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

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1. EXPOSÉ DU GOUVERNEMENT ÉGYPTIEN

Le régime des mandats internationaux n'a pas été destiné à conférer à la Puissance mandataire la souveraineté sur les populations des territoires soumis aux mandats. Le mandat reconnaît au mandataire des pouvoirs administratifs, d'autant plus forts que la population est plus arriérée ; mais, même très étendus, comme dans les mandats « C », ils ne pourraient jamais atteindre un pouvoir de libre disposition, un droit réel de souveraineté.

2. — Et si le Gouvernement de l'Union sud-africaine a été autorisé dès 1920, en vertu du texte original du mandat, à administrer le Territoire du Sud-Ouest africain : « en tant que partie intégrante de l'Union », à l'instar de tous les mandats « C », il n'en est pas moins vrai qu'il n'avait qu'un pouvoir d'administration comportant diverses obligations internationales. Aussi, pendant vingt ans d'existence de la Société des Nations, l'Union sud-africaine n'avait-elle cessé de présenter à la Commission permanente des Mandats prévue à l'article 22 du Pacte de la S. d. N., les rapports annuels du Gouvernement de l'Union sur son administration du Sud-Ouest africain. En examinant ce rapport annuel, la Commission interpellait souvent le représentant du Gouvernement de l'Union sur sa dite administration, rendant ainsi effectif le contrôle de la S. d. N.

3. — Par la dissolution de la S. d. N., la Commission des Mandats a cessé d'exister, mais il serait téméraire d'en conclure que les obligations internationales, découlant pour la Puissance mandataire en vertu du mandat, auraient cessé d'exister ; et que désormais celle-ci serait libre de disposer du territoire placé sous son mandat comme bon lui semblerait, sans rendre compte à qui que ce soit de son administration ou de son action.

4. — Admettre pareille conclusion, c'est feindre d'ignorer qu'une nouvelle organisation internationale a pris en charge, sous une forme même plus perfectionnée et plus développée, les fonctions internationales qu'exerçait jadis la S. d. N. au nom d'une communauté internationale encore plus restreinte.

5. — Pour ce qui concerne particulièrement le régime des mandats prévu dans l'article 22 du Pacte, la dissolution de la

S. d. N. a mis incontestablement fin à ses fonctions relatives au contrôle de l'administration des Puissances mandataires et au sort des territoires sous mandat. Mais il y a lieu de rappeler qu'avant de s'éteindre l'Assemblée générale de la S. d. N., dans sa résolution unanime d'avril 1946, à sa dernière session de Genève, avait pris soin de noter que « des principes correspondant à ce que déclare l'article 22 du Pacte sont incorporés dans certains chapitres de la Charte des Nations Unies ». De même, dans sa dite résolution, la S. d. N. enjoignait aux Puissances mandataires de continuer à administrer les territoires sous mandat conformément aux obligations qui leur incombaient de par les mandats respectifs, jusqu'à ce que d'autres solutions soient prises d'un commun accord par l'Organisation des Nations Unies et par les Puissances mandataires.

6. — Cette résolution de l'Assemblée générale de la S. d. N. doit s'interpréter à la lumière du chapitre XII de la Charte des Nations Unies sur le régime international de tutelle, et notamment des articles 77, 79 et 80 dudit chapitre. Le premier de ces articles, dans son paragraphe premier, stipule que le régime de tutelle s'appliquera, entre autres, aux territoires ACTUELLEMENT sous mandat qui viendraient à être placés sous ce régime en vertu d'accord de tutelle. Le paragraphe 2 de ce même article ajoute qu'un ACCORD ULTÉRIEUR déterminera quels territoires rentrant dans cette catégorie — ou dans les autres catégories mentionnées au paragraphe 1 de cet article — seront placés sous le régime de la tutelle et à quelles conditions. L'article 79 précise que les conditions de tutelle, pour chacun des territoires DESTINÉS A ÊTRE PLACÉS SOUS CE RÉGIME, de même que les modifications et amendements qui peuvent être apportés à ces conditions, feront l'objet d'un accord entre les États directement intéressés, Y COMPRIS LA PUISSANCE MANDATAIRE, dans le cas de territoire sous mandat d'un Membre des Nations Unies, et seront approuvés conformément aux articles 83 et 85 (c'est-à-dire par le Conseil de Sécurité pour les zones désignées comme stratégiques, et par l'Assemblée générale et le Conseil de Tutelle, pour tous les autres zones ou territoires).

7. — A ajouter que l'article 80 de la Charte avait pris soin de souligner dans son premier paragraphe que jusqu'à la conclusion des accords de tutelle conformément aux articles 77, 79 et 81, « aucune disposition du chapitre XII de la Charte ne saura être interprétée comme modifiant directement ou indirectement, en aucune manière, les droits quelconques d'aucun État ou d'aucun peuple ou les termes d'actes internationaux en vigueur auxquels des Membres de l'Organisation peuvent être parties ». Cette clause de sauvegarde ne devant être interprétée cependant comme motivant un retard ou un ajournement de la négociation et de la conclusion d'accords pour placer des territoires sous mandat ou

autres sous le régime de tutelle, prévu à l'article 77. (Voir texte anglais de l'art. 80, par. 2, de la Charte.)

8. — En appliquant ces dispositions au cas concret sous examen, il semble en résulter que l'acte original du mandat conférant à l'Union sud-africaine l'administration du Territoire du Sud-Ouest africain, avec les droits et les obligations que ce mandat comporte, doit nécessairement continuer à recevoir son application, dans toute la mesure du possible, et ce jusqu'à la conclusion d'un accord particulier de tutelle, ou jusqu'à ce que le sort de ce territoire soit autrement décidé par les organes internationalement compétents.

9. — Les textes précités laissent voir en outre qu'il n'existe aucune obligation juridique, ni à charge des organes des Nations Unies, ni surtout à charge des Puissances mandataires, de transférer les territoires actuellement sous mandat, en territoires sous tutelle. Les dispositions de l'article 77 semblent avoir un caractère nettement facultatif ; et l'article 80, paragraphe 2, lui-même se trouve subordonné aux clauses facultatives de l'article 77.

10. — Il résulte également desdits textes que le consentement de la Puissance mandataire est nécessaire pour présenter un accord de tutelle ou pour en arrêter les conditions (voir article 77, alinéa 2, et l'article 79 de la Charte). Et il n'y a aucune autre disposition dans la Charte que l'on pourrait interpréter comme étant de nature à créer, explicitement ou implicitement, une obligation de soumettre un accord de tutelle ou d'imposer juridiquement ce régime de tutelle aux Puissances mandataires quant aux territoires qu'elles administraient en vertu d'un acte international de mandat.

11. — Par contre, on ne saurait admettre que la Puissance mandataire puisse disposer comme bon lui semblerait du territoire placé sous son mandat, ou en modifier unilatéralement le statut international. En ce faisant, elle méconnaîtrait en effet non point seulement son propre titre : l'acte original du mandat ; mais aussi les décisions compétemment prises par les organes de la S. d. N. au nom de la communauté internationale, ou du moins d'un nombre considérable d'États se trouvant tous Membres à présent des Nations Unies.

12. — Tenant compte de ces considérations de fait et de droit, on devrait admettre, à défaut d'un accord de tutelle, que la Puissance mandataire doit continuer à administrer le territoire, à lui confié, dans l'esprit du mandat en respectant, dans toute la mesure du possible, les obligations mises à sa charge par l'acte du mandat. Ceci est tout à fait conforme du reste à la résolution unanime de la dernière Assemblée générale de la S. d. N. du mois d'avril 1946.

13. — L'Organisation des Nations Unies ayant hérité des pouvoirs et de la « mission sacrée de civilisation » de la S. d. N. vis-à-vis des peuples non encore capables de se diriger eux-mêmes, comme précisément le sont les populations des territoires sous mandat, il paraîtrait difficile de vouloir refuser aux Nations Unies le pouvoir de contrôler l'administration du Sud-Ouest africain, dont aucun acte contraire, internationalement reconnu, n'est venu modifier le statut international établi en 1920.

14. — Ce contrôle pourrait continuer à s'exercer à l'heure actuelle par les organes correspondant le plus (quant à leurs attributions) au Conseil de la S. d. N. et à la Commission permanente des Mandats, à savoir : l'Assemblée générale des Nations Unies et le Conseil de Tutelle. Ce dernier faisant en l'espèce l'œuvre qu'accomplissait autrefois la Commission permanente des Mandats, se résumant comme suit : 1) examiner le rapport annuel que devrait présenter aux Nations Unies le Gouvernement de l'Union sud-africaine sur son administration du Sud-Ouest africain ; 2) demander au représentant de l'Union les éclaircissements et les renseignements nécessaires relatifs à l'administration dudit territoire ; 3) rendre compte de tout cela à l'Assemblée générale annuelle des Nations Unies.

15. — Devant continuer à administrer le Sud-Ouest africain dans l'esprit du mandat qui lui a été confié dès 1920, à plus forte raison l'Union sud-africaine ne saurait s'arroger le droit de modifier unilatéralement le statut dudit territoire. Arrêté par un acte international, ce statut ne pourrait être modifié légalement que par un acte contraire ayant la même force et la même valeur juridique. Ceci exigerait l'intervention et le consentement préalables du Conseil de Tutelle et de l'Assemblée générale des Nations Unies. Il va sans dire que ces deux organes ne sauraient agir arbitrairement, mais devraient s'inspirer des buts du régime même des mandats et des principes dominant de la Charte, y compris ceux ayant inspiré les chapitres XI et XII.

16. — A la lumière de ce qui précède, il est relativement aisé de répondre aux questions posées par l'Assemblée générale dans sa Résolution du 6 décembre 1949.

De l'avis du Gouvernement égyptien :

1° Le Statut international du Territoire du Sud-Ouest africain, continuant à être celui d'un territoire sous mandat, l'Union sud-africaine doit continuer à administrer ce territoire dans l'esprit du mandat avec toutes les obligations que ce système comportait d'après l'acte original du mandat, en tenant compte seulement, au point de vue de la procédure, du changement survenu depuis, par l'institution de l'Organisation des Nations Unies ayant pris les lieu et place de la S. d. N.

2° Les dispositions du chapitre XII de la Charte sur le régime international de tutelle ne s'appliqueront au Territoire du Sud-Ouest africain que si ce territoire venait à être placé sous ce régime en vertu d'un accord entre les États directement intéressés, comprenant bien entendu l'Union sud-africaine, et approuvé conformément aux articles 83 et 85 de la Charte. En attendant, le Conseil de Tutelle aura à l'égard de ce territoire sensiblement les mêmes attributions qu'avait jadis la Commission permanente des Mandats.

3° L'Union sud-africaine est sans compétence pour modifier le statut international du Territoire du Sud-Ouest africain. Déterminé par un acte international, ce statut exige pour sa modification un acte international contraire, lequel, vu le nouvel agencement de la communauté internationale, nécessite pour le moins l'approbation du Conseil de Tutelle et de l'Assemblée générale des Nations Unies.

Le 11 mars 1950.

2. STATEMENT SUBMITTED BY THE GOVERNMENT OF THE UNION OF SOUTH AFRICA

1. The Court is confronted with a number of questions, the first two of which, namely, "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 ?", are not only of a general nature, but also such that the answers to them depend on the answers to the particular questions. The Government of the Union of South Africa will therefore in the present statement deal with the particular questions.

2. The first particular question is :

> *"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 ?"*

There can be obligations under the Mandate only if that instrument still exists as a document having legal force and effect. Whether the Mandate continues to exist as such a document, depends in turn on whether 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. It is hardly necessary to review in detail the origins of the mandates system. The important legal fact which emerges clearly from the investigations of generally accepted authorities, is that the legal title by which a mandatory exercised the administration of a mandated territory was a double one, deriving on the one hand from the Supreme Council of the Principal Allied and Associated Powers which appointed the mandatories, and on the other hand, from the Council of the League of Nations which confirmed the mandates.

4. In order to determine whether the Principal Allied and Associated Powers have any legal rights at present in respect of the mandates or, conversely, whether the Union of South Africa has any obligations towards those Powers in respect of its administration of South-West Africa, it is necessary to establish the exact nature of the renunciation by Germany in Article 119 of the Treaty of Versailles of all her right and title over her overseas possessions in favour of the Principal Allied and Associated Powers.

5. In this connexion, the judgment of the Appellate Division of the Supreme Court of South Africa in the case of *Rex versus*

Christian (1924 A.D., page 101) may be of some assistance. The then Chief Justice stated as follows: "The expression 'renounce in favour of' is sometimes used in the treaty as equivalent to 'cede to'. By Articles 83 and 87, for instance, Germany renounced in favour of Czechoslovakia and of Poland respectively all right and title over territory within certain boundaries separately specified. That was in effect a cession in each case of the territory indicated; it ceased to form part of Germany, and it became portion of the new State. Not so with the overseas possessions; or at any rate with such of them as fell within the operation of Article 22. They were not by Article 119 ceded to all or any of the Principal Powers, any more than the City of Danzig was ceded to them under Article 100. The *animus* essential to a legal cession was not present on either side. For the signatories must have intended that such possessions should be dealt with as provided by Part I of the Treaty; they were placed at the disposal of the Principal Powers merely that the latter might take all necessary steps for their administration on a mandatory basis. The difference between territory actually ceded and territory renounced in order to be mandated is shown by a comparison of Articles 254 and 257. In the former case, the cessionary is compelled to assume responsibility for a proportion of the German debt; in the latter, no such obligation is imposed on the mandatory in spite of the fact that all German public property in the territory [of South-West Africa] is transferred to it. The intention of the signatories seems to have been to place certain overseas possessions relinquished by Germany upon a basis new to international law, and regulated primarily by Article 22 of the Treaty."

6. In other words, the Principal Powers were given a commission to dispose of the German territories in question in a specified manner, which they did on May 7, 1919, and May 20, 1920, by assigning those territories to mandatories, by subsequent agreement on boundaries and by notifying to the League Council the terms and conditions of the mandates which they proposed should be adopted by the Council. Having thus performed their commission, the Principal Powers were *functi officio*. Whatever title they possessed to the German territories in question before the establishment of the mandates system was merely a transitional title of which they divested themselves by doing what they had agreed to do.

7. The mandates themselves are in the form of grants from the League Council, not from the Principal Powers, and mandatories undertook to exercise the mandates on behalf of the League of Nations, not on behalf of the Principal Powers. Indeed, at no time since the allocation of the mandates has there been concrete evidence that the Principal Powers, as such, have claimed rights or regarded themselves, as such, as having duties in respect of the administration of mandated territories.

8. After the allocation of the mandates, the administration of those territories was determined solely by Article 22 of the Covenant and by the terms of the individual mandates. Thus, amendments of the texts of mandates, the alteration of the frontiers of mandated territories and the termination of the mandates system in respect of those territories which became independent, were brought about without the participation of the Principal Powers.

9. It is true that the United States of America, as an Associated Power, put forth a claim to participation in the allocation of mandates and in the drafting of their terms after rejecting the Peace Treaty. But that claim was limited to participation in the original establishment of the mandates system under Article 22 of the Covenant. The C Mandates had, however, already been confirmed when the United States replied to the invitation from the League Council to take part in the confirmation of mandates. Rights acquired subsequently by the United States were in consequence of agreements with individual mandatories, but no such agreement exists with respect to South-West Africa.

10. It is true, also, that Articles 40[1] and 43[2] of the Peace Treaty with Italy of February 10, 1947, are not inconsistent with the possible contention that the Principal Powers are, as such, still concerned with mandatory administration and can claim legal rights in respect thereof. Those articles are, in themselves, however, no proof of the existence of, or of a claim to, such rights. They are just as little inconsistent with the contention that the Principal Powers have no such rights and that they were inserted in the Treaty *ex abundanti cautela* (Article 40 to the extent that it refers to such rights and Article 43 in its entirety), in order to preclude Italy from putting forth claims in the future.

11. In the light of the above considerations, the Government of the Union of South Africa contend that they do not have international obligations under the Mandate towards the Principal Allied and Associated Powers.

12. The next question is whether the Union of South Africa owes to the United Nations any obligations under the Mandate which it previously owed to the League of Nations. The answer must necessarily depend on whether the United Nations had succeeded to, or assumed, the functions of the League of Nations relating to the mandates system. Clearly, the Union of South Africa can have no obligations under the Mandate towards the non-existent League of Nations, so that, assuming that that

[1] Article 40 : Italy hereby renounces all rights, titles, and claims deriving from the mandate system or from any undertakings given in connexion therewith, and all special rights of the Italian State in respect of any mandated territory.

[2] Article 43 : Italy hereby renounces any rights and interests she may possess by virtue of Article 16 of the Treaty of Lausanne signed on July 24, 1923.

organization had no successor in law, the Mandate as a legally enforceable instrument must be regarded as having ceased to exist.

13. Similarly, if the United Nations, not as successor to, but as substitute for, the League of Nations, did not assume the functions of the League in relation to the mandates system, there could be no continuance of the obligations under the Mandate in the sense that they would now be due to the United Nations.

