 1948, confirmed by Resolution 337 (IV) of December 6th, 1949.

For the above reasons, the Court has arrived at the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it.

The right of petition was not mentioned by Article 22 of the Covenant or by the provisions of the Mandate. But on January 31st, 1923, the Council of the League of Nations adopted certain rules relating to this matter. Petitions to the League from communities or sections of the populations of mandated territories were to be transmitted by the mandatory Governments, which were to attach to these petitions such comments as they might consider desirable. By this innovation the supervisory function of the Council was rendered more effective.

The Court is of opinion that this right, which the inhabitants of South-West Africa had thus acquired, is maintained by Article 80,

paragraph 1, of the Charter, as this clause has been interpreted above. In view of the result at which the Court has arrived with respect to the exercise of the supervisory functions by the United Nations and the obligation of the Union Government to submit to such supervision, and having regard to the fact that the dispatch and examination of petitions form a part of that supervision, the Court is of the opinion that petitions are to be transmitted by that Government to the General Assembly of the United Nations, which is legally qualified to deal with them.

It follows from what is said above that South-West Africa is still to be considered as a territory held under the Mandate of December 17th, 1920. The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. These observations are particularly applicable to annual reports and petitions.

According to Article 7 of the Mandate, disputes between the mandatory State and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, if not settled by negotiation, should be submitted to the Permanent Court of International Justice. Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions.

* * *

Reference to Chapter XI of the Charter was made by various Governments in written and oral statements presented to the Court. Having regard to the results at which the Court has arrived, the question whether the provisions of that chapter are applicable does not arise for the purpose of the present Opinion. It is not included in the questions submitted to the Court and it is unnecessary to consider it.

* * *

Question (b) : *“Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa ?”*

Territories held under Mandate were not by the Charter automatically placed under the new International Trusteeship System.

This system should, according to Articles 75 and 77, apply to territories which are placed thereunder by means of Trusteeship Agreements. South-West Africa, being a territory held under Mandate (Article 77 *a*), may be placed under the Trusteeship System in accordance with the provisions of Chapter XII. In this sense, that chapter is applicable to the Territory.

Question (*b*) further asks in what manner Chapter XII is applicable to the Territory. It appears from a number of documents submitted to the Court in accordance with the General Assembly's Resolution of December 6th, 1949, as well as from the written and the oral observations of several Governments, that the General Assembly, in asking about the manner of application of Chapter XII, was referring to the question whether the Charter imposes upon the Union of South Africa an obligation to place the Territory under the Trusteeship System by means of a Trusteeship Agreement.

Articles 75 and 77 show, in the opinion of the Court, that this question must be answered in the negative. The language used in both articles is permissive ("as may be placed thereunder"). Both refer to subsequent agreements by which the territories in question may be placed under the Trusteeship System. An "agreement" implies consent of the parties concerned, including the mandatory Power in the case of territories held under Mandate (Article 79). The parties must be free to accept or reject the terms of a contemplated agreement. No party can impose its terms on the other party. Article 77, paragraph 2, moreover, presupposes agreement not only with regard to its particular terms, but also as to which territories will be brought under the Trusteeship System.

It has been contended that the word "voluntarily", used in Article 77 with respect to category (*c*) only, shows that the placing of other territories under Trusteeship is compulsory. This word alone cannot, however, over-ride the principle derived from Articles 75, 77 and 79 considered as a whole. An obligation for a mandatory State to place the Territory under Trusteeship would have been expressed in a direct manner. The word "voluntarily" incorporated in category (*c*) can be explained as having been used out of an abundance of caution and as an added assurance of freedom of initiative to States having territories falling within that category.

It has also been contended that paragraph 2 of Article 80 imposes on mandatory States a duty to negotiate and conclude Trusteeship Agreements. The Court finds no justification for this contention. The paragraph merely states that the first paragraph of the 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. There is nothing to suggest that the

provision was intended as an exception to the principle derived from Articles 75, 77 and 79. The provision is entirely negative in character and cannot be said to create an obligation to negotiate and conclude an agreement. Had the parties to the Charter intended to create an obligation of this kind for a mandatory State, such intention would necessarily have been expressed in positive terms.

It has further been maintained that Article 80, paragraph 2, creates an obligation for mandatory States to enter into negotiations with a view to concluding a Trusteeship Agreement. But an obligation to negotiate without any obligation to conclude an agreement can hardly be derived from this provision, which expressly refers to delay or postponement of "the negotiation and conclusion" of agreements. It is not limited to negotiations only. Moreover, it refers to the negotiation and conclusion of agreements for placing "mandated and other territories under the Trusteeship System as provided for in Article 77". In other words, it refers not merely to territories held under Mandate, but also to the territories mentioned in Article 77 (b) and (c). It is, however, evident that there can be no obligation to enter into negotiations with a view to concluding Trusteeship Agreements for those territories.