14. If the United Nations is to be regarded as the successor in law to the League of Nations, it is not sufficient to demonstrate that it is a substitute for the League. It must be demonstrated in addition that the rights and obligations of the League have passed to the United Nations, succession being a substitution plus continuation. This, however, is not possible, for there is no evidence whatever that in the United Nations there is a continuation of the personality of the League. Indeed, the two organizations existed for some time side by side as distinct *personæ*, and when the League finally dissolved itself, its legal personality died with it. There was no sign of a legal *nexus* between the two organizations, each being the creature of a separate independent statute. States which were Members of the League did not automatically become Members of the United Nations. Some of them are not members even to-day.

15. Nor has the United Nations regarded itself as the legal successor to the League. The Executive Committee which sat in London from 16 August to 24 November, 1945, and which had, as one of its tasks, the drawing up of recommendations to the Preparatory Commission on the transfer of certain functions of the League to the United Nations, had accepted the idea of a total transfer of the League's functions and assets to the United Nations, subject to exceptions and without prejudice to future action. Although such a total transfer was not finally recommended, the language appropriate to a legal succession appeared in the report and recommendations. The report was repudiated by the Soviet Delegation on the ground that it made the United Nations appear to be the successor in law to the League. The proposals finally adopted by the Preparatory Commission avoided the suggestion of a "transfer" of functions and spoke of the "assumption" by the United Nations of "certain activities" previously exercised by the League.

16. The commentary on the Report of the Preparatory Commission, published by the Government of the United Kingdom (Cmd. 6734) states that the change "avoids the suggestion of *de jure* survival of any part of the League, a result which several delegations were anxious to achieve".

17. While there has therefore been a *de facto* continuity in respect of certain activities of the League, there has been no

legal succession which would automatically ensure to the United Nations the right to exercise the functions of the League in relation to the mandates system. That being so, the Mandate for South-West Africa, in so far as its existence depended on the continued existence of the legal personality of the League of Nations, must be regarded as having expired.

18. It appears to be correct to say, therefore, that the United Nations can have legal rights only in respect of those functions previously exercised by the League of Nations which the United Nations has specifically assumed. The General Assembly, in its Resolution of 12 February, 1946, declared "that the United Nations is willing in principle, and subject to the provisions of this Resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations....", and then proceeded to enumerate those functions and powers. It did not include in that enumeration any functions and powers relating to the mandates system.

19. In the same Resolution, the General Assembly declared that it "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". No such request has been made to the United Nations.

20. The Assembly of the League of Nations, in its Resolution of 18 April, 1946, relating to mandates, recognized "that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end....". It "noted" that the Charter of the United Nations embodies principles corresponding to those declared in Article 22 of the Covenant of the League. But beyond noting these corresponding principles, it did not take any steps to effect the transfer of any of its rights or duties in respect of mandated territories, to the United Nations. The Resolution of the League Assembly was later than that of the General Assembly of the United Nations, so that, if there had been any intention on the part of the League that the United Nations should assume functions and powers relating to mandates, that intention would have been expressed in a manner similar to that adopted in other resolutions of the same date whereby Members of the League, in so far as it was necessary, assented and gave effect to the Resolution of the General Assembly of the United Nations. It is clear, therefore, that whereas the United Nations assumed none of the League's functions or powers with respect to mandates, and whereas the League recognized that its own functions in that respect had come to an end, there could be no continuation of obligations under the mandates towards

the United Nations. The mandates, and in particular the Mandate for South-West Africa, must, therefore, necessarily have ceased to exist as legally enforceable instruments.

21. It follows that statements made by South African delegates at the final session of the League of Nations and at sessions of the General Assembly of the United Nations, to the effect that the Union of South Africa would continue to administer South-West Africa in accordance with the obligations of the Mandate, or in accordance with the spirit of the Mandate, could not be regarded as indicative of the continued existence of the Mandate itself. They were statements of the policy which the Government of the Union of South Africa would continue to carry out in South-West Africa, and no more legal significance can be attached to them than can be attached to any statement of policy made by a sovereign, independent State. What was declared on those occasions is being carried out at present, but the Government of the Union of South Africa do not admit any legal obligation under the Mandate compelling them to do so.

22. The second particular question is:

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

When the Government of the Union of South Africa signed the Charter, the Territory of South-West Africa was a mandated territory and fell within category (*a*) of Article 77, namely, "territories now held under mandate". It is, however, the view of the Government of the Union of South Africa that there is no legal obligation to place it under trusteeship. The language of the relevant provisions of Chapter XII is in their opinion clearly permissive. The opening provision in that chapter, namely, Article 75, does indeed contain an obligation, but it is an obligation placed upon the United Nations to establish under its authority an international trusteeship system. The same article states that the system is for the administration and supervision of such territories "as *may* be placed thereunder by subsequent individual agreements". Clearly, there could be no trusteeship system in the absence of territories to which it would apply. While still a mandatory Power, the Union of South Africa had, at San Francisco, on May 7, 1945, circulated a document which was admitted as a conference document, making known its view "that the mandate should be terminated and that the territory should be incorporated as part of the Union of South Africa". That view was repeated in essence at the final meeting of the League of Nations. At that meeting the delegate of the Union of South Africa made a formal statement to the effect that the Union of South Africa intended at the forthcoming session of

the United Nations 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 Union Government, on both occasions, clearly indicated their policy of incorporation of the territory, if its peoples so desired. Both the United Nations and the League of Nations were aware of this, of the fact that the mandates system would terminate upon the dissolution of the League and that the Union of South Africa did not intend to submit a trusteeship agreement. Indeed, paragraph 4 of the League's resolution noting "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", left the door open for the course proposed by the Union Government. The use of the words "other arrangements" was significant. These words do not restrict the manner of dealing with such territories to the submission of trusteeship agreements, but are wide enough, and were, it is submitted, intended, to include the proposals which the Union Government had in mind. Had the League intended otherwise, the words used would no doubt have been "until trusteeship agreements have been entered into", or words to that effect. The subsequent consultation of the peoples of South-West Africa confirmed the Government of the Union of South Africa in their policy of incorporation, which was, however, not proceeded with in deference to the political groupings in the United Nations at the time.

23. But although it was known at San Francisco that the Union of South Africa did not intend to submit a trusteeship agreement, it was equally well known that most, if not all, of the other mandatory Powers would submit agreements placing under trusteeship the territories administered by them under mandate. In respect of such territories as would eventually be placed thereunder, the United Nations undertook, therefore, to establish the trusteeship system. It undertook something which it knew beforehand it would be able to put into effect. The word "may" in Article 75, used in conjunction with the word "agreements"—a word necessarily implying a voluntary connotation—is, however, incontestably permissive and not obligatory, and no more can be inferred from Article 75 than that there was an obligation upon the United Nations to establish a trusteeship system in respect of territories voluntarily placed thereunder.

24. In Article 77, a similar permissive phraseology is employed, namely, "such territories in the following categories as may be placed" under the trusteeship system "by means of trusteeship

agreements". These words, appearing in the opening part of Article 77, clearly govern equally the three categories of territories which follow. Two of them, (*b*) and (*c*), are admittedly voluntary categories. The third one, namely, mandated territories, appears in precisely the same context as the other two, and there is nothing to indicate that it alone, while governed similarly by the permissive opening words, should be regarded as an obligatory, and not as a voluntary category.

25. The use of the word "voluntary" in category (*c*) only, is in itself no reason for according to the two other categories an obligatory character. If the words "may" and "agreements", especially when used in conjunction with each other, necessarily connote, as they do, something permissive and voluntary, it would need more than an inference from the use of the word "voluntary" in only one category to change that connotation to something imperative and obligatory. If anything, that word was used *ex abundanti cautela* and not in order to negative the voluntary nature of categories (*a*) and (*b*), it being apparent that the territories referred to in category (*c*) are such as stand in close constitutional relationship with the administering authorities, to whom it might be desirable to indicate as clearly as possible that there is no suggestion of compulsion in Article 77.

26. But whatever doubt may exist as to the voluntary nature of Article 77, must certainly be dispelled by the unequivocal wording of paragraph 2 of that article, which reads : "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." No implication which may possibly arise from the wording of paragraph 1 could override so specific a provision. Paragraph 2 leaves no doubt that it applies to all three categories of territories. It leaves no doubt that, if agreement with the United Nations is not reached in respect of a particular territory within a particular category, that territory will fall outside the trusteeship system.

27. Bearing in mind the fundamental provision contained in Article 2, paragraph 1, of the Charter, that "the Organization is based on the principle of the sovereign equality of all its Members", it is impossible to read into the second paragraph of Article 77 any suggestion that the agreement referred to therein can be other than a voluntary one, submitted and entered into without compulsion.

28. It could hardly be maintained that any mandatory Power intended, by the terms of this article, to assume any legal obligation to bring the territory of which it is the mandatory under a régime which differs in important respects from the mandates system, by an agreement of which the terms could not be known at the time and which might well contain provisions very different from the terms of the mandate previously held by it. The San Francisco Con-

ference was not unmindful of this aspect of the matter. At that Conference, the representative of Australia (Dr. Evatt) stated: "The assumption is that there is an identity between the terms of the mandate, and the terms of the trusteeship system, but there is not. In many aspects they differ.... There are differences of substantial import between the trusteeship system which is now being erected as a framework, and the mandate system .... and we cannot alter the mandatory system. The only body that could possibly have altered it was the League.... It is not a question of merely continuing the mandates. The mandate system was a trusteeship system, but it differs in important respects from this system, and therefore .... you cannot by an act of an organization such as this alter the existing terms of those mandates, without the authority of the person carrying out the trust."

29. In the light of the above, paragraph (2) of Article 80, which provides against delay and postponement of the negotiation and conclusion of trusteeship agreements, can apply only where the State concerned has already decided to submit an agreement. To hold that it applied under other circumstances as well, would not only be a contradiction of the voluntary nature of Articles 75 and 77, but would also lead to obviously unintended results.

30. Paragraph 2 of Article 80 applies with reference to all territories specified in Article 77, including, therefore, the territories referred to in category (*c*), that is, territories voluntarily placed under the system by States responsible for their administration. This circumstance alone makes it impossible to contend that paragraph 2 of Article 80 carries the implication of a legal obligation. Such an implication would make it entirely inconsistent with the expressly voluntary category (*c*) and would mean that every State responsible for the administration of any territory in any category referred to in Article 77 (including *inter alia* non-self-governing territories), is bound to submit a trusteeship agreement. Such a conclusion cannot be accepted.

31. The view that there is no legal obligation to place former mandated territories under trusteeship is finally confirmed by the proceedings at San Francisco. The delegate for Egypt at San Francisco proposed that the word "all" be inserted after "(*a*)" in Article 77 (at that time paragraph B 3 of the draft chapter on trusteeship). Had the proposal been adopted, category (*a*) of Article 77 would now have read: "all territories now held under mandate". "Objection was taken to the proposed amendment on the ground that it would have the effect of creating a compulsory system, and thus of legislating beyond the competence of the present Conference.... No Power now holding a mandate should be expected to continue to accept responsibility under a new system, if it had no share in deciding upon the revised terms of

its trust" (*United Nations Conference on International Organization*, Volume X, page 469). The Egyptian proposal was consequently defeated.

32. For the above reasons, the Government of the Union of South Africa maintain that they are under no legal obligation to place the territory of South-West Africa under trusteeship.

33. The third and last particular question 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 the international status of the Territory ?"*

In expressing their views on this question, the Government of the Union of South Africa wish to state at the outset that they have not at any time, acting alone, modified the international status of South-West Africa. It is certain, however, that the status of that territory has already been modified as a result of the dissolution of the League of Nations.

34. The word "status" in the English language, as defined by the Oxford Dictionary, means, in its legal sense, a person's relation to others as fixed by law. Whereas in the past, therefore, the international status of South-West Africa could not be determined without considering its, as well as the Union of South Africa's, relation to the League of Nations, the present status of the territory has changed to the extent that it bears no relationship to that organization at all.

35. Because, as has been pointed out, the United Nations neither succeeded to, nor assumed, the functions of the League in relation to the mandates system, the United Nations itself cannot claim to replace the League in the latter's past relationship towards the Territory and the Union of South Africa. The power which the League, acting together with a mandatory power, had to modify the status of a mandated territory, has, therefore, not passed to the United Nations.

36. The Principal Allied and Associated Powers which, at no stage since the allocation of the mandates, took any active part in the amendment of mandate texts, or in the alteration of frontiers, and who must, in any event, be regarded as *functi officio*, have no rights in respect of former mandated territories and have no power, thus, to modify the status of such territories.

37. It is clear, furthermore, that those signatories of the Treaty of Versailles which ratified it, have no right to modify the status, or to sanction any fresh disposition, of the Territory of South-West Africa without the consent of the Union of South Africa

which also ratified the treaty. Finally, there is no obligation on the Union of South Africa to place the territory under trusteeship.

38. Nevertheless, the international status of South-West Africa has undergone a change, for it no longer has the status of a mandated territory. As has been pointed out, that change was not brought about by any unilateral act of the Government of the Union of South Africa, but in consequence of the dissolution of the League. Ever since the allocation of the mandates, the mandates system was governed by Article 22 of the Covenant and by the terms of the individual mandates. The latter having ceased to exist, it is necessary to determine the effects of the dissolution of the League on Article 22, for in such determination will lie the answer to the question whether the Union of South Africa is competent or not to modify the international status of South-West Africa.

39. The Covenant of the League of Nations is an integral part of the Treaty of Versailles, comprising Articles 1 to 26 thereof, and including, therefore, Article 22. Although an integral part of the treaty, it differed from the rest of it in two important respects. Firstly, there were more signatories, either by virtue of original signature, later accession or admission, to the Covenant than to the entire treaty, and secondly, there was a procedure of amendment not applicable to the rest of the treaty. The power to amend, contained in Article 26, could be exercised by unanimous vote in the Council and by a majority of the Members of the League whose representatives composed the Assembly. As all the States which had ratified the treaty were not members of the Council, it was possible to amend the Covenant without the consent of all those States. For the rest of the treaty, however, including Articles 118 and 119, no amendment could, or can, be effected without the consent of all the signatories who ratified it. The Covenant was, therefore, a document of a type different from the rest of the treaty, although forming part of it. As the statute of the great majority of States, designed to promote international co-operation and to achieve international peace and security, its existence as a legal document was inseparable from that of the League of Nations which it established.

40. When, therefore, the League of Nations at its final session dissolved itself, its dissolution had the effect of removing from the Treaty of Versailles that part which contained the Covenant. If that were not so, the absurd position would obtain that those of the signatories to the whole treaty, who have accepted the Charter of the United Nations, nevertheless still accept, as legally valid, the terms of the Covenant.

41. Admittedly, the power to amend does not, in general, necessarily include the power to repeal. But in dissolving the League, the

Assembly purported to act in terms of Article 3, paragraph 3, of the Covenant, and not in terms of Article 26. It came together as an assembly of sovereignly equal States and, dealing with a matter "within the sphere of action of the League or affecting the peace of the world", unanimously decided, in its Resolution of 18 April, 1946, that "the League of Nations shall cease to exist except for the sole purpose of the liquidation of its affairs".

42. The act of dissolution has never been questioned, and although a number of States did not participate in that act, their consent thereto cannot otherwise than be necessarily implied. It is juridically inconceivable, therefore, that any State could, at this stage, claim either the application or the fulfilment of any specific article of the Covenant, including Article 22.

43. There is consequently no international legal document presently in force, limiting the administrative powers of the Union of South Africa with respect to the Territory of South-West Africa, or enjoining it to continue its treatment of the territory as a separate international entity. The Government of the Union of South Africa maintain, therefore, that they alone have the competence to modify the international status of the territory.

44. If it should be held, however, that Article 22 of the Covenant still has legal validity, it is submitted that it obviously cannot be legally valid to the extent of reviving the League or the mandate or the Mandates Commission. That being so, the remainder of Article 22, in so far as it could apply to South-West Africa under the circumstances, would do no more than reiterate what is, in fact, the policy of the Government of the Union of South Africa towards the Territory of South-West Africa. Nor would it do less than allow the Union of South Africa to administer the territory as an integral portion of its own territory which, in fact, it is not doing, except to a limited extent. In so far as it may be held to be valid, therefore, Article 22 could not operate as a limitation upon the relationship between the Union of South Africa and the Territory of South-West Africa. In particular, it imposes no obligation on the Union of South Africa to refrain from modifying the international status of that territory.

45. As the Government of the Union of South Africa hold the view that they alone are competent to modify the international status of South-West Africa, and as the competence to modify implies the competence to determine the status of the territory, the latter part of the question under consideration in their submission falls away.

46. The Government of the Union of South Africa would close this statement by expressing their view that the Territory of South-West Africa falls, at present, under no known category in inter-

national law. It was taken by conquest by the Union of South Africa during the 1914-1918 War and subsequently placed under mandate which has now lapsed. It is not a colony, or an independent State or part of the territory of the Union of South Africa. Its status in international law is *sui generis*, and it is being administered in accordance with a system which is *sui generis*, but which is nevertheless not inconsistent with the objectives of the Charter of the United Nations. It is the considered view of the Government of the Union of South Africa that there is no international legal limitation upon their competence in respect of the territory and that their international obligations, arising from the status of the territory, are to be determined accordingly.

3. WRITTEN STATEMENT OF THE UNITED STATES OF AMERICA ON THE QUESTIONS SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE UNITED NATIONS GENERAL ASSEMBLY IN ITS RESOLUTION 338 (IV), DATED DECEMBER 6th, 1949

Introductory

The General Assembly of the United Nations, in Resolution 338 (IV), dated December 6, 1949, decided to submit certain legal questions concerning the Territory of South-West Africa to the International Court of Justice, with a request for an advisory opinion. In that resolution the General Assembly proposed first a general question concerning the status in international law of the Territory of South-West Africa and the international rights and obligations of the Union of South Africa with respect to that Territory. The General Assembly went on in the same resolution to detail certain specific aspects of the general question, on which in particular the Assembly sought an advisory opinion from the International Court of Justice. Resolution 338 (IV) reads as follows:

"*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."

The Government of the United States desires to address itself in this written statement to four issues which, in this Government's opinion, are the legal issues principally raised by the questions which the General Assembly has submitted to the Court. The four issues are: (I) Whether, and if so how, the obligations of the Mandate for South-West Africa continue to bind the Union of South Africa; (II) Whether, and if so how, the provisions of Chapter XII of the United Nations Charter are applicable to the Territory of South-West Africa; (III) Whether, and if so how, the provisions of Chapter XI of the Charter are applicable to South-West Africa; and (IV) How the Mandate for South-West Africa, if it subsists, may be modified or terminated. The present written statement sets forth the views of the Government of the United States on these issues.

I. Obligations of the Mandate for South-West Africa

The obligations of the Mandate for South-West Africa continue to bind the Union of South Africa at the present time. This proposition seems fairly well established with respect to the substantive obligations laid down in the mandate instrument, although some difficulties on the procedural side are obvious in view of the dissolution of the League of Nations.

A. *Source of the Union's authority in South-West Africa*

The Union of South Africa has derived its authority in the Territory of South-West Africa from the treaties and other international agreements of the general settlement following the First World War.

1. *The Treaty of Versailles*

The authority of the Union of South Africa in the Territory of South-West Africa stems from the Treaty of Versailles. Articles 118 and 119 of the Treaty of Versailles provide:

> "*Article 118.*—In territory outside her European frontiers as fixed by the present Treaty, Germany renounces all rights, titles and privileges whatever in or over territory which belonged to her or to her allies, and all rights, titles and privileges whatever their origin which she held as against the Allied and Associated Powers.
>
> Germany hereby undertakes to recognize and to conform to the measures which may be taken now or in the future by the Principal Allied and Associated Powers, in agreement where necessary with third Powers, in order to carry the above stipulation into effect.
>
> In particular Germany declares her acceptance of the following articles relating to certain special subjects.
>
> *Article 119.*—Germany renounces in favour of the Principal Allied and Associated Powers[1] all her rights and titles over her overseas possessions."

Article 22 of the Covenant of the League of Nations, embodied in the Treaty of Versailles, provides, in part:

> "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 inhabited 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 civilization 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 responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as mandatories on behalf of the League.
>
> The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.
>
> . . . . . .
>
> There are territories, such as South-West Africa and certain of the South Pacific Islands, 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

[1] These Powers were stated in the Preamble of the Treaty to be the United States of America, France, the British Empire, Italy and Japan.

be best administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent commission shall be constituted to receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the mandates."

2. *Work of the Principal Allied and Associated Powers on allocations and mandate instruments*

Prior to signature of the Treaty of Versailles, while South-West Africa was occupied by armed forces of the Union of South Africa, the Principal Allied and Associated Powers including the United States, acting through the Supreme War Council, on May 5, 1919, decided upon the following allocation of mandate: "*German South-West Africa*. The mandate shall be held by the Union of South Africa." See V, *Foreign Relations of the United States* (Paris Peace Conference 1919), 506-508. In this manner the Principal Allied and Associated Powers anticipated the authority they would have under Article 119 of the Treaty of Versailles when it came into effect, and took the first step toward making the Union of South Africa the mandatory Power for South-West Africa. Before the Union could be confirmed in its mandate, it remained for the Treaty to enter into force and the terms of mandate to be fixed pursuant to the eighth paragraph of Article 22 of the League Covenant.

On June 27, 1919, the Principal Allied and Associated Powers, through a meeting of the Council of Four at which Japan was also represented, considered drafts of the mandate instruments prepared by Lord Milner and circulated by Mr. Lloyd George. The Council of Four agreed to set up a commission consisting of one representative of each of the five Powers "to consider the drafting of mandates" and for related purposes. See VI, *Foreign Relations of the United States* (Paris Peace Conference 1919), 723-729. On the following day, June 28, 1919, the Treaty of Versailles was signed.

On December 24, 1919, the Heads of Delegations of the Principal Allied and Associated Powers considered the drafts drawn up by the Commission on Mandates which they had established six months earlier. Approving the "A" and "B" drafts in principle, they referred all to a drafting committee, noting, however, the need to discuss the "C" drafts further with Japan, which insisted on the insertion of an "open-door" clause. See IX, *Foreign Relations of the United States* (Paris Peace Conference 1919),

637-648. A little over two weeks later—January 10, 1920—the League of Nations came into being and Article 22 of the Covenant became effective.

3. *Action by the League Council on mandates*

On August 5, 1920, the Council of the League of Nations, meeting at San Sebastian, heard and unanimously adopted a report submitted by the representative of Belgium, Mr. Hymans, entitled "The appeal of the Council to the Principal Allied and Associated Powers to define the mandates to be conferred under Article 22 of the Covenant". League of Nations Council P.V. 20/29/14 (8th sess., San Sebastian, July 31-August 5, 1920), 39-43, 63, 176-191; League of Nations *Official Journal* No. 6 (September, 1920), 313, 317, 334-351. Among the measures which the report found necessary to "ensure the observance of Article 22 and to apply the mandatory system" was the following:

> "(*c*) The mandatory Powers chosen must be invested with the authority and the necessary powers for administering territories by means of an instrument which will legally bind them." League of Nations Council P.V. 20/29/14 (8th sess., San Sebastian, July 31-August 5, 1920), 179.

Continuing to review steps taken, the report found as to the decision of the Principal Allied and Associated Powers of May 5, 1919 (as supplemented by a decision of August 7, 1919):

> "This agreement has not been expressed in a form implying a legal obligation, although the territories in question are actually being administered by the mandatory Powers to whom it was intended to entrust them." *Ibid.*

The report then went on to explain the necessity for agreement by both the Principal Allied and Associated Powers and the Council in completing the legal investiture of the mandatory with the right to administer the mandate[2].

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[2] The report by Mr. Hymans read, in part:

"I.—*Allocation of the mandates and legal title of the mandatories*

"There is one point on which there seems to be no divergency of opinion, namely, that the right to allocate the mandates—that is to say, to appoint the mandatory Powers and to determine the territories over which they shall exercise authority—belongs to the Principal Allied and Associated Powers. Article 22 of the Covenant makes no provision regarding the authority which shall appoint the mandatories; but Article 119 of the Treaty of Versailles transfers the sovereignty over the former German overseas possessions to the Principal Allied and Associated Powers, and Article 118 expressly stipulates that measures shall be taken by the Principal Allied and Associated Powers, in agreement, where necessary, with third Powers, in order to carry into effect the full consequences of the provision by which Germany renounces her rights outside Europe. These two articles of the Treaty of Versailles can obviously serve as guides in the interpretation of the Covenant, since they are strictly contemporary, have been drawn up by the same authors,

After adopting Mr. Hymans' report, the League Council passed the following resolutions:

"I. The Council decides to request the Principal Powers to be so good as to (*a*) name the Powers to whom they have decided

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and since the Covenant forms part of the Treaty of Versailles. The Allied Powers have adopted the same interpretation of Article 22 of the Covenant by inserting articles in the Treaty of Peace of Saint-Germain dated September 10, 1919, with Austria, and in the draft treaty with Turkey, which stipulate expressly that the right to appoint mandatory Powers shall belong to the Principal Allied Powers. There can be no question, moreover, as to the intentions of the authors of the Covenant with regard to this question.

"It is not enough, however, that the mandatory Powers should be appointed; it is important that they should also possess a *legal title*—a mere matter of form, perhaps, but one which should be settled, and the consideration of which will help towards a clear understanding of the conception of mandates.

"It must not be forgotten that, although the mandatory Power is appointed by the Principal Powers, it will govern as a mandatory and in the name of the League of Nations.

"It logically follows that the legal title held by the mandatory Power must be a double one: one conferred by the Principal Powers, and the other conferred by the League of Nations. The procedure should, in fact, be the following:—

"1. The Principal Allied and Associated Powers confer a mandate on one of their number or on a third Power.

"2. The Principal Powers officially notify the Council of the League of Nations that a certain Power has been appointed mandatory for such a certain defined territory.

"3. The Council of the League of Nations takes official cognizance of the appointment of the mandatory Power, and informs the latter that it [the Council] considers it as invested with the mandate, and at the same time notifies it of the terms of the mandate, after ascertaining whether they are in accordance with the provisions of the Covenant." *Id.*, at 181.

The report contained the following comment concerning the relationship of responsibility as between the League and the mandatory:

"III.—*The extent of the League's right of control*

. . . . . .

"The practical and positive question appears to me to be 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 rights of control should not provoke any justifiable complaints, and thus increase the difficulties of the task undertaken by the mandatory Power." *Id.*, at 187.

to allocate the mandates provided for in Article 22 ; (*b*) to inform it as to the frontiers of the territories to come under these mandates ; (*c*) to communicate to it the terms and the conditions of the mandates that they propose should be adopted by the Council from [*sic*] following the prescriptions of Article 22.

II. The Council will take cognizance of the mandatory Power appointed and will examine the draft mandates communicated to it, in order to ascertain that they conform to the prescriptions of Article 22 of the Covenant.

III. The Council will notify to each Power appointed that it is invested with the mandate, and will, at the same time, communicate to it the terms and conditions.

IV. The Council instructs the Secretary-General, following the recommendations set forth in this report, to prepare a draft scheme for the organization of the Commission of Control provided for by Article 22, para. 9." *Id.*, at 191.

At a meeting of the Council of the League at Brussels, October 28, 1920, a further report by Mr. Hymans, entitled "Mandates", was read and unanimously adopted. League of Nations Council P.V. 20/29/16 (10th sess., 1920), 21-27, 59, 189-197 ; League of Nations *Official Journal* No. 8 (1920), 28, 30-33. Mr. Hymans' report noted that agreement had still not been reached on the terms of the mandates and stated unequivocally the power and duty of the Council to intervene :

"Beyond doubt, it is in every way desirable that the Principal Powers should be able to arrive at a complete understanding and to submit agreements to the League. Failing this very desirable agreement, however, the Covenant provides for the intervention of the Council with a view to determining the degree of authority, of control or of administration to be exercised by the mandatories.

The Council, whose duty is to ensure the carrying out of the Covenant, will, without doubt, have to inform the Assembly as to the present position with regard to this matter. We sincerely hope, therefore, that before the end of the Assembly the Principal Powers will have succeeded in settling by common agreement the terms of the mandates which they wish to submit to the Council. The latter would certainly be disposed to reserve its report upon this question until the end of the Assembly meeting at Geneva, so as to allow the Powers adequate time for the purpose."

By letter of October 27, 1920, this view was communicated by the League Council to the Principal Allied Powers. The entire matter was also fully reported by the Council to the League Assembly. See II, *League of Nations Official Records*, Assembly (1st sess., 1920, Sixth Committee), 371 *et sqq.*, Annex 17 *b*. On December 1, 1920, agreement still not having been reached, the letter of October 27 was followed up by the following telegram :

"In the name of the Council of League of Nations I have the honour to refer to letters which Council addressed to you on the subject of mandates on August 5th and October 27th, 1920 *Stop* In order to give to Principal Allied Powers the necessary time to complete their negotiations regarding terms and conditions of the mandates which they decide to propose should be adopted by the Council the Council had arranged not to present this report to the Assembly on this subject until the last days of the meeting *Stop* This Council has received no draft mandate up to the present and in view of the strong public feeling on the subject it ventures to urge the extreme importance of a quick settlement *Stop* Anxious as it is to see the mandates drafted by previous agreement between the Principal Allied Powers the Council cannot indefinitely postpone the fulfilment of the duties which will fall to it if such agreement is not reached *Stop* It is to be anticipated that the Assembly will remind the Council of the clause in the Covenant which declares that the degree of authority control or administration to be exercised by the mandatory shall if not previously agreed upon be determined by the Council *Stop* The Council therefore most earnestly begs that any draft mandates upon which agreement may have been reached by the Principal Allied Powers should be communicated to it at a sufficiently early date to enable the Council to give all necessary information to the Assembly before the end of the present meeting *Stop* HYMANS President of the Assembly." League of Nations Council P.V. 20/29/17 (11th sess., 1920), 92.

The British Government on December 14, 1920, submitted a draft mandate instrument to the League Council. This was referred to the Legal and Mandates Section of the Secretariat. On December 17, 1920, the Council of the League at the 14th meeting of the 11th Session decided, subject to certain amendments, to accept the British draft mandate for the Territory of South-West Africa. League of Nations Council P.V. 20/29/17 (11th sess., 1920), 36, 37. The instrument so approved became the mandate instrument for South-West Africa [3].

4. *Special position of two of the Principal Allied and Associated Powers in regard to the mandates*

It may be relevant to note at this juncture that the position of Japan and the United States differed somewhat from that of the other Principal Allied and Associated Powers with respect to the mandates. In the case of Japan that difference was slight. It is reflected in a reservation entered by Japan on December 17, 1920 (when the League Council approved the mandate for South-West Africa). As will be seen from the text of the reservation [4],

[3] The text of the instrument is given below at pages 106, 128.

[4] The reservation made by Japan reads:

"*Declaration by the Japanese Government relating to 'C' Mandates*

"From the fundamental spirit of the League of Nations and as the question of interpretation of the Covenant, His Imperial Japanese Majesty's Government

it in no way impaired Japan's recognition of, and agreement to, the mandates as finally given by the Council of the League of Nations.

The United States did not ratify the Treaty of Versailles. However, it acquiesced in the establishment of the mandate system, including the approval of mandate instruments. Article I of the separate treaty which the United States subsequently concluded with Germany reads :

> "Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such treaty has not been ratified by the United States." Article I of the Treaty of Berlin, signed August 25, 1921, ratifications exchanged November 11, 1921.

So far as the United States is concerned, therefore, its failure to ratify the Treaty of Versailles should not be considered to invalidate or weaken the dispositions made in the creation and operation of the mandate system.

5. *Character of the Union's authority in South-West Africa*

It has now been seen that the Union of South Africa acquired its authority with respect to South-West Africa from the following series of acts which, taken together, brought the mandate into being : the Treaty of Versailles, the allocation of mandate by the Principal Allied and Associated Powers, and the approval of terms of mandate by the Council of the League of Nations. Authority was bestowed on the Union to exercise powers of tutelage over South-West Africa on behalf of the League. No authority other than that of the Mandate was conferred on the Union of South Africa with respect to the Territory of South-West Africa. The character of the Union's authority as mandatory Power is clearly indicated in the report (quoted in footnote 2 above) which the League Council approved when it met at San Sebastian.

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have a firm conviction in the justice of the claim they have hitherto made for the inclusion of a clause concerning the assurance of equal opportunities for trade and commerce in 'C' mandates. But from the spirit of conciliation and co-operation and their reluctance to see the question unsettled any longer, they have decided to agree to the issue of the Mandate in its present form. That decision, however, should not be considered as an acquiescence on the part of His Imperial Japanese Majesty's Government in the submission of Japanese subjects to a discriminatory and disadvantageous treatment in the mandated territories ; nor have they thereby discarded their claim that the rights and interests enjoyed by Japanese subjects in these territories in the past should be fully respected." *Id.*, at 104.

B. *The Mandate remains in force as an international obligation*

The Union of South Africa has continued since the Versailles settlement and approval of the Mandate by the League of Nations in 1920 to administer the mandated Territory of South-West Africa. Nothing has happened in the intervening years to discharge the Union Government from the legal obligations it undertook pursuant to the Treaty of Versailles and the terms of its Mandate. These obligations have not been terminated pursuant to provisions of the Mandate, by the outbreak of the Second World War, or by the dissolution of the League of Nations and the establishment of the United Nations. The members of the world community, severally and through the League of Nations and the United Nations, have clearly evidenced their belief in the continuing legal force of the mandatory's obligations, and their intention that these obligations should not lapse. The Union of South Africa evidenced concurrence in such belief and intention by action and by word until 1948. And South Africa, since 1948, has not by action or by word renounced the rights conferred on it as mandatory. In 1948 some expressions by Union Government representatives indicated belief that the Mandate had expired, but in 1949 still other Union statements were made which cast doubt on the previous expressions.

1. *The Mandate has not expired according to its terms*

(*a*) The Mandate has not been terminated under the provisions of Article 7 of the Mandate

Article 7 of the Mandate provides: "The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate." The League of Nations Council never gave its consent to a modification of the Mandate resulting in its termination, nor has the United Nations done so[5].