It is contended that the Trusteeship System created by the Charter would have no more than a theoretical existence if the mandatory Powers were not under an obligation to enter into negotiations with a view to concluding Trusteeship Agreements. This contention is not convincing, since an obligation merely to negotiate does not of itself assure the conclusion of Trusteeship Agreements. Nor was the Trusteeship System created only for mandated territories.

It is true that, while Members of the League of Nations regarded the Mandates System as the best method for discharging the sacred trust of civilization provided for in Article 22 of the Covenant, the Members of the United Nations considered the International Trusteeship System to be the best method for discharging a similar mission. It is equally true that the Charter has contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System. It may thus be concluded that it was expected that the mandatory States would follow the normal course indicated by the Charter, namely, conclude Trusteeship Agreements. The Court is, however, unable to deduce from these general considerations any legal obligation for mandatory States to conclude or to negotiate such agreements. It is not for the Court to pronounce on the political or moral duties which these considerations may involve.

For these reasons, the Court considers that the Charter does not impose on the Union an obligation to place South-West Africa under the Trusteeship System.

* * *

Question (c) : *“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 international status of the Territory results from the international rules regulating the rights, powers and obligations relating to the administration of the Territory and the supervision of that administration, as embodied in Article 22 of the Covenant and in the Mandate. It is clear that the Union has no competence to modify unilaterally the international status of the Territory or any of these international rules. This is shown by Article 7 of the Mandate, which expressly provides that the consent of the Council of the League of Nations is required for any modification of the terms of the Mandate.

The Court is further requested to say where competence to determine and modify the international status of the Territory rests.

Before answering this question, the Court repeats that the normal way of modifying the international status of the Territory would be to place it under the Trusteeship System by means of a Trusteeship Agreement in accordance with the provisions of Chapter XII of the Charter.

The competence to modify in other ways the international status of the Territory depended on the rules governing the amendment of Article 22 of the Covenant and the modification of the terms of the Mandate.

Article 26 of the Covenant laid down the procedure for amending provisions of the Covenant, including Article 22. On the other hand, Article 7 of the Mandate stipulates that the consent of the Council of the League was required for any modification of the terms of that Mandate. The rules thus laid down have become inapplicable following the dissolution of the League of Nations. But one cannot conclude therefrom that no proper procedure exists for modifying the international status of South-West Africa.

Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations for any modification of its terms, brought into operation for this purpose the same organ which was invested with powers of supervision in respect of the administration of the Mandates. In accordance with the reply given above to Question (a), those powers of supervision now belong to the General Assembly of the United Nations. On the other hand, Articles 79 and 85 of the Charter require that a Trusteeship Agreement be concluded by the mandatory Power and approved by the General Assembly

before the International Trusteeship System may be substituted for the Mandates System. These articles also give the General Assembly authority to approve alterations or amendments of Trusteeship Agreements. By analogy, it can be inferred that the same procedure is applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the Trusteeship System. This conclusion is strengthened by the action taken by the General Assembly and the attitude adopted by the Union of South Africa which is at present the only existing mandatory Power.

On January 22nd, 1946, before the Fourth Committee of the General Assembly, the representative of the Union of South Africa explained the special relationship between the Union and the Territory under its Mandate. There would—he said—be no attempt to draw up an agreement until the freely expressed will of both the European and native populations had been ascertained. He continued: "When that had been done, the decision of the Union would be submitted to the General Assembly for judgment."

On April 9th, 1946, before the Assembly of the League of Nations, the Union representative declared that "it is 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 South-West Africa a status under which it would be internationally recognized as an integral part of the Union".

In accordance with these declarations, the Union Government, by letter of August 12th, 1946, from its Legation in Washington, requested that the question of the desirability of the territorial integration in, and the annexation to, the Union of South Africa of the mandated Territory of South-West Africa, be included in the Agenda of the General Assembly. In a subsequent letter of October 9th, 1946, it was requested that the text of the item to be included in the Agenda be amended as follows: "Statement by the Government of the Union of South Africa on the outcome of their consultations with the peoples of South-West Africa as to the future status of the mandated Territory, and implementation to be given to the wishes thus expressed."

On November 4th, 1946, before the Fourth Committee, the Prime Minister of the Union of South Africa stated that the Union clearly understood "that its international responsibility precluded it from taking advantage of the war situation by effecting a change in the status of South-West Africa without proper consultation either of all the peoples of the Territory itself, or with the competent international organs".