(*b*) Independence has not been granted by the mandatory

The question of possible ways of modifying the international status of South-West Africa consistently with the terms of the Mandate is discussed in Part IV below (pages 127 *et sqq.*). Assuming, however, that one method of modification or termination is by giving independence to the territory, it is clear that this has not been done. The letter which the deputy permanent representative of the Union of South Africa to the United Nations, on July 11, 1949, addressed to the Secretary-General, and the accompanying text of the South-West Africa Affairs Amendment Act of 1949 make abundantly clear the continued status of the Territory as a dependent area of the Union of South Africa. U.N. Doc. A/929 (July 13, 1949).

[5] The status of the United Nations in relation to the Mandate is discussed in I, C, 2 and IV, C, below (pages 106-111, 135-137).

(c) South-West Africa has not been incorporated in any other country

It has been suggested that South Africa can incorporate South-West Africa because this was the future planned for the Territory at the Paris Peace Conference. See U.N *Official Records*, General Assembly (3rd sess., 1st part, Fourth Committee, 1949), 294 (statement by representative of Union of South Africa). But cf. *id.*, at 313-314 (statement by representative of Uruguay). Termination of the Mandate by incorporation was foreseen by President Wilson, but only on the basis that it should not be annexation and that it be based on the wishes of the people of South-West Africa after their development had reached the stage which would "qualify them to express a wish as to their ultimate relations.... The fundamental idea would be that the world was acting as trustee through a mandatory, and would be in charge of the whole administration until the day when the true wishes of the inhabitants would be ascertained." See III, *Foreign Relations of the United States* (Paris Peace Conference, 1919), 740. It seems clear that the guaranty of impartiality, in determining when unification might be proper, was to be found and was intentionally made to reside in the considered opinion of the world community.

As will be brought out below (pages 102, 129-130), the Union of South Africa requested approval of incorporation by the General Assembly of the United Nations in 1946, and the General Assembly in Resolution 65 (I) of December 14, 1946, declined to accede to such incorporation. Unilateral action by the Union of South Africa to effect incorporation would be contrary to the Mandate, and appears not in fact to have been proclaimed by the Union Government. See U.N *Official Records*, General Assembly (4th sess., Fourth Committee, 1949), 213-215, 239-240 (statements by representative of Union of South Africa).

2. *The Mandate was not terminated by the Second World War*

(a) General principles of international law

It seems unnecessary to dwell at length on the question of the effect of the Second World War upon this mandate. It is generally accepted that treaties to which belligerents alone are parties are not necessarily abrogated by war. It is even clearer that a multipartite agreement of such general interest to the community of nations as a League of Nations Mandate could not be abrogated, *ipso facto*, by the outbreak of war. *The North Atlantic Fisheries Case*, Hague Court Reports (ed. Scott, 1916), 141, 159. *Accord: Clark* v. *Allen*, 331 U.S., 503 (1947); *Techt* v. *Hughes*, 229 N.Y., 222 (1920); see also, *Resolution of Institute of International Law on Effect of War on Treaties*, Christiania, 1912, Oxford University Press (ed. Scott, 1916), 173-174; V, Hackworth, *Digest of International Law*, sec. 513; II, Oppenheim, *International Law* (6th ed., 1944), sec. 99.

(*b*) Subsequent action by the parties

In San Francisco, while drafting the United Nations Charter, in Geneva, when dissolving the League, and in the United Nations itself, both the mandatory Powers and the other Members of the League and the United Nations have premised their actions on the continuing effectiveness of the mandates. The San Francisco Conference drafted and approved Articles 77, 79 and 80 of the Charter, which set out rules applicable to "territories now held under mandate", or "territories held under mandate by a Member of the United Nations". Article 80, among other things, was designed expressly to preserve the rights of mandatories and of the peoples of mandated territories. The League's final resolution regarding mandates expressly sanctioned the continuing validity of the mandates[6].

3. *Dissolution of the League and establishment of the United Nations did not end the Mandate*

(*a*) Effect of a mandatory's withdrawal from the League

That the obligation of a mandatory under Article 22 and the mandate instrument are not dependent on continuance of the membership of such mandatory in the League of Nations has been demonstrated in the case of Japan. On March 27, 1935, Article 22 as part of the Covenant defining obligations of membership ceased to bind Japan ; but Article 22, as incorporated by reference in the mandate for the former German possessions in the North Pacific Ocean, continued to have and receive binding legal effect. The League asserted and Japan recognized the continuing jurisdiction of the Permanent Mandates Commission, as an agent of the League Council, to receive and consider Japan's annual reports under paragraph 7 of Article 22 of the Covenant and Article 6 of the mandate instrument. These positions were taken notwithstanding any existing theoretical uncertainties as to the location of "sovereignty", and notwithstanding the very practical difference that upon Japan's withdrawal the participation of Japan as a Member of the Council in reviewing reports and in designating the members of the Commission automatically terminated. See League of Nations *Official Journal*, Permanent Mandates Commission (28th sess., 1935), 125, 183-184.

The case of Japan differs from the case of the Union of South Africa. In the latter the Union of South Africa has not withdrawn, but the Council of the League has been dissolved as the instrument for supervising the carrying out of the obligations of the mandate instruments and Article 22 of the Covenant ; this dissolution was effected by the Union and the other remaining

[6] A more extended discussion of this question is contained in I, B, 3, below (pages 96-99).

Members of the League. The Union remains a Member of the United Nations, which it, together with the other remaining Members of the League and other States, has generally entrusted with functions formerly exercised by the League. It cannot be contended that the Union Government, in concert with the other governments referred to, has released the mandatory from the obligations of the Mandate.

(*b*) The making of the United Nations Charter

The Charter of the United Nations was drafted at San Francisco, April 25-June 25, 1945, and came into force October 24, 1945. The League of Nations was dissolved by a Resolution of the League Assembly of April 18, 1946, following meetings at Geneva commenced on April 8, 1946. The Union of South Africa, of course, played an active part in both tasks.

The intention of the Union Government, the intention of the other mandatory Powers, the intention of all governments concerned and of record, with the exception of one [7], whose subsequent acquiescence in the resolutions relating to the Territory of South-West Africa shows a change in its position, was not to permit the adoption of the United Nations Charter or the dissolution of the League to impair rights and obligations under the mandates.

The provisions of Articles 77 (1) (*a*), 79 and 80 of the Charter of the United Nations make it clear that the Charter does not terminate any mandate but rather contemplates the continuing existence of the mandates until other arrangements are agreed upon. Article 80 reads :

> "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."

Article 77 (1) (*a*) enumerates as one of the categories subject to the application of Chapter XII "territories now held under mandate". Again Article 79 requires approval of trusteeship

[7] This was Egypt. See League of Nations *Official Journal*, Assembly (21st sess., 1946), Special Suppl. No. 194, 58-59 ; U.N. *Official Records*, General Assembly (1st sess., 2nd part, plenary, 1946), 1327 ; same (2nd sess., plenary, Vol. I), 650-651 ; same (3rd sess., 1st part, plenary, 1948), 592 ; same (2nd sess., Fourth Committee, 1947), 51.

agreements by a mandatory Power "in the case of territories held under mandate by a Member of the United Nations".

Likewise the history of the framing of the Charter shows an intention to conserve and not to end mandates. At the fourth meeting of Committee II/4 of the United Nations Conference on International Organization at San Francisco, on May 14, 1945, "The delegate from the Union of South Africa, supplementing his remarks at the third meeting, stated that the Committee should bear in mind, in drawing up general principles, that the terms of existing mandates could not be altered without the consent of the mandatory Power." See 10, U.N.C.I.O. Doc. 439. At the same meeting the representative of the United States "pointed out that his Government did not seek to change the relations existing between a mandatory and a mandated territory without the former's consent". See *id.*, at 440. At the ninth meeting, as at other times, the representative of Egypt made clear his concern that the trusteeship provisions of the Charter should not alter the rights of the peoples of a mandated territory. See *id.*, at 477. The Committee provisionally approved a text after recording the following statement by the United States delegate :

> "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.
>
> The Chairman suggested that this statement should be made a matter of record." See *id.*, at 486.

The final report of the Committee to Commission II contained the following explanation of the matter :

> "*Maintenance of existing rights, 'Conservatory Clause'* (Section B, paragraph 5)
>
> The Committee recommends that specific provision be made to the effect that, except as may be agreed upon in individual trusteeship agreements and until such agreements have been concluded, nothing in the chapter on dependent territories is to be interpreted as altering the rights of any States or any peoples or the terms of existing international instruments to which Member States respectively may be parties. The Committee, also, recommends that this provision for the safeguarding of such rights and international instruments shall not be interpreted as giving grounds for delay or postponement in the negotiation and conclusion of agreements placing territories under the trusteeship system.

Some delegates proposed that changes be made in this conservatory paragraph so that it would apply only to the rights of inhabitants of each territory and not to the rights of mandatory Powers and other States and peoples. Other delegates felt that there was no reason to cut off some rights and preserve others. They held that all rights without distinction should be treated equally.

The delegate for the United States emphasized the fact that paragraph 5 neither increased nor diminished the rights of any States or any peoples with respect to any territories and that any change in such rights would remain a matter for subsequent agreements.

In the discussion of paragraph 5, it was suggested, with reference to mandated territories, that the paragraph should include a specific reference to paragraph 4 of Article 22 of the Covenant of the League of Nations. Objections to this suggestion were raised on the grounds that it would be inadvisable to refer, specifically, to any one international instrument to which all the United Nations were not parties. It was stated that the phrase 'existing international instruments' was preferable.

The Committee accepted the interpretation that among the 'rights whatsoever of any States or any peoples', mentioned in the proposed amendment, there are included any rights set forth in paragraph 4 of Article 22 of the Covenant of the League of Nations." *Id.*, 610-611.

(*c*) London session of United Nations General Assembly and final session of League of Nations Assembly

At the first part of the First Session of the General Assembly, the Fourth Committee considered some of the problems arising in the institution of the international trusteeship system of the United Nations. The entire discussion at the eleventh and twelfth meetings of the Committee was predicated on the continued existence of the mandates until new arrangements should be agreed upon, such as the placing of a mandated territory under trusteeship. See U.N. *Official Records*, General Assembly (1st sess., 1st part, Fourth Committee, 1946), 6 (statements by representatives of New Zealand and Union of South Africa); *id.*, at 12 (statements by representatives of the Netherlands and France); *id.*, at 13 (statement by representative of Australia).

Following this discussion in the Fourth Committee, the General Assembly adopted Resolution XI (I) on February 9, 1946. That resolution referred in its preamble to "Members of the United Nations which are now administering territories held under mandate", and in two operative paragraphs stated:

> "3. Welcomes the declarations, made by certain States administering territories now held under mandate, of an intention to negotiate trusteeship agreements in respect of some of those territories....

4. Invites the States administering territories now held under mandate to undertake practical steps...."

The view that the mandates continued in force after the dissolution of the League was clearly expressed by representatives of the mandatory Powers at the Twenty-First Session of the League of Nations Assembly, held at Geneva, April 8-18, 1946. The representatives of the United Kingdom and France made statements acknowledging the continuance of their obligations as mandatories. See League of Nations *Official Journal*, Assembly (21st sess., plenary, 1946), 28 *et sqq*. The representative of Belgium specifically recognized that Article 80 of the United Nations Charter, by preserving rights, likewise preserved the correlative duties of mandatory Powers. See *id*., at 43. The representative of New Zealand, recalling the statements of Prime Minister Fraser to the United Nations General Assembly, said :

"New Zealand does not consider that the 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."

And the representative of 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. Accordingly, until the coming into force of appropriate trusteeship agreements under Chapter XII of the Charter, the Government of Australia will continue to administer the present mandated territories, in accordance with the provisions of the mandates, for the protection and advancement of the inhabitants. In making plans for the dissolution of the League, the Assembly will very properly wish to be assured as to the future of the mandated territories, for the welfare of the peoples of which this League has been responsible. So far as the Australian territories are concerned, there is full assurance. In due course these territories will be brought under the trusteeship system of the United Nations ; until then, the ground is covered not only by the pledge which the Government of Australia has given to this Assembly to-day but also by the explicit international obligations laid down in Chapter XI of the Charter, to which I have referred. There will be no gap, no interregnum, to be provided for." See *id*., at 47.

Probably the most explicit statement of the continuity of the obligations of a mandatory Power following dissolution of the League of Nations was that of the representative of the Union of South Africa :

> "Since the last League meeting, new circumstances have arisen obliging the mandatory Powers to take into review the existing arrangements for the administration of their mandates. As was fully explained at the recent United Nations General Assembly in London, the Union Government have deemed it incumbent upon them to consult the peoples of South-West Africa, European and non-European alike, regarding the form which their own future government should take. On the basis of those consultations, and having regard to the unique circumstances which so signally differentiate South-West Africa—a territory contiguous with the Union—from all other mandates, 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. As the Assembly will know, it is already administered under the terms of the Mandate as an integral part of the Union. 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.
>
> The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. 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." See *id.*, at 32-33.

Before adjournment, the League Assembly on April 18, 1946, adopted the following resolution :

> "The Assembly,
>
> 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,
>
> 1. Expresses its satisfaction with the manner in which the organs of the League have performed the functions entrusted to them with respect to the mandates system and in particular pays tribute to the work accomplished by the Permanent Mandates Commission ;

2. Recalls the role of the League in assisting Iraq to progress from its status under an 'A' Mandate to a condition of complete independence, welcomes the termination of the mandated status of Syria, the Lebanon and Transjordan, which have, since the last session of the Assembly, become independent members of the world community ;

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 intention 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." See *id.*, at 58.

The only dissent was expressed by Egypt ; its view was "that mandates have terminated with the dissolution of the League of Nations". However, the opinion was expressly related to the case of Palestine, an "A" Mandate. See *id.*, at 59.

The report of the Assembly's Committee had stated before this resolution was adopted :

> "Following upon a number of statements in plenary session of the Assembly with regard to the future of the territories now held under mandate, this subject was but briefly discussed by the First Committee. Attention was drawn by the delegate of China to the fact that, although the Charter of the United Nations —in particular by the establishment of an international trusteeship system—embodied principles corresponding to those of the mandate system, it made no provision for assumption by the United Nations of the League's functions under that system as such. The continued application to the mandated territories of the principles laid down in the Covenant of the League was a matter on which the Assembly would wish to be assured. The First Committee took note of the fact that all the Members of the League now administering mandated territories had expressed their intention to continue, notwithstanding the dissolution of the League, to administer these territories for the well-being and development of the peoples concerned in accordance with their obligations under the respective mandates, until other arrangements were agreed upon with the United Nations." See *id.*, at 251.

(*d*) Sessions of the General Assembly 1946-1949

On October 9, 1946, the Union of South Africa placed on the provisional agenda of the General Assembly an item entitled "Statement by 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", thus carrying out its earlier commitment to present its case concerning South-West Africa to the United Nations. In a letter dated October 17, 1946, and addressed to the Secretary-General for circulation to the other Members of the United Nations, the Government of the Union acknowledged the continuing status of South-West Africa as a mandate.

The language of the letter of October 17 and of the lengthy memorandum which accompanied it is repetitively eloquent of the major premise of the Union Government that the mandate relationship, with its attendant rights and obligations, was still in force. See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Part I, 1946), 199-235. When the Fourth Committee took up the South-West Africa agenda item, Field Marshal Smuts, representing South Africa, made it clear that the Union of South Africa had not acted to alter the status of the mandated territory without consultation with its inhabitants and "the competent international organs", and quoted with approval the statement of Egeland at Geneva that the Union would "continue to administer the territory scrupulously in accordance with the obligations of the mandate". See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Part I, 1946), 235, 239-240.

The general tenor of discussion in the General Assembly from 1946-1948 was that the mandate for South-West Africa continued in existence. See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Sub-Committee 2, 1946), 48 (statement by representative of India) ; same (2nd sess., Fourth Committee, 1947), 50 (statement by representative of United States) ; *id.*, at 47 (statement by representative of Denmark) ; *id.*, at 55 (statement by representative of Mexico) ; *id.*, at 6 (statement by representative of China) ; same (2nd sess., plenary, 1947), 581-584 (statement by representative of Australia) ; *id.*, at 597 (statement by representative of India) ; same (3rd sess., 1st part, Fourth Committee, 1948), 312-313 (statement by representative of Uruguay) ; *id.*, at 315 (statement by representative of Pakistan) ; *id.*, at 318-319 (statement by representative of Brazil) ; *id.*, at 325-326 (statement by representative of Belgium) ; *id.*, at 349 (statement by representative of Denmark) ; *id.*, at 350-351 (statement by representative of United States). A minority of the members of the Assembly took the position that the Mandate had already expired ; most of these premised their conclusion by contending that the trusteeship system had already in fact replaced the mandate system since the placing of mandates under trusteeship was compulsory. See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Sub-Committee 2, 1946), 48-49 (U.S.S.R.) ; same (2nd sess., Fourth Committee, 1947), 8 (Guatemala) ; *id.*, at 14, 60 (Uruguay) ; *id.*, at 14, 64 (Colombia) ;

id., at 55 (Cuba); same (3rd sess., 1st part, Fourth Committee, 1946), 365 (Costa Rica) [8].

South Africa at the sessions of the General Assembly in 1946-1947 by no means embraced the minority view but firmly supported the view of the majority. See U.N. *Official Records*, General Assembly (1st sess., 2nd part, plenary, 1946), 1326; same (2nd sess., Fourth Committee, 1947), 3-4, 135 (communication to United Nations from Union Government); *id.*, at 193; same (2nd sess., plenary, 1947), 632-634.

Conclusive of the official views of the United Nations and of the majority of the members of the community of nations are the resolutions passed in 1946, 1947 and 1948 by the General Assembly. By Resolution XI (I) of February 9, 1946, the General Assembly welcomed "The declarations made by certain States administering territories now held under mandate of an intention to negotiate...." and invited "the States administering territories now held under mandate" to implement Article 79 of the Charter. This resolution was unanimously adopted. See U.N. *Official Records*, General Assembly (1st sess., 1st part, plenary, 1946), 376. On December 14, 1946, the General Assembly in Resolution 65 (I) again referred to South-West Africa as "now held under mandate" and "mandated territory". Resolution 141 (II) of November 1, 1947, not only maintained the recommendations of Resolution 65 (I), but itself carefully distinguished between "all other States administering territories previously held under mandate" which had placed such territories under trusteeship or had offered them independence, and the Union of South Africa which had informed the United Nations that it would "maintain the *status quo*" and "continue to administer the territory in the spirit of the existing mandate". Also unequivocal is the language of Resolution 227 (III) of November 26, 1948, which refers to "the mandated Territory of South-West Africa" and "the existing Mandate", and which maintains the recommendations of the previous resolutions.

Recent developments with respect to the Union of South Africa's administration of South-West Africa and the expressions of Union representatives indicating partial or total termination of the Mandate, although perhaps foreshadowed in 1947, first clearly appear in 1948. Read beside the record of contemporary events and statements, such belated comments are not persuasive as to the intentions and understanding of the Union and other States when the League was dissolved and the United Nations established. They are, moreover, inconsistent with continued assertion by the Union of authority over the mandated territory, since termination of the mandate would have ended the Union's authority in the Territory.

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[8] But cf. U.N. *Official Records*, General Assembly (2nd sess., plenary, 1947), 605 (Netherlands); same (2nd sess., Fourth Committee, 1947), 10 (Iraq).

On November 9, 1948, Mr. Louw, the representative of South Africa in the Fourth Committee, referred to the fact that an agreement reached on October 21, 1948, between the Union Government and the political parties of South-West Africa "provided for a closer association and integration of South-West Africa with the Union of South Africa along the lines envisaged in the previous mandate, since expired". See U.N. *Official Records*, General Assembly (3rd sess., 1st part, Fourth Committee, 1948), 293. This was the first assertion by South Africa in the United Nations that the Mandate was no longer in force.

The meaning and effect of this assertion is obscured by certain other statements made by the South-African representative to the Fourth Committee at the same time. For example, Mr. Louw maintained that there had been no change of position by the Union Government with respect to South-West Africa ; only a year previously the Union had asserted the continuing status of South-West Africa as a mandated territory. Mr. Louw reaffirmed his Government's firm intention to administer the Territory "in the spirit of the mandate". See *id.*, at 310. Later on in Fourth Committee discussion, the representative of South Africa objected to a proposed paragraph in a draft resolution because it "was contrary to the provisions of the Charter, inasmuch as it disregarded rights possessed by the Union of South Africa under the Mandate and the Charter". See *id.*, at 368. The representative of South Africa at the plenary session of the Paris meeting of the Assembly quoted a cable just received from his Prime Minister which stated : "The South African Government is exercising a right which has never been disputed to administer the Territory as an integral part of the Union." See U.N. *Official Records*, General Assembly (3rd sess., 1st part, plenary, 1948), 587.

On July 11, 1949, Mr. J. R. Jordaan, deputy permanent representative of the Union of South Africa to the United Nations, by letter to the Secretary-General informed the latter that the Union Government would submit no further reports to the United Nations respecting South-West Africa, and transmitted a copy of the South-West Africa Affairs Amendment Act (No. 23) of 1949. He said in closing :

> "In particular, it will be noted from the summary that under the new form of association, which is entirely consonant with the spirit of the Mandate, no greater powers are devolved upon the Union Government in respect of South-West Africa than were accorded under the terms of the original Mandate, but on the other hand certain powers previously exercised by the Union Government are now to be exercised by the Legislature of South-West Africa, which thus exercises a considerably greater measure of self-government than is enjoyed by a province of the Union." (U.N. Doc. A/929, July 13, 1949.)

When the General Assembly met at its Fourth Session in 1949, the representative of South-West Africa appeared again to recognize the continued existence of the Mandate, and asserted that the Union's rights stemmed from the Mandate. See U.N. *Official Records*, General Assembly (4th sess., Fourth Committee, 1949), 213-239.

C. *Description of the Union's obligations under the Mandate*

1. *Substantive obligations*

The substantive obligations of the Union of South Africa with respect to the Territory of South-West Africa are set forth in the mandate instrument :

> " *Article 1.* The territory over which a mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.
>
> *Article 2.* The Mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.
>
> The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present mandate.
>
> *Article 3.* The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.
>
> The supply of intoxicating spirits and beverages to the natives shall be prohibited.
>
> *Article 4.* The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.
>
> *Article 5.* Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling."

2. *Other aspects of the Mandate*

(*a*) The problems raised by Article 7 of the mandate instrument (modification, disputes) are discussed in Part IV below (pages 127 *et sqq.*)

(*b*) Reporting

Article 6 of the South-West Africa Mandate reads :

> "The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the Territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5."

With the League of Nations no longer in existence, it is obvious that a mandatory Power cannot submit reports to the League Council. It is necessary to consider whether some substitute arrangement is available, so that technical difficulties shall not frustrate fulfilment of the Mandate objective stated in these words by President Wilson :

> "The administration would be so much in the view of the world that unfair processes could not be successfully attempted."

The reporting function has always been considered an essential element in the mandate system, serving by way of assurance to the international community that the "sacred trust" over dependent areas administered by mandatory Powers is being faithfully executed. Indeed, the reporting function was regarded as so important—and as being required by Article 22 of the League Covenant quite apart from the requirements of individual mandate instruments—that the League Council caused reports on mandated territories to be submitted and examined even before mandate instruments had been approved for the territories in question. It was made clear in the League Council that the Council would intervene and fix the Mandate terms (pursuant to Article 22, paragraph 8, of the Covenant) if too much time elapsed before these should be agreed to with the mandatories-designate. The Council permitted interim administration by these Powers only on condition of their furnishing reports. See League of Nations Council, P.V. 20/29/16 (10th sess., 1920), 25-26 ; League of Nations *Official Journal*, Assembly (2nd sess., plenary, 1921), 345, 347-348 ; League of Nations *Official Journal*, Permanent Mandates Commission (1st sess., 1921), 8, 28 ; League of Nations *Official Journal*, Council (14th sess., 2nd part, 1921), Annex 272 (pages 3-4), Annex 266.

With the dissolution of the League, it would be natural to expect that United Nations machinery might be substituted for League machinery in the examination of reports on mandates not yet converted into trust territories. The language of the Charter gives some indication on this point by stating (in Article 80) that nothing in the trusteeship chapter shall be construed "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". Thus it would

seem, in view of the importance of reporting under the mandate system, that this function is preserved by Article 80 of the Charter —"the conservatory clause". The United Nations would be the logical and only representative of the international community to receive mandate reports.

Prime Minister Fraser's remarks before Commission II of the United Nations Conference on International Organization at San Francisco are illuminating in this regard:

> "The work immediately ahead is how those 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 toward its formation this evening." U.N.C.I.O. Docs. 1144 (June 21, 1945); 1208 (June 27, 1945).

There was no dissent from this statement, and the report of Committee II/4 was thereupon unanimously approved by the Commission.

At the first part of its First Session, the United Nations General Assembly on February 12, 1946, adopted Resolution XIV-I (I), entitled "Transfer of certain functions, activities and assets of the League of Nations.—Functions and powers belonging to the League of Nations under international agreements." The resolution provides, in part:

> "Under various treaties and international conventions, agreements and other instruments, the League of Nations and its organs exercise, or may be requested to exercise, numerous functions or powers for the continuance of which, after the dissolution of the League, it is, or may be, desirable that the United Nations should provide.
>
> Certain Members of the United Nations, which are parties to some of these instruments and are Members of the League of Nations, have informed the General Assembly that, at the forthcoming session of the Assembly of the League, they intend to move a resolution whereby the Members of the League would, so far as this is necessary, assent and give effect to the steps contemplated below.
>
> Therefore:
>
> 1. The General Assembly reserves the right to decide, after due examination, not to assume any particular function or power, and to determine which organ of the United Nations or which specialized agency brought into relationship with the United Nations should exercise each particular function or power assumed.
>
> 2. The General Assembly records that those Members of the United Nations which are parties to the instruments referred to above assent by this resolution to the steps contemplated

below and express their resolve to use their good offices to secure the co-operation of the other parties to the instruments so far as this may be necessary.

3. The General Assembly declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations, and adopts the following decisions, set forth in A, B, and C below.

. . . . . .

C. 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."

The background of this resolution, in the United Nations Preparatory Commission, in its constituent committees, and in the *ad hoc* League of Nations Committee of the General Assembly (first session, first part), discloses that there was little discussion of the mandates problem in preparing Resolution XIV-I (I) for adoption by the General Assembly. It appears from the history of the resolution as well as from the wording of Part C that it was not intended automatically to transfer, to the United Nations, League of Nations functions with respect to mandates. It was contemplated that the winding-up of the mandate system would be accomplished pursuant to the trusteeship chapter of the Charter. But, to the extent that this was not done and that functions with respect to mandates remained outstanding, it is submitted that Resolution XIV-I (I) constitutes a general provision under the authority of which the General Assembly may consider and decide to assume certain League of Nations functions under instruments having a political character, including mandate functions if these —contrary to expectation—should remain to be attended to.

The resolution provides that the General Assembly shall consider the question of assuming such League of Nations functions on "any request from the parties". So far as reporting under the South-West Africa Mandate is concerned, 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. The Union Government submitted to the United Nations a report on South-West Africa for 1946. The General Assembly, in Resolutions 141 (II) and 227 (III), made specific provi-

sion for examination by the Trusteeship Council of reports on South-West Africa.

In this connexion the attitude of the Union Government on reporting after the League's demise seems significant. In 1947 the Union Government was of the opinion that it "should continue to render reports to the United Nations Organization as it had done heretofore under the Mandate". See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 134 (resolution adopted by Parliament of Union of South Africa, quoted in letter of July 23, 1947, from Union Government to United Nations Secretary-General). On September 12, 1947, the Union Government forwarded another letter to the Secretary-General, containing its report for 1946 on South-West Africa, and stating that this report was in terms of the Union Government's letter of 23 July, 1947. See U.N. Doc. A/334/Add. 1 (September 22, 1947). At the same session of the General Assembly, the representative of South Africa unequivocally "assured the Committee that the Government of the Union had given its word and would, therefore, submit annually a report on South-West Africa". See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 16.

At the Third Session of the General Assembly, in 1948, Mr. Louw, representing the Government of the Union of South Africa, made reference to "the distinct understanding that the United Nations had no supervisory jurisdiction in the Territory", and to the submission of the report in 1947 as "for purposes of information and as a gesture" and "on a voluntary basis" and not "as an admission of accountability for the administration of South-West Africa"; he claimed that the Trusteeship Council could not "determine whether the Union of South Africa is adequately discharging its responsibilities under the terms of the Mandate", and said that the League did not "make the United Nations its legatee in respect of the mandated territories"[9]. See U.N. *Official Records*, General Assembly (3rd sess., 1st part, Fourth Committee, 1948), 287-289.

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[9] In this connexion, it should be observed that the first official communication to the United Nations of the view that reporting is strictly a voluntary matter with the Union of South Africa would appear to be found in the letter of its deputy permanent representative of May 31, 1948, forwarding additional information requested by the Trusteeship Council. In that letter the Union Government stated:

"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 wide-spread 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." See U.N. *Official Records*, T/175 (June 3, 1948), ii.

297. It is evident that these statements of 1948 were not in accord with earlier statements made by the Government of the Union or with the general course of conduct it had been following from 1946 up to that time in regard to South-West Africa.

It is concluded, on the basis of Article 80 of the Charter, on the basis of General Assembly Resolution XIV-I (I) of February 12, 1946, on the basis of the Union's conduct in pledging itself to submit reports and in reporting, and on the basis of the Assembly's subsequent action, that the United Nations has assumed the exercise of the League of Nations function in regard to reporting on the mandated Territory of South-West Africa. It is believed, therefore, that the Union of South Africa continues to be obligated, under the Mandate, to submit reports on its administration of the Territory, submitting these to the United Nations for consideration by the organ which the General Assembly designates for this purpose.

II. Applicability of the provisions of Chapter XII of the United Nations Charter to the Territory of South-West Africa

The General Assembly, in one of the particular inquiries which it has submitted to the Court, has asked: "(*b*) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa?" This particular inquiry raises, first, the issue whether South-West Africa, as one of the mandated territories, comes within the general purview of Chapter XII. It is concluded that Chapter XII does provide for the placing of mandated territories under the international trusteeship system of the United Nations, but that the placing of mandated territories under trusteeship is not compulsory.

A. *The provisions of Chapter XII of the Charter are applicable to South-West Africa*

It is evident from a reading of Chapter XII in the United Nations Charter, from a consideration of the history of its provisions, and from the circumstances and situation which the Charter's provisions were intended to meet, that Chapter XII is applicable to mandated territories and, among them, to South-West Africa. The mandate system, which was established following the First World War, was still in existence at the end of the Second World War, when the United Nations Charter was being framed. Under the Charter, a new international organization was to be created, and the League of Nations would go out of existence. Chapter XII of the Charter was designed for the purpose of setting up an international trusteeship system under the authority of the United Nations. This trusteeship system was by no means limited in its intended scope to the mandated territories, but it was clearly contemplated

that existing mandates not yet ready for independence would be converted into trust territories under the United Nations international trusteeship system. Organs of the League of Nations had played an important role in the operation of the mandate system. Since the League was to terminate, obviously new machinery was required to take over the functions of the League organs. And, indeed, there were reasons for reexamining some substantive aspects of the concept of international trusteeship, so that revisions of the mandate system might be made in the course of converting mandated territories into trust territories.

1. *The Charter provisions: Articles 77, 79, 80 (2)*

That the provisions of Chapter XII are applicable to mandated territories, including South-West Africa, is made evident first of all in the language of the Charter itself. Article 77 of the Charter provides:

> "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."

Sub-paragraph 1 (*a*) of this article refers directly to "territories now held under mandate" as included within the general scope of the international trusteeship system to be set up pursuant to Chapter XII.

Article 79 provides:

> "The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, 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, and shall be approved as provided for in Articles 83 and 85."

Here again the language of the Charter makes quite clear that mandated territories are covered by the trusteeship chapter.

Article 80 contains what has been referred to as the "conservatory" clause:

> "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 2 of this article refers directly to mandated territories as being the subject of the negotiation and conclusion of agreements for placing them under the international trusteeship system of the United Nations.

These provisions of the Charter leave no doubt that the provisions of Chapter XII are applicable to the Territory of South-West Africa as one of the mandated territories.

2. *History of Chapter XII at the San Francisco Conference*

Since the terms of the Charter are in themselves so clear, it is scarcely necessary to refer to the proceedings at the San Francisco Conference in order to gain a definite understanding of the scope of Chapter XII so far as its applicability to mandated territories is concerned. Accordingly, no extended discussion of the San Francisco Conference will be undertaken at this point and only a few illustrative instances will be cited.

Throughout the proceedings of Committee II/4 at San Francisco, there was a complete understanding that the provisions which later became Chapter XII of the Charter would be applicable to mandates with a view to converting these into trust territories. This is indicated in the statements of a number of representatives on the Committee. See, e.g., U.N.C.I.O. Docs. 241 (May 11, 1945), 1; 260 (May 12, 1945), 2; 310 (May 15, 1945), 2; 448 (May 13, 1945), 2; 512 (May 23, 1945), 1; 552 (May 24, 1945), 3; 877 (June 9, 1945), 3.

The report of the Rapporteur of Committee II/4 to Commission II at San Francisco contained the following statement:

> "The Committee recommends that the trusteeship system shall be applicable to such territories in certain specified categories as may be placed thereunder by trusteeship agreements. The categories are (*a*) territories now held under mandate...." U.N.C.I.O. Doc. 1115 (June 20, 1945), 4.

At the third meeting of Commission II, on June 20, 1945, when that commission took up the report of Committee II/4, the President of the commission, Field Marshal Smuts, said in his opening statement that the portion of the Charter which was to become Chapter XII "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" [Section A subsequently became Chapter XI of the Charter]. See U.N.C.I.O. Docs. 1144 (June 21, 1945); 1208 (June 27, 1945).

Before leaving this consideration of the history of Chapter XII at San Francisco, it should be noted that the delegation of the Union of South Africa circulated among the other delegations and sought to introduce in Committee II/4 a statement which representatives of the Union Government have subsequently referred to as a "reservation". This statement argued in favour of incorporation of South-West Africa in the Union[10] and expressed the Union

[10] The text of the statement was as follows:

"(*a*) When the disposal of enemy territory under the Treaty of Versailles was under consideration, doubt was expressed as to the suitability of the mandatory form of administration for the territory which formerly constituted the German Protectorate of South-West Africa.