By thus submitting the question of the future international status of the Territory to the "judgment" of the General Assembly as the "competent international organ", the Union Government recognized the competence of the General Assembly in the matter.

The General Assembly, on the other hand, affirmed its competence by Resolution 65 (I) of December 14th, 1946. It noted with satisfaction that the step taken by the Union showed the recognition of the interest and concern of the United Nations in the matter. It expressed the desire "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", and concluded: "The General Assembly, therefore, is unable to accede to the incorporation of the Territory of South-West Africa in the Union of South Africa."

Following the adoption of this resolution, the Union Government decided not to proceed with the incorporation of the Territory, but to maintain the *status quo*. The General Assembly took note of this decision in its Resolution 141 (II) of November 1st, 1947.

On the basis of these considerations, the Court concludes that competence to determine and modify the international status of South-West Africa rests with the Union of South Africa acting with the consent of the United Nations.

For these reasons,

The Court is of opinion,

On the General Question :

unanimously,

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

On Question (a) :

by twelve votes to two,

that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court ;

On Question (b) :

unanimously,

that the provisions of Chapter XII of the Charter are applicable to the Territory of South-West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System ;

and by eight votes to six,

that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System ;

On Question (c) :

unanimously,

that the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations.

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

(Signed) BASDEVANT,
President.

(Signed) E. HAMBRO,
Registrar.

Vice-President GUERRERO regrets that he is unable to concur in the opinion of the Court on the answer to the question under letter (b) and declares that in his opinion the Charter imposes on the Union of South Africa an obligation to place the Territory of

South-West Africa under the Trusteeship System, and that therefore the Union is bound under paragraph 2 of Article 80 of the Charter not to delay or postpone the negotiation and conclusion of an agreement for placing the Territory under the Trusteeship System. Otherwise Article 80 of the Charter would have no meaning. On this point and on the text in general, Mr. Guerrero shares the views expressed by Judge De Visscher.

Judges ZORIČIĆ and BADAWI PASHA declare that they regret to be unable to concur in the answer given by the Court to the second part of the question under letter (b). They share in general the views expressed on this point in the dissenting Opinion of Judge De Visscher.

Judge Sir ARNOLD McNAIR and Judge READ, availing themselves of the right conferred on them by Article 57 of the Statute, have appended to the Opinion of the Court statements of their separate Opinions.

Judges ALVAREZ, DE VISSCHER and KRYLOV, availing themselves of the right conferred on them by Article 57 of the Statute, have appended to the Opinion of the Court statements of their dissenting Opinions.

(Initialed), J. B.

(Initialed) E. H.

ANNEX

List of documents submitted to the Court by the Secretary-General of the United Nations in application of Article 65 of the Statute

I

DOCUMENTS TRANSMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE SECRETARY-GENERAL IN ACCORDANCE WITH RESOLUTION 338 (IV) ADOPTED BY THE GENERAL ASSEMBLY ON 6 DECEMBER, 1949

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League of Nations—The records of the First Assembly—Meetings of the Committees (II)—Minutes of the Sixth Committee—Allocation of mandates (Annex 17 *b*; Appendix 2).

Terms of League of Nations Mandates—Mandate for German South-West Africa.

Document republished by the United Nations [A/70].

League of Nations—Treaty Series—Publication of treaties and international engagements registered with the Secretariat of the League of Nations—No. 310.—Treaty concerning the re-establishment of peace between Germany and the United States of America, signed at Berlin, 25 August, 1921 (excerpt). [Volume XII, 1922, Numbers 1, 2, 3 and 4.]

Constitution of a Permanent Mandates Commission approved by the Council on 1 December, 1920.

See below: League of Nations—Responsibilities of the League arising out of Article 22 (Mandates)—Report by the Council to the Assembly—Annex 14.

League of Nations—Official Journal—Minutes of the sixteenth session of the Council—Second meeting (excerpt)—531. Allowances to members of the Permanent Mandates Commission. [3rd Year, No. 2—February, 1922.]

League of Nations—Official Journal—Minutes of the forty-sixth session of the Council—Fourth meeting (excerpt)—Question of the appointment of an additional member on the Permanent Mandates Commission. [8th Year, No. 10—October, 1927.]

League of Nations—Permanent Mandates Commission—Rules of procedure submitted for the approval of the Council of the League of Nations. [C.404. M.295. 1921. VI.]

Rules of procedure of the Permanent Mandates Commission.

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League of Nations—Permanent Mandates Commission—Rules of procedure. [C.404(2). M. 295(2). 1921. VI.]