"(*b*) Nevertheless, on 17 December, 1920, by agreement between the Principal Allied and Associated Powers and in accordance with Article 22, Part I (Covenant of the League of Nations) of the Treaty, a mandate (commonly referred to as a C Mandate) was conferred upon the Government of the Union of South Africa to administer the said Territory.

"(*c*) Under the mandate the Union of South Africa was granted full power of administration and legislation over the Territory as an integral portion of the Union of South Africa, with authority to apply the laws of the Union to it.

"(*d*) For twenty-five years, the Union of South Africa has governed and administered the Territory as an integral part of its own territory and has promoted to the utmost the material and moral well-being and the social progress of the inhabitants.

"It has applied many of its laws to the Territory and has faithfully performed its obligations under the mandate.

"(*e*) The Territory is in a unique position when compared with other territories under the same form of mandate.

"(*f*) It is geographically and strategically a part of the Union of South Africa, and in World War I a rebellion in the Union was fomented from it, and an attack launched against the Union.

"(*g*) It is in large measure economically dependent upon the Union, whose railways serve it and from which it draws the great bulk of its supplies.

"(*h*) Its dependent native peoples spring from the same ethnological stem as the great mass of the native peoples of the Union.

"(*i*) Two thirds of the European population are of Union origin and are Union nationals, and the remaining one third are enemy nationals.

"(*j*) The Territory has its own legislative Assembly granted to it by the Union Parliament, and this Assembly has submitted a request for incorporation of the Territory as part of the Union.

"(*k*) The Union has introduced a progressive policy of native administration, including a system of local government through native councils giving the natives a voice in the management of their own affairs; and under Union administration native reserves have reached a high state of economic development.

Government's intention to raise the matter at a subsequent peace conference. The South-African representative, after having circulated copies of this statement on May 7, 1945, read it in the Committee on May 12, 1945. The records of the Conference show that "the Chairman ruled that references to specific territories were only in order when used for illustrative purposes. The task of the Committee was to discuss principles and machinery, not individual territorial issues." U.N.C.I.O. Doc. 260 (May 13, 1945), 2.

At the Second Session of the General Assembly, the representative of the Union of South Africa made the following statement concerning the South-African "reservation" in a plenary meeting:

> ".... It is only in respect of this territory that a specific reservation has been made. This was done at San Francisco before the Charter was signed and also at the First Session of the General Assembly in London. It has been said that all kinds of people might have made reservations, but the reservation was in fact made and that fact was known to all parties. It is true that this reservation does not appear against the signature of the Charter on behalf of the Government of the Union of South Africa. The reason for this is a very simple one. It was not necessary to make this reservation in that way because the Charter quite clearly does not impose any obligation to deal with the territory only by submitting a trusteeship agreement and in no other way. My Government, nevertheless, thought it expedient, in order to avoid all future misunderstanding, to make their position in regard to this territory quite clear. That was done in the only way in which it could properly and appropriately be done, namely, by means of an official statement handed in at San Francisco as a conference document.
>
> It is true that when this document was subsequently read by the South-African representative before the committee dealing with the trusteeship provisions of the Charter, it was ruled out by the Chairman of that committee, but only in so far as it could be said to be introduced for the expression of an opinion or for action by that committee in relation to the future of the territory, and not in so far as it served merely as an illustration of the

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"(*l*) In view of contiguity and similarity in composition of the native peoples of South-West Africa, the native policy followed in South-West Africa must always be aligned with that of the Union, three fifths of the population of which is native.

"(*m*) 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.

"(*n*) 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.

"(*o*) As territorial questions are however reserved for handling at the later Peace Conference, where the Union of South Africa intends to raise this matter, it is here only mentioned for the information of the Conference in connexion with the mandates question." See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Part I, 1946), 200 (Annex 13).

difficulties of administering 'C' Mandates. It was ruled out, to the extent I have just described, on the ground that it dealt with the future of a particular territory, whilst the committee was concerned not with particular territories but with the general principles of the trusteeship system. But this cannot alter the indisputable fact that this statement was handed in to the Secretariat as a conference document, and that it was circulated as such and brought to the notice of the representatives of the other States." See U.N. A/P.V. 105 (2nd sess., plenary, 1947), 187-190.

It is not believed that the statement circulated by the South African delegation at San Francisco and the subsequent references made to it by representatives of the Union Government in any way affect the general conclusion that the provisions of Chapter XII of the Charter are applicable to the mandated Territory of South-West Africa. Neither in its content nor in the manner in which the "reservation" was presented does the statement of May 7, 1945, derogate from the general applicability of Chapter XII to mandates, including the Territory of South-West Africa. The effect of the "reservation" was simply to give notice that the Union of South Africa would later raise in a competent forum the question of the future of South-West Africa, with a view to incorporation of that Territory in the Union.

3. *Final session of the League of Nations Assembly*

It was clearly the understanding of the mandatory Powers, when they met at the last session of the League Assembly, that the provisions of Chapter XII of the United Nations Charter were applicable to mandates. The Acting Secretary-General of the League of Nations included the following statement in his "Report on the work of the League during the War" submitted to League Members just before the final session: "As to the methods by which the mandates system can be replaced by the trusteeship system outlined in the Charter, it is expected that governments will make proposals during the League Assembly meeting." See League of Nations Document A.6.1946 (Introduction). In statements made before the League Assembly at its last session, representatives of the British, Chinese, French, New Zealand, Belgian and Australian Governments all indicated their understanding that the provisions of Chapter XII of the Charter were applicable to mandated territories and that the Charter contemplated the conversion of mandates into trust territories.

4. *Early sessions of the United Nations General Assembly*

The General Assembly, at the first part of its First Session, adopted on February 9, 1946, Resolution XI (I), which contained the following preambulatory and operative paragraphs:

"With a view to expediting the conclusion of these agreements and the establishment of the Trusteeship Council, the Preparatory Commission recommended that the General Assembly should call on those Members of the United Nations which are now administering territories held under mandate to undertake practical steps, in concert with the other States directly concerned, for the implementation of Article 79 of the Charter.

Without waiting for the recommendation of the Preparatory Commission to be considered by the General Assembly, the Members of the United Nations administering territories held under mandate took the initiative in making declarations in regard to these territories.

. . . . . .

With respect to Chapters XII and XIII of the Charter, the General Assembly:

. . . . . .

(3) Welcomes the declarations, made by certain States administering territories now held under mandate, of an intention to negotiate trusteeship agreements in respect of some of these territories....

(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."

The terms of this resolution show a clear understanding on the part of the General Assembly that the provisions of Chapter XII were applicable to mandated territories.

At the second part of its First Session, the General Assembly on December 14, 1946, adopted Resolution 65 (I), which contained the following provisions:

"*The General Assembly....*

Recalling that the Charter of the United Nations provides in Articles 77 and 79 that the trusteeship system shall apply to territories now under mandate as may be subsequently agreed;

Referring to the Resolution of the General Assembly of 9 February, 1946, inviting the placing of mandated territories under trusteeship....

Therefore, the General Assembly....

Recommends that the mandated Territory of South-West Africa be placed under the international trusteeship system and invites the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the aforesaid Territory."

These provisions of the General Assembly's Resolution of December 14, 1946, indicate a clear understanding that the provisions of Chapter XII of the Charter are applicable to mandated territories and, in particular, to the Territory of South-West Africa.

At its Second Session, the General Assembly adopted on November 1, 1947, Resolution 141 (II), which provided in part as follows :

> "*Whereas*, in its Resolution dated 9 February, 1946, the General Assembly invited all States administering territories then under mandate to submit trusteeship agreements for approval ;
>
> *Whereas*, in its Resolution dated 14 December, 1946, the General Assembly recommended, for reasons given therein, that the mandated Territory of South-West Africa be placed under the international trusteeship system and invited the Government of the Union of South Africa to propose, for the consideration of the General Assembly, a trusteeship agreement for the aforesaid Territory ;
>
> *Whereas* the Government of the Union of South Africa has not carried out the aforesaid recommendations of the United Nations ;
>
> *Whereas* it is a fact that all other States administering territories previously held under mandate have placed these territories under the trusteeship system or offered them independence....
>
> *The General Assembly, therefore....*
>
> *Firmly maintains* its recommendation that South-West Africa be placed under the trusteeship system ;
>
> *Urges* the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the Territory of South-West Africa and expresses the hope that the Union Government may find it possible to do so in time to enable the General Assembly to consider the agreement at its Third Session...."

Thus, again in this resolution, the General Assembly indicated its understanding of the applicability of Chapter XII to mandated territories, including South-West Africa.

The above resolution, as recommended to the General Assembly by the Fourth Committee, contained an additional paragraph of preamble which read as follows :

> "*Whereas* it is the clear intention of Chapter XII of the Charter of the United Nations that all territories previously held under mandate shall, until granted self-government or independence, be brought under the international trusteeship system."

This additional paragraph was dropped from the resolution during the consideration by the Plenary Session of the Assembly. See U.N. A/P.V. 105 (2nd sess., plenary, 1947), 252. Deletion of the paragraph was proposed by the representative of Denmark. He stated that in the Fourth Committee a number of delegations had expressed their apprehension that this paragraph implied

the existence of a legal obligation on the mandatory Powers to submit to the General Assembly a trusteeship agreement for all mandated territories except those which had been granted self-government or independence. The representative of Denmark expressed his fear that the resolution as a whole might not obtain a two-thirds majority if the paragraph in question were retained.

At early sessions of the General Assembly, a number of delegations made statements indicating their clear understanding that the provisions of Chapter XII of the Charter are applicable to mandated territories. Some delegations made explicit statements to the effect that conversion of mandates into trust territories was the normal course contemplated by the Charter. For example, the official records of the General Assembly give the following account of a statement made by the representative of the Netherlands at the first part of the First Session :

> "Although Article 77 of the Charter did not make the transfer of territories under mandate to the trusteeship system absolutely obligatory, the sense of Chapter XII and of the discussions in San Francisco clearly indicated that the normal course was for such territories to come under the trusteeship system. The only possible exception to this would be a situation wherein a trusteeship agreement failed of consummation. This, however, did not depend upon the arbitrary will of the mandatory Power." U.N. *Official Records*, General Assembly (1st sess., 1st part, Fourth Committee, 1946), 11.

Similar statements were made in the following year by the representatives of France and Iraq. See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 12 ; U.N. A/P.V. 105 (2nd sess., plenary, 1947), 127-130.

B. *Manner of application of Chapter XII to South-West Africa*

The principal issue concerning the manner in which the provisions of Chapter XII of the Charter are to be applied to mandated territories is whether placing of mandates under trusteeship is compulsory or not. In other words, did the Members of the United Nations administering mandated territories undertake in the Charter unconditionally to place the mandated territories under the international trusteeship system of the United Nations ? It seems clear that the placing of mandated territories under trusteeship is not made compulsory by Chapter XII. The States administering mandated territories are not required to accept whatever terms of trusteeship might be agreed upon by the appropriate United Nations organ, nor are they required to submit terms of trusteeship for mandated territories to a United Nations organ, thus giving the United Nations the power to approve such terms and place mandated territories under trusteeship.

1. *Provisions of the Charter*

Article 77 provides in paragraph 1 that: "The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements." Paragraph 2 of the same article provides: "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." These provisions indicate that a mandatory Power is not obligated to place a mandated territory under the international trusteeship system, and that it is not required to submit a trusteeship agreement for the approval of the appropriate United Nations organ. In defining the categories of territories which may be placed under trusteeship, Article 77 reads as follows:

> "(*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."

It will be noted that the word "voluntarily" is used in Article 77 only with respect to category (*c*) and is not used with respect to categories (*a*) and (*b*). From this it might be argued that the placing of territories under trusteeship is compulsory with respect to territories in categories (*a*) and (*b*), and is optional only with respect to territories in category (*c*). However, this interpretation based on the appearance of the word "voluntarily" in (*c*) alone is not sustained by a consideration of the provisions of Article 77 as a whole. The provisions of paragraph 2 of Article 77 are not limited in their operation to territories in category (*c*) but apply with respect to territories in all three categories. Likewise the word "may" in Article 77 (1) applies to all three.

Quite apart from the question whether the Charter makes the conversion of mandates into trust territories compulsory and requires the mandatory Powers at least to submit draft trusteeship agreements for the consideration of the United Nations, the Charter establishes that the agreement of the mandatory Power is necessary to any terms of trusteeship which may be proposed for a mandated territory. Thus, Article 79 provides:

> "The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, 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, and shall be approved as provided for in Articles 83 and 85."

2. *History of the Charter provisions*

If the provisions of Chapter XII left any doubt as to the non-compulsory character of the placing of mandated territories under

trusteeship, those doubts are dispelled by an examination of the history of Chapter XII at San Francisco. At the fourth meeting of Committee II/4, the United States representative "pointed out that this Government did not seek to change the relations existing between a mandatory and a mandated territory without the former's consent, and it supported the principle of voluntary submission of territories to the system". See U.N.C.I.O. Doc. 310 (May 15, 1945), 2.

At the eighth meeting of Committee II/4, the representative of Egypt proposed an amendment to the proposal which later became Article 77. This amendment would have resulted in Article 77 reading as follows:

> "The trusteeship system shall apply to:
>
> (*a*) all territories now held under mandate;
>
> (*b*) territories which may be detached from enemy States as a result of the Second World War;
>
> (*c*) territories voluntarily placed under the system by States responsible for their administration." See U.N.C.I.O. Doc. 512 (May 23, 1945), 1.

Objection was taken to the proposed amendment on the ground that it would have the effect of creating a compulsory system. The amendment was defeated. See *id.*, at 2.

At the ninth meeting of Committee II/4, the United States proposed inclusion in the provision, which later became Article 79, of the phrase "including the mandatory Power in the case of territories held under mandate by one of the United Nations....". This amendment, making clear that the agreement of the mandatory Power was requisite to placing a mandated territory under trusteeship, was adopted unanimously by the Committee. See U.N.C.I.O. Doc. 552 (May 24, 1945), 2.

Subsequently, the representative of Egypt proposed in Committee II/4 that provisions embodying the following principles be included in the chapter on trusteeship:

> "That in all trust territories, within its competence, the General Assembly shall have the power to terminate the status of trusteeship, and declare the territory to be fit for full independence, either at the instance of the administering authority, or on the recommendation of any Member of the Assembly.
>
> That whenever there is any violation of the terms of the trusteeship arrangements by the administering authority, or when the administering Power has ceased to be a Member of the United Nations, or has been suspended from membership, the Organization shall take the necessary steps for the transfer of the territory under trusteeship to another administering authority...."

Against this proposal, it was urged "that a provision for the termination or transfer of a trusteeship without the consent of the

trustee Power would be contrary to the voluntary basis upon which the trusteeship proposals had been built". See U.N.C.I.O. Doc. 1018 (June 16, 1945), 5. The representative of Egypt subsequently withdrew his proposal.

The report of the Rapporteur of Committee II/4 to Commission II and the report of the Rapporteur of Commission II to the plenary session of the San Francisco Conference did not consider specifically the question whether the placing of mandated territories under the trusteeship system was to be compulsory or optional. These reports, which in part paraphrased the language of the provisions which were to become Chapter XII, contained no statements to indicate that the conversion of mandates to trust territories was to be compulsory. See U.N.C.I.O. Docs. 1115 (June 20, 1945), 4; 1210 (June 27, 1945).

3. *General Assembly discussions 1946-1948*

During the first three sessions of the General Assembly, in discussions on the question of South-West Africa, there occurred a considerable amount of debate on the issue whether the placing of South-West Africa as a mandated territory under the trusteeship system was compulsory or not. The debate on this question was most extended during the Second Session of the Assembly, in 1947. During the first three sessions, representatives of approximately half of the Members of the United Nations expressed views on the issue. From these discussions, it appeared that approximately an equal number of Member governments took positions on each side of this issue. Representatives of the following Governments maintained that mandatory Powers were under a legal obligation to place mandated territories under trusteeship: India [11], China [12], U.S.S.R. [13], Byelorussia [14], Poland [15], Philippines [16], Guatemala [17],

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[11] See U.N. *Official Records*, General Assembly (1st sess., 1st part, Fourth Committee, 1946), 27; same (2nd sess., Fourth Committee, 1947), 4.

[12] See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Sub-Committee 2, 1946), 51; same (2nd sess., Fourth Committee, 1947), 6; same (3rd sess., Fourth Committee, 1948), 296, 299.

[13] See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Sub-Committee 2, 1946), 55; same (2nd sess., Fourth Committee, 1947), 9; U.N. A/P.V. 105 (2nd sess., plenary, 1947), 96; U.N. *Official Records*, General Assembly (3rd sess., Fourth Committee, 1948), 338, 348.

[14] See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, 1946), 107; same (2nd sess., Fourth Committee, 1947), 64.

[15] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 6; U.N. A/P.V. 105 (2nd sess., plenary, 1947), 106; U.N. *Official Records*, General Assembly (3rd sess., Fourth Committee, 1948), 330.

[16] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 7.

[17] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 8, 63.

Uruguay [18], Colombia [19], Syria [20], Haiti [21], and Brazil [22].

Representatives of a number of other countries expressed the view that the Charter did not impose a legal obligation upon mandatory Powers to place mandated territories under the trusteeship system of the United Nations : United Kingdom [23], Netherlands [24], United States [25], Cuba [26], Australia [27], Union of South Africa [28], Denmark [29], France [30], Greece [31], New Zealand [32], Belgium [33], Canada [34], Bolivia [35], and Iraq [36].

It was argued in favour of the existence of a legal obligation that in the absence of such an obligation no mandatory Powers might place mandated territories under the trusteeship system, and that in consequence the Trusteeship Council could not be formed and the trusteeship system could therefore not be placed in full operation.

[18] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 14 ; U.N. A/P.V. 105 (2nd sess., plenary, 1947), 102.

[19] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 14.

[20] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 94 ; U.N. A/P.V. 105 (2nd sess., plenary, 1947), 111.

[21] See U.N. A/P.V. 105 (2nd sess., plenary, 1947), 76.

[22] See U.N. *Official Records*, General Assembly (3rd sess., Fourth Committee, 1948), 319.

[23] See U.N. *Official Records*, General Assembly (1st sess., 1st part, Fourth Committee, 1946), 10 ; same (1st sess., 2nd part, Fourth Committee, 1946), 100 ; same (2nd sess., Fourth Committee, 1947), 14 ; same (3rd sess., Fourth Committee, 1948), 298.

[24] See U.N. *Official Records*, General Assembly (1st sess., 1st part, Fourth Committee, 1946), 11 ; same (2nd sess., Fourth Committee, 1947), 8, 52 ; U.N. A/P.V. 105 (2nd sess., plenary, 1947), 62-65.

[25] See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Sub-Committee 2, 1946), 49 ; same (2nd sess,. Fourth Committee, 1947), 5, 50.

[26] See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Sub-Committee 2, 1946), 51.

[27] See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Sub-Committee 2, 1946), 62 ; same (2nd sess., Fourth Committee, 1947), 58 ; U.N. A/P.V. 104 (2nd sess., plenary, 1947), 76.

[28] See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, 1946), 52 ; same (1st sess., 2nd part, Fourth Committee, 1946), 239 ; same (2nd sess., Fourth Committee, 1947), 4, 15 ; U.N. A/P.V. 105 (2nd sess., plenary, 1947), 176 ; U.N. A/P.V. 164 (3rd sess., plenary, 1948), 27.

[29] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 8, 47.

[30] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 11, 53.

[31] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 14 ; same (3rd sess., Fourth Committee, 1948), 320.

[32] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 17.

[33] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 17 ; same (3rd sess., Fourth Committee, 1948), 325.

[34] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 56.

[35] See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 61.

[36] See U.N. A/P.V. 105 (2nd sess., plenary, 1947), 131.

On the other hand, it was argued that the Charter could not be thought to require that all territories detached from enemy States as a result of the Second World War *must* be placed under trusteeship—a result which would seem to be unavoidable if the placing of mandated territories under trusteeship were compulsory. These debates during the first three sessions of the General Assembly disclosed a division of opinion on the issue whether trusteeship was compulsory for the mandated territories. No definite conclusion was reached. However, it has already been observed that at the Second Session a paragraph of preamble was deleted from a proposed resolution on the South-West Africa question on the ground that it seemed to many Members to imply that there was a legal obligation under the Charter to place mandated territories under the international trusteeship system of the United Nations.

III. Applicability of the provisions of Chapter XI of the United Nations Charter to South-West Africa

A. *By reason of the continuing existence of the mandate, South-West Africa is a non-self-governing territory within the meaning of Chapter XI*

1. *Nature of the mandate*

Article 22 of the Covenant of the League referred to certain territories formerly under German sovereignty—including South-West Africa—as territories "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world". In pursuance of this provision, South-West Africa was placed under the tutelage of the Union of South Africa, within the mandate system. Indeed the Territory was made a class C Mandate (see the sixth paragraph of Article 22), since its stage of development toward self-government or independence was considered not far advanced. There is nothing to suggest that this status has altered so radically in thirty years that South-West Africa no longer requires tutelage. Indeed, the Union Government's proposal for incorporation of the Territory (discussed in I, B, above) clearly shows that in the mandatory's judgment South-West Africa is not yet able to stand by itself.

2. *United Nations Charter*

(*a*) Terms of Article 73

The scope of application of Chapter XI is set forth in Article 73 of the Charter, which reads:

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government 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, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

(*a*) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

(*b*) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

(*c*) to further international peace and security;

(*d*) to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this article and;

(*e*) 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."

Since South-West Africa is a mandated territory whose people cannot stand by themselves and whose administration has therefore been allocated to a mandatory which continues to administer the mandate, the mandated territory would seem to be, *ipso facto*, a territory "whose peoples have not yet attained a full measure of self-government".

(*b*) Terms of Article 77

Article 77, discussed in detail in Part II above, provides that the trusteeship system is applicable, *inter alia*, to "territories now held under mandate". Territories referred to in Chapter XII were intended to fall also within the scope of Chapter XI, as 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.

(*c*) History of Chapter XI

At San Francisco, in 1945, while participating in the work of drafting the Charter, Field Marshal Smuts, President of Commission II, made it clear that Chapter XI was intended to apply to mandates:

" A [designation of proposal which became Chapter XI] 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."

Similarly, the report of the Rapporteur of Committee II/4, which drafted Chapter XI at San Francisco, recommended that the proposal, which later became Chapter XI, be a declaration by States Members of the United Nations responsible for the administration of territories whose peoples have not yet attained a full measure of self-government. The report flatly stated : "This declaration would be applicable to all such territories." See 10, U.N.C.I.O. Docs. 608.

(*d*) Subsequent General Assembly discussions

Field Marshal Smuts told the Fourth Committee in 1946 that the Union of South Africa "would, in accordance with Article 73, paragraph (*e*), of the Charter, transmit regularly to the Secretary-General" information on South-West Africa. See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Part I, 1946), 101-102.

Dr. Evatt, of Australia, addressing the General Assembly on November 1, 1947, said :

> ".... We have put into the Charter a special chapter dealing with non-self-governing territories. This was in order to meet the position of territories, such as mandated territories, which are not placed under the trusteeship system—a territory like South-West Africa.
>
> When one looks at Chapter XI and, more particularly, at the declarations contained in it regarding non-self-governing territories, one will see that non-self-governing territories are very analogous to those included under the trusteeship system itself. Therefore, there is no gap in the Charter of the United Nations. If the Union of South Africa does not bring its territory under the trusteeship system, it is still, in my view, a non-self-governing territory. The Union Government will have to give, voluntarily, reports for the information of the Secretary-General. The Secretary-General can do as he chooses with this information." See U.N. *Official Records*, General Assembly (2nd sess., plenary, Vol. I, 1947), 587-588.

B. *Obligation to report under Article 73 (e)*

As noted above, if South-West Africa were placed under trusteeship, the obligation to report under Article 73 (*e*) would no longer apply. It should be further noted that a literal reading of Article 73 (*e*) might lead to the conclusion that because Chapter XII is *applicable* to any mandate or to any non-self-governing territory (Article 77 (1) (*a*), (*b*), and (*c*)), they would all be territories to which Chapters XII and XIII "apply". Such a construction makes nonsense of the reporting provision, and the final sentence of Article 73 (*e*) is to be given its natural construction that when such territories have been brought under trusteeship so that the reporting provisions of Chapter XII "apply" so as to *require* reports, duplicating reports under Chapter XI are not necessary.

Specific provision is not made respecting duplication of reports on mandates. It would seem, however, that there is nothing in the

provisions of the Charter to prevent acceptance by the General Assembly of reports such as a mandatory is required to make under its mandate in satisfaction of the requirements of Article 73 (*e*), provided only that the Assembly is satisfied that the report meets the minimum substantive standard set by Article 73 (*e*). This position is consistent with the intention of Chapter XI respecting reports under the trusteeship system of Chapters XII and XIII. It is also consistent with the precedent established by the General Assembly's Resolution 141 (II), dated November 1, 1947, referring the report for 1946 on South-West Africa to the Trusteeship Council, and with the fact that the General Assembly did not request the Union Government to report separately and additionally for the purposes of Article 73 (*e*).

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

In the question submitted to the Court by the General Assembly, the following particular inquiry is made:

> "(*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?"

In Part I of the present statement, the view is expressed that the mandate for South-West Africa continues in force at the present time. In Part III above, the view is expressed that, while the mandate continues, South-West Africa remains a non-self-governing territory within the meaning of Chapter XI of the Charter. In view of these conclusions, it is submitted that the question of competence to modify the international status of the Territory of South-West Africa is essentially a question of competence to modify the mandate.

A. *The mandate for South-West Africa may be replaced by trusteeship*

The provisions of Chapter XII in the Charter make quite clear that mandated territories, including South-West Africa, can be placed under the international trusteeship system of the United Nations. This is probably the clearest way in which the mandate may be modified. In view of the discussion contained in Part II above, it is not believed necessary to present further discussion here on this point.

B. *The Union of South Africa does not have competence unilaterally to modify the Mandate*

In part (*c*) of the General Assembly's question, it is asked specifically whether the Union of South Africa has "the competence to modify the international status of the Territory of South-West

Africa". Presumably the question is whether the Union may effect such modification unilaterally. It is the view of the Government of the United States that the Union is not competent to bring about modifications unilaterally.

1. *Terms of the Mandate*

Article 7 of the Mandate for South-West Africa provides, in part : "The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate." It was thus made clear, when the League Council approved the terms of Mandate in 1920, that any modification of those terms would require the Council's consent. Termination of the Mandate altogether may be regarded as the extreme form which modification might take. During the life of the League, the consent of the Council would obviously have been required for any modification in the Mandate's terms and for ending the Mandate entirely. Since the League of Nations is no longer in existence, it is evident that the League Council's consent could not be obtained for a modification or termination of the Mandate for South-West Africa. It must then be asked (*a*) whether the mandatory Power has acquired full freedom of modification or termination on the League's demise, or (*b*) whether modification and termination have now become impossible. In the view of the United States, neither of these consequences follows. As has been pointed out in I, C, 2, above, and as this statement will attempt to show in IV, C, below, the United Nations is capable under certain circumstances of assuming the exercise of important functions of the League of Nations in relation to the mandate system.

2. *Location of sovereignty over South-West Africa*

It might be argued with much persuasiveness that the Union of South Africa had the competence to modify the Mandate for South-West Africa if the Union held sovereignty over the latter territory. It appears to be established, however, that the Union does not have sovereignty over South-West Africa [37]. This was the position taken by the Permanent Mandates Commission of the League of Nations, adopted by the League Council, and later accepted by the Government of the Union of South Africa. See League of Nations *Official Journal*, Council (44th sess., 1927), 426 (report of the Permanent Mandates Commission) ; same (56th sess., 1929), 1467-1468, 1472 (report of the Commission) ; same (60th sess., 1930), 1303 (report of the Commission).

It is interesting to note that Prime Minister Fraser, of New Zealand, made the following statement before Commission II at the San Francisco Conference, when the Commission was considering

[37] Whatever the authority enjoyed by a mandatory Power for purposes of internal administration of the mandated territory, the measure of this authority is not relevant in determining international rights and obligations in regard to the territory. Cf. *Rex* v. *Christian* [1924], S. Afr. L.R. 101 (App. Div.).

the report of the Trusteeship Committee, of which Mr. Fraser had been Chairman :

> "But 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."

Mr. Fraser was the last speaker before the Commission on the report of Committee II/4 ; following his statement, the President of the Commission, Field Marshal Smuts, of the Union of South Africa, declared that the Committee's report was adopted unanimously. U.N.C.I.O. Docs. 1144 (June 21, 1945) ; 1208 (June 27, 1945).

3. *Views of League and United Nations Members, 1946-1947*

Early in 1946, some of the mandatory Powers made declarations of an intention to negotiate trusteeship agreements for some of the mandated territories. The Union of South Africa did not make such a declaration, and its representative was questioned in this regard at the first part of the First Session of the United Nations General Assembly. In response, the representative of the Union of South Africa spoke as follows :

> "Referring to the text of Article 77, he said that under the Charter the transfer of the mandates regime to the trusteeship system was not obligatory. According to paragraph 1 of Article 80, no rights would be altered until individual trusteeship agreements were concluded. It was wrong to assume that paragraph 2 of this article invalidated paragraph 1. The position of the Union of South Africa was in conformity with this legal interpretation.
>
> He explained the special relationship between the Union and the territory under its mandate, referring to the advanced stage of self-government enjoyed by South-West Africa, and commenting on the resolution of the Legislature of South-West Africa calling for amalgamation with the Union. There would be no attempt to draw up an agreement until the freely expressed will of both the European and native populations had been ascertained. When that had been done, the decision of the Union would be submitted to the General Assembly for judgment." See U.N. *Official Records*, General Assembly (1st sess., 1st part, Fourth Committee, 1946), 10.

The representative of New Zealand stated that he

> "was gratified that a great deal of ambiguity had been removed by Mr. Nicholls' remarks. He asked whether he was right in understanding that, after ascertaining the will of the native and European populations, the Union of South Africa would lay the whole matter before the General Assembly.
>
> Mr. Nicholls (Union of South Africa) replied that his Government was taking steps to ascertain the wishes of the populations

of the territory under mandate. It would then reach a decision, and submit the decision to the General Assembly." See *id.*, at 11.

The Assembly of the League of Nations held its last session at Geneva in April, 1946. Various delegates included comments on the mandates question in their main speeches before the Assembly. The representative of the Union of South Africa devoted the greater part of his speech to this question. In it he said :

> "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. As the Assembly will know, it is already administered under the terms of the Mandate as an integral part of the Union. 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.
>
> The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will, nevertheless, regard the dissolution of the League as in no way diminishing their obligations under the Mandate, which they will continue to discharge with the full and proper appreciation of their responsibilities until such time as other arrangements are agreed upon concerning the future status of the Territory." See League of Nations *Official Journal*, Assembly (21st sess., plenary, 1946), 32-33.

At this closing session of the Assembly, the following resolution was adopted on the subject of mandates :

> "The Assembly,
>
> 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 :
>
> 1. Expresses its satisfaction with the manner in which the organs of the League have performed the functions entrusted to them with respect to the mandates system and in particular pays tribute to the work accomplished by the Mandates Commission ;
>
> 2. Recalls the role of the League in assisting Iraq to progress from its status under an 'A' Mandate to a condition of complete independence, welcomes the termination of the mandated status of Syria, the Lebanon, and Transjordan, which have, since the last session of the Assembly, become independent members of the world community ;

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." See *id.*, at 278.

At the second part of the First Session of the United Nations General Assembly, the Union of South Africa transmitted to the Assembly a "Statement 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". See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Part I, 1946), 199 (Annex 13). In the discussion of this agenda item in the Fourth Committee, Field Marshal Smuts, representing the Union of South Africa, proposed the formal incorporation of the Territory of South-West Africa with the Union. After report by a sub-committee, there was further debate in the Fourth Committee, which recommended a resolution to the plenary session. The resolution adopted by the General Assembly read as follows :

"*The General Assembly*,

Having considered the statements of the delegation of the Union of South Africa regarding the question of incorporating the mandated Territory of South-West Africa in the Union ;

Noting with satisfaction 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 ;

Recalling that the Charter of the United Nations provides in Articles 77 and 79 that the trusteeship system shall apply to territories now under mandate as may be subsequently agreed ;

Referring to the Resolution of the General Assembly of 9 February, 1946, inviting the placing of mandated territories under trusteeship ;

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 ;

Assured by the Delegation of the Union of South Africa that, pending such agreement, the Union Government will continue to administer the Territory as heretofore in the spirit of the principles laid down in the Mandate ;

Considering that the African inhabitants of South-West Africa have not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation of their territory;

Therefore, the General Assembly,

Is unable to accede to the incorporation of the Territory of South-West Africa in the Union of South Africa; and

Recommends that the mandated territory of South-West Africa be placed under the international trusteeship system and invites the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the aforesaid territory." Resolution 65 (I).

A year later, at the Second Session of the General Assembly, the representative of the Union of South Africa made the following statements concerning his Government's response to the General Assembly resolution just quoted:

"Mr. Lawrence (Union of South Africa) recalled that the General Assembly had found itself unable to accede to his Government's request for incorporation of South-West Africa in the Union of South Africa and had recommended that a trusteeship agreement should be submitted. His Government was not proceeding with its proposal to incorporate South-West Africa in the Union. To this degree it was complying with the resolution of the General Assembly.... Although the General Assembly had not thought to take into account the wishes of the inhabitants, the Government of the Union of South Africa, in deference to the wishes of the General Assembly, did not propose to proceed with incorporation." See U.N. *Official Records*, General Assembly (2nd sess., Fourth Committee, 1947), 3-4.

Following discussions in the Fourth Committee, the General Assembly at its Second Session adopted a resolution on South-West Africa which read, in part, as follows:

"*Whereas* the Government of the Union of South Africa in a letter of 23 July, 1947, informed the United Nations that it has decided not to proceed with the incorporation of South-West Africa in the Union, but to maintain the *status quo* and to continue to administer the territory in the spirit of the existing mandate, and that the Union Government has undertaken to submit reports on its administration for the information of the United Nations:

"*The General Assembly*, therefore,

"*Takes note* of the decision of the Government of the Union of South Africa not to proceed with the incorporation of South-West Africa...." Resolution 141 (II).