Obligations falling upon the League of Nations under the terms of Article 22 of the Covenant (Mandates). (Report presented by the Belgian Representative, M. Hymans, and adopted by the Council of the League of Nations at San Sebastian on 5 August, 1920.)

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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.]

League of Nations—Permanent Mandates Commission—Minutes of the twelfth session (including the Report of the Commission to the Council)—Annex 4: Summary of the procedure to be followed in the matter of petitions concerning mandated territories. [C.545. M.194. 1927. VI.]

League of Nations—"C" Mandates—Questionnaire intended to facilitate the preparation of the annual reports of the mandatory Powers. [C.397. M.299. 1921. VI.]

League of Nations—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. [A. 14. 1926. VI.]

The Mandates System: Origin, Principles, Application.

See Series of League of Nations Publications, Geneva, April 1945. [VI. A. Mandates, 1945, VI. A. 1.]

League of Nations—Official Journal—Special Supplement No. 194—Records of the twentieth (conclusion) and twenty-first ordinary sessions of the Assembly:

Second plenary meeting (excerpt)—Speech by Mr. Leif Egeland (Union of South Africa).

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- Summary report of 2nd meeting, 10 May, 1945
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- Proposed working paper for chapter on dependent territories and arrangements for international trusteeship [323, II/4/12] See Volume 10, pp. 677 to 683.
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- Summary record of 40th meeting, 22 June, 1945 [WD. 440, CO/204] (excerpt). [English only.]

Summary record of 41st meeting, 23 June, 1945 [WD. 441, CO/205] (excerpt). [English only.]

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See Folder 26—Resolution 28 (II) of the Trusteeship Council—Annex and Folder 24—18th meeting, pp. 30 to 32.

Folder 26.

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Resolutions adopted by the Trusteeship Council during its second session—28 (II). Report of the Government of the Union of South Africa on the administration of South-West Africa for the year 1946.

VIII. RECORDS OF THE TRUSTEESHIP COUNCIL, THIRD SESSION

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Folder 28.*Trusteeship Council.**Records of proceedings.*

31st meeting (excerpt).

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Folder 29.*Trusteeship Council.**Documents.*

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Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council

T/181/Add. 3.

Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council

T/181/Add. 4.

Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council

T/181/Add. 5.

Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council

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Report of the Trusteeship Council covering its second and third sessions—Chapter VII—South-West Africa—Report on the administration of South-West Africa for 1946 A/603.

IX. RECORDS OF THE GENERAL ASSEMBLY, FIRST PART OF THE THIRD SESSION

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Agenda of the General Assembly, Third Session.

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77th meeting.

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80th meeting.

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Fourth Committee.

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Report of the Fourth Committee A/734.

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See A/734, pp. 405 and 406.

Denmark, Norway and Uruguay : revised draft resolution A/C.4/163/Rev. 1.

See A/734, pp. 407 and 411.

- India : draft resolution A/C.4/164.
See A/734, pp. 407 and 408.
- Greece : amendment to the draft resolution of Denmark, Norway and Uruguay (A/C.4/163) A/C.4/165.
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- Cuba : amendment to the draft resolution submitted by Denmark, Norway and Uruguay (A/C.4/163) A/C.4/166.
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- India : sub-amendment to the amendment of Cuba (A/C.4/166) to the draft resolution of Denmark, Norway and Uruguay (A/C.4/163/Rev. 1) A/C.4/167.
See Folder 31, 82nd meeting, pp. 358 and 359.
- India : sub-amendment to the amendment of Cuba (A/C.4/166) to the draft resolution of Denmark, Norway and Uruguay (A/C.4/163/Rev. 1) A/C.4/167/Rev. 1.
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- Burma and Philippines : amendment to the revised draft resolution of Denmark, Norway and Uruguay (A/C.4/163/Rev. 1) A/C.4/168.
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- Belgium : amendment to the draft resolution of Denmark, Norway and Uruguay (A/C.4/163/Rev. 1) A/C.4/169.
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- India : amendment to the revised draft resolution of Denmark, Norway and Uruguay (A/C.4/163/Rev. 1) A/C.4/170.
See Folder 31, 84th meeting, p. 373.
- Report of the Government of the Union of South Africa on the administration of South-West Africa : report of the Trusteeship Council—Letter dated 19 November, 1948, from the Delegation of the Union of South Africa to the Chairman of the Fourth Committee A/C.4/171.
- Draft report of the Fourth Committee A/C.4/172.
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- [*Note—See Folder 29 for :
 Report of the Trusteeship Council covering its second and third sessions—Chapter VII—South-West Africa—Report on the administration of South-West Africa for 1946* A/603.]

Folder 33.

Plenary meetings of the General Assembly.

Records of proceedings and documents.

164th plenary meeting—Report of the Government of the Union of South Africa on the administration of South-West Africa. Report of the Trusteeship Council: report of the Fourth Committee.

[*Note—See Folder 29 for :*

Report of the Trusteeship Council covering its second and third sessions—Chapter VII—South-West Africa—Report on the administration of South-West Africa for 1946 A/603.

See Folder 32 for :

Report of the Fourth Committee A/734.]

Folder 34.

Plenary meetings of the General Assembly.

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227 (III). Question of South-West Africa.

X. RECORDS OF THE TRUSTEESHIP COUNCIL, FIFTH SESSION

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[*Note—See Folder 42 for:*

Letter from Mr. J. R. Jordaan, deputy permanent representative of the Union of South Africa to the United Nations, addressed to the Secretary-General

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Folder 37.

South-West Africa Constitution Act.

Letter from Mr. J. R. Jordaan, deputy permanent representative of the Union of South Africa to the United Nations, addressed to the Secretary-General

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South-West Africa Constitution Act, 1925—
The Laws of South-West Africa, 1925: Proclamations and principal Government notices issued in South-West Africa, 1st January to 31st December, 1925 (excerpt).

Folder 38.

Trusteeship Council.

Resolution.

III (V). Question of South-West Africa.

XI. RECORDS OF THE GENERAL ASSEMBLY, FOURTH SESSION

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Document.

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Documents.

- India : draft resolution A/C.4/L.53.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council—Report of the Fourth Committee—Paragraph 29 (A/1180).
- Denmark, Norway, Syria and Thailand : draft resolution A/C.4/L.54.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council—Report of the Fourth Committee—Paragraph 34 (i) (A/1180).
- India : draft resolution A/C.4/L.55.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council—Report of the Fourth Committee—Paragraph 34 (ii) (A/1180).
- Guatemala : proposal A/C.4/L.56.
- Guatemala : revised proposal A/C.4/L.56/Rev. 1.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council—Report of the Fourth Committee—Paragraph 7 (A/1180).
- Dominican Republic : amendment to the proposal submitted by Guatemala (A/C.4/L.56) A/C.4/L.58.
See Folder 40, 132nd meeting, paragraph 2.
- Union of Soviet Socialist Republics : amendment to the draft resolution submitted by India (A/C.4/L.53) A/C.4/L.61.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council

—*Report of the Fourth Committee—Paragraph 32 (A/1180).*

Guatemala : amendment to the draft resolution submitted by India (A/C.4/L.53) A/C.4/L.63.

See Folder 40, 136th meeting, paragraphs 48 and 49.

Denmark, India, Norway, Syria and Thailand : draft resolution A/C.4/L.64.

See Folder 42—Question of South-West Africa : report of the Trusteeship Council—Report of the Fourth Committee—Paragraph 35 (A/1180).

Communications received by the Secretary-General A/C.4/L.57 and A/C.4/L.57/Corr. I.

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See Folder 42—Question of South-West Africa : report of the Trusteeship Council—Report of the Fourth Committee—Paragraph 10 (A/1180).

Report of Sub-Committee 7 to the Fourth Committee A/C.4/L.62.

Question of South-West Africa : report of the Trusteeship Council—Draft report of the Fourth Committee A/C.4/L.65.

See Folder 42—Question of South-West Africa : report of the Trusteeship Council—Report of the Fourth Committee—(A/1180).

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269th plenary meeting.

Letter from Mr. J. R. Jordaan, deputy permanent representative of the Union of South Africa to the United Nations, addressed to the Secretary-General A/929.

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Question of South-West Africa—Argentina, Belgium, Brazil, Canada, China, Denmark, Dominican Republic, Guatemala, Iraq, Lebanon, Mexico, Norway, Syria, Thailand, Turkey, United States of America, Uruguay : amendment to draft resolution II proposed by the Fourth Committee (A/1180) A/1197.
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Resolutions adopted on the reports of the Fourth Committee—337 (IV). Question of South-West Africa : reiteration of previous resolutions and submission of reports. 338 (IV). Question of South-West Africa : request for an advisory opinion of the International Court of Justice.

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Non-self-governing territories

Summary of information transmitted to the Secretary-General during 1946.

United Nations Publications, Sales No. 1947 VIB 1.

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Special Committee on information transmitted under Article 73(e) of the Charter.

Non-self-governing territories.

Date of receipt of information on territories enumerated. Item IV of the Provisional Agenda

A/AC.28.W.6

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