The record thus discloses that as the League of Nations went out of existence its Assembly, including the Union of South Africa, looked forward to subsequent agreement between the mandatory

Powers and the United Nations concerning the future of the mandated territories. In accordance with this understanding, the Union of South Africa made a proposal to the United Nations General Assembly, later in 1946, for the incorporation of South-West Africa into the Union. The General Assembly did not agree to this proposal. The Government of the Union refrained from going ahead to implement it in the absence of approval by the General Assembly. From this record emerges persuasive evidence of a common understanding that it was necessary for the mandatory Power to reach agreement with the United Nations before modification or termination of the South-West Africa Mandate could be effected.

4. *The precedent of other mandates*

Before leaving the question of competence by the Union of South Africa unilaterally to modify the South-West Africa Mandate, it may be useful to consider the case of certain other mandates, in which fundamental changes have been brought about through their attainment of independence. Article 22 of the Covenant of the League of Nations in the Treaty of Versailles looked forward to ultimate independence for the mandated territories. For some of these territories it envisaged early independence. For example, the fourth paragraph of Article 22 provides:

> "Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence 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. The wishes of these communities must be a principal consideration in the selection of the mandatory."

This paragraph referred to territories which subsequently became class A Mandates. South-West Africa became a class C Mandate. This type of territory was referred to as follows in the sixth paragraph of Article 22 of the League Covenant:

> "There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centers 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 above mentioned in the interests of the indigenous population."

Independence nevertheless remained a possible eventual goal for these territories which became class C Mandates. With respect to South-West Africa, discussions in the General Assembly of the United Nations have indicated that a number of countries have regarded independence as a possible solution to the future of

South-West Africa. See U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Sub-Committee 2, 1946), 49 (statement by representative of United States); same (1st sess., 2nd part, Fourth Committee, 1946), 89 (statement by representative of U.S.S.R.); *id.*, at 105 (statement by representative of Poland); *id.*, at 112 (statement by representative of Syria); same (3rd sess., 1st part, Fourth Committee, 1948), 320 (statement by representative of Brazil).

The class A Mandates—Iraq, Syria and Lebanon, Transjordan (now the Hashemite Kingdom of the Jordan), and Palestine—have undergone fundamental changes leading to independence. In the case of Iraq, the termination of the mandate and the creation of the Kingdom of Iraq as a separate State were accomplished with the consent of the appropriate League organs and the admission of Iraq to membership in the League of Nations. Syria and Lebanon and Transjordan were granted independence by their respective mandatories shortly before the end of the League's existence, at a time when the League was not in active operation. Nevertheless, the League Assembly in its Resolution of April 18, 1946, welcomed "the termination of the mandated status of Syria, the Lebanon, and Transjordan, which have, since the last session of the Assembly, become independent members of the world community....". Syria and Lebanon had already become Members of the United Nations [38].

In April 1947, the mandatory for Palestine requested the calling of a special session of the General Assembly to consider the question of the future government of Palestine and make recommendations concerning it. A special session was held, and a United Nations Special Committee on Palestine was appointed by the Assembly. This Committee reported to the second regular session of the Assembly in the fall of 1947, and on the basis of its report the General Assembly adopted Resolution 109 (II) containing recommendations concerning the future of Palestine. The resolution recommended the establishment of a Jewish State, an Arab State, and an internationalized city of Jerusalem. On May 15, 1948, the State of Israel came into existence. Subsequently, it was admitted to membership in the United Nations. Negotiations are still in progress concerning the definitive arrangements to be made with respect to Jerusalem and the portions of Palestine outside of Israeli territory.

In all of these cases there has been more than unilateral action on the part of the mandatory Power in terminating the mandate through the achievement of independence by the mandated territories. In the case of Iraq, the consent of the League Council was given. In the cases of Syria and Lebanon and Transjordan, the

[38] The application of Transjordan for admission to membership in the United Nations, following its rejection by the Security Council, was endorsed by the General Assembly. See Resolutions 113 (II), 197 (III) and 296 (IV).

League Assembly gave its approval, the League Council not being in operation at that time. Again in the case of Palestine, the mandatory did not act alone, and the termination of the mandate occurred pursuant to a resolution of the United Nations General Assembly [39].

It is submitted, therefore, that the Union of South Africa is not competent alone to modify the Mandate for South-West Africa, whether through the granting of independence or otherwise. It is believed that modifications of the mandate, including termination, require the approval of the appropriate representative body of the international community.

C. *The Mandate for South-West Africa may be modified by agreement between the mandatory Power and the United Nations General Assembly*

As has been shown earlier in this statement, the Union of South Africa assumed authority and administration in the Territory of South-West Africa pursuant to the Treaty of Versailles, the allocation made by the Principal Allied and Associated Powers, and the mandate terms approved by the Council of the League of Nations. Thus the Union became a trustee, and exercised its powers in South-West Africa on behalf of the large portion of the international community which were parties to the Treaty of Versailles and Members of the League of Nations. It has been seen that under the mandate system modifications of the mandate required the assent of the international community, to be given through the Council of the League. In the view of the Government of the United States, the termination of the League of Nations did not end the interest of the international community in the mandate for South-West Africa and did not leave that community without means of asserting its interest.

1. *General Assembly Resolution of February 12, 1946*

The League of Nations had not yet been brought to an end when the General Assembly of the United Nations met for the first time in London in 1946. In anticipation of the demise of the League, the General Assembly adopted a resolution at the first part of its First Session making provision for the transfer or possible transfer of certain functions and activities of the League of Nations. This resolution was adopted on the report of an *ad hoc* League of Nations Committee of the Assembly, appointed to consider the problems which would arise through termination of the League. Resolution XIV-I (I), adopted by the General Assembly on February 12, 1946, provides in part as follows:

> "Under various treaties and international conventions, agreements and other instruments, the League of Nations and its

[39] The question of the General Assembly's authority as a successor to the League of Nations will be dealt with in IV, C, below.

organs exercise, or may be requested to exercise, numerous functions or powers for the continuance of which, after the dissolution of the League, it is, or may be, desirable that the United Nations should provide.

Certain Members of the United Nations, which are parties to some of these instruments and are Members of the League of Nations, have informed the General Assembly that, at the forthcoming session of the Assembly of the League, they intend to move a resolution whereby the Members of the League would, so far as this is necessary, assent and give effect to the steps contemplated below.

Therefore:

1. *The General Assembly* reserves the right to decide, after due examination, not to assume any particular function or power, and to determine which organ of the United Nations or which specialized agency brought into relationship with the United Nations should exercise each particular function or power assumed.

2. *The General Assembly* records that those Members of the United Nations which are parties to the instruments referred to above assent by this resolution to the steps contemplated below and express their resolve to use their good offices to secure the co-operation of the other parties to the instruments so far as this may be necessary.

3. *The General Assembly* declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations, and adopts the following decisions, set forth in A, B, and C below.

. . . . . .

C. *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 is believed that through this resolution the Members of the United Nations and the Members of the League who are Members of the United Nations have agreed that organs of the United Nations might assume functions formerly exercised by League organs under certain international agreements, and further agreed that the General Assembly would consider requests from the parties for the exercise of these functions of League organs by organs of the United Nations. It is believed that in this manner a means was provided for the assumption of these League functions, with respect to mandates, by organs of the United Nations. Thus, the power of the

League Council to consent or withhold consent to modifications of a mandate could, upon request from the parties, be assumed by the United Nations General Assembly or some other United Nations organ to which the General Assembly might transfer responsibility.

2. *League of Nations Resolution of April 18, 1946*

In the League's final resolution on mandates (see p. 64 above), which was anticipated in General Assembly Resolution XIV-I (I), the League Assembly took 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 upon between the United Nations and the respective mandatory Powers". In this way, as pointed out earlier, the League Assembly looked forward to agreement between the mandatories and the United Nations on the future of the mandates.

3. *Proceedings of the United Nations General Assembly 1946-1948*

Reference has been made earlier to the submission by the Union of South Africa at the second part of the First Session, concerning its proposal for incorporation of South-West Africa in the Union. Reference has been made also to the resolution adopted by the General Assembly following a discussion of this subject, to the response of the Union Government, and to discussions and resolutions of later sessions of the General Assembly [40]. It is believed that these events show 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-I (I) of the Assembly. In the view of the United States, a mandate can be modified by agreement between the mandatory Power and the United Nations General Assembly. It is submitted that this was the pattern followed in the case of the Palestine mandate, and could be followed in the case of the South-West Africa mandate.

D. *Modification of the mandate without the consent of the mandatory*

There remains the possibility that the appropriate organ representing the international community might, in certain circumstances, be competent to modify a mandate regardless of consent by the mandatory Power. Such circumstances might include (*a*) breach by the mandatory of mandate obligations, and (*b*) events

[40] See also the following statements made in sessions of the General Assembly: U.N. *Official Records*, General Assembly (1st sess., 2nd part, Fourth Committee, Sub-Committee 2, 1946), 51 (China); U.N. A/P.V. 105 (2nd sess., plenary, 1947), 26-31 (India); *id.*, at 57-60 (Guatemala); U.N. *Official Records*, General Assembly (3rd sess., Fourth Committee, 1948), 289 (Union of South Africa); *id.*, at 312 (Uruguay).

making Article 22 of the League Covenant and the mandate itself no longer applicable to the situation of the mandated territory. Professor Wright, in his *Mandates under the League of Nations* (1930), 440-441, has stated:

> "Whether the League can appoint a new mandatory in case one of the present mandatories should cease to function has not been determined. Nor has it been decided whether the League can dismiss a mandatory though both powers may be implied from the Covenant assertion that the mandatories act 'on behalf of the League', and members of the Permanent Mandates Commission have assumed that they exist. Furthermore, it would seem that the mandate of a given nation would automatically come to an end in case the mandatory ceased to meet the qualifications stated in the Covenant and that the League would be the competent authority to recognize such a fact. Australia, however, has declared that the League has no power to dismiss a mandatory, and in reply to the question of her representative the Council's *Rapporteur* said the decision with regard to the guarantee of loans in case of transfer of mandate carried no implication in regard to the way in which that might take place. Since the areas subject to mandate are defined in Article 22 of the Covenant, it would seem that the League, whose competence is defined by the Covenant, could not withdraw a territory from the status of mandated territory unless through recognition that the conditions there defined no longer exist in the territory."

There appears to have been no settled law on these questions during the life of the League of Nations. Had a dispute arisen it could have been settled pursuant to paragraph 2 of Article 7 in the terms of the Mandate for South-West Africa. That paragraph provided:

> "The mandatory agrees 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 cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

Whether, since the termination of the League of Nations, any League power unilaterally to modify a mandate has survived in an organ of the United Nations such as the General Assembly is similarly unclear. The League Assembly Resolution of April 18, 1946, looked toward *agreed* arrangements between the mandatory Powers and the United Nations concerning the future of mandates. That resolution was adopted, of course, under circumstances in which the mandatory Powers without exception had declared their intentions to discharge the obligations of the mandates. An obviously different situation is created if a mandatory Power denounces or breaches its mandate. It may be questionable then whether the element of consent on the part of the mandatory is relevant to action by the appropriate international organ.

In the event of need, an authoritative determination on the above points might be secured pursuant to Article 7 of the mandate instrument taken in conjunction with Article 37 of the Statute of the International Court of Justice. That article provides :

> "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

If no organ of the United Nations were competent, or able, to make new provision for a mandated territory where the mandatory was breaching its obligations or the situation had so changed that the purpose of the mandate was no longer being effectuated, there might be a residuum of authority in the remaining Principal Allied and Associated Powers which could then be employed to make a new disposition. See Wright, *op. cit. supra*, 320, 502. The necessary determination of facts and establishment of rights might have to be accomplished, in such circumstances, through a proceeding before an appropriate international tribunal.

4. WRITTEN STATEMENT OF THE GOVERNMENT OF INDIA

On the termination of the First World War, the Principal Allied and Associated Powers were confronted with the problem of the future of ex-enemy territories. They had three alternatives: (1) annexation, (2) direct international administration, and (3) the placing of the territories under a mandate system. They chose the third.

2. This decision was given effect to by:

First, the Covenant;

Second, the Peace Treaties (Versailles, June 28, 1919, Sèvres, August, 1920, Lausanne, July 24, 1923), which ceded the ex-enemy territories to the Principal Allied and Associated Powers;

Third, political decisions by the Allies regarding:

(*a*) which ex-enemy territories were to become mandates,

(*b*) the terms of the mandate;

Fourth, confirmation, and definition of the terms if necessary, of the mandates, by the League.

3. *Vide* Article 119 of the Treaty of Peace with Germany signed at Versailles on June 28, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over German South Africa.

The Principal Allied and Associated Powers agreed that in accordance with Article 22 of the Covenant, a mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer South-West Africa and proposed that the mandate should be in certain terms.

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 terms of the mandate.

The Council of the League of Nations confirmed the mandate and defined its terms on the 17th December, 1920.

4. In order to ascertain the international status of the Territory of South-West Africa and the international obligations of the Union of South Africa arising therefrom, it is essential first to consider what was the position with respect to these matters at the outbreak of the Second World War and then to consider whether this position has been modified, and if so, to what extent by the events that have occurred since.

5. An analysis of Article 22 of the Covenant and the Mandate for South-West Africa, which constitute basic documents, shows that:

(*a*) Paragraph 1 of Article 22 of the Covenant laid down the basic principle underlying the mandate system, the principle being "that the well-being and *development*" of "peoples not *yet* being able to stand by themselves under the strenuous conditions of the modern world" form a "sacred trust of civilization", and that "securities for the performance of this trust should be embodied in this Covenant". In other words, the overall purpose of setting up the mandate system was to "develop" the peoples, so that they may in due course be able *to stand* by themselves.

(*b*) *Vide* paragraph 2 of Article 22, this fundamental principle, which was applicable to all the peoples of the territories to be placed under the mandate system, was to be given practical effect by entrusting the *tutelage* of the peoples to advanced nations willing to accept the mandate. The relation of tutelage implies fundamentally a relation of service and delegation wholly incompatible with any rights of sovereignty in the mandatory. The tutelage was to be "exercised by them as mandatories *on behalf of the League*". It has been suggested that the words "on behalf of the League" imply or recognize a conferment of some sovereignty on the League. It is respectfully submitted that the suggestion is erroneous and will be critically examined later.

(*c*) The underlying conception of the trust for development of peoples so that they would be "able to stand alone" was mentioned again in paragraph 4 of Article 22. As the communities formerly belonging to the Turkish Empire had reached a stage of development where their existence as independent nations could be provisionally recognized, it was necessary only to provide for the rendering of administrative advice and assistance by the mandatory, in the selection of which the wishes of these communities were to be a principal consideration.

(*d*) Paragraph 5 of Article 22 applied to peoples at such a stage of development that the mandatory was made responsible for the administration of the territory under certain specified conditions.

(*e*) Paragraph 6 applied, *inter alia*, to South-West Africa which could be "*best administered* under *the laws* of the mandatory as *integral portion of its territory*, subject to the safeguards above mentioned in the interests of the indigenous population". The safeguards referred to were "freedom of conscience and religion, subject only to maintenance of public order and morals, the prohibition of abuses such as slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of natives for other than police purposes and the defence of territory". Articles 2-5 of the Mandate carried out the objectives of this paragraph. It has been contended by the Union of South Africa that, by virtue of this paragraph and Article 2 of Mandate,

the Territory of South-West Africa became an integral portion of South Africa. It is respectfully submitted that contention is unsound because paragraph 6 speaks of administration and not of government as an integral portion.

(*f*) Paragraph 7 of Article 22 provided for an annual report by the mandatory to the Council "in reference to the territory committed to its *charge*", and Article 6 of the Mandate incorporated a similar provision. This provided the means by which the League could supervise the carrying out of the mandate. The word "charge" again emphasized the temporary character of the mandate and the eventual development of the peoples to a stage where they would be able to stand alone.

(*g*) Paragraph 8 of Article 22 provided that the degree of authority, control of administration to be exercised by the mandatory, shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council. In exercise of its powers under this paragraph, the Council confirmed and approved of the terms of the Mandate for South-West Africa proposed by the Principal Allied and Associated Powers and accepted by the mandatory.

It is respectfully submitted that the mandate did not by virtue of the confirmation of the League acquire any additional validity or force.

(*h*) Paragraph 9 of Article 22 provided for the constitution of a Permanent Commission "to receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the mandate".

A Permanent Commission was set up by a Resolution of the Council of the League, dated December 11, 1920, and till 1940 it continued to receive and examine reports from the Union of South Africa in reference to South-West Africa.

(*i*) It remains only to mention the first paragraph of Article 7 of the Mandate, which provided that "the consent of the Council of League of Nations is required for any modifications of the terms of the present Mandate". The proper interpretation of this will be examined later.

6. At the eve of the outbreak of the Second World War, South Africa had been administering the territory under the mandate and sending annual reports to the Council of the League. The territory was not in the ownership of South Africa, for :

(i) Germany had divested itself of all rights of ownership in the territory. The Principal Allied and Associated Powers had acquired all these rights.

(ii) South Africa's rights were confined to what was granted to it in the mandate. South Africa was precluded by the terms of the mandate from doing many things which an owner of territory could do. It could not, for instance, give military training to

the natives otherwise than for purposes of internal police and the local defence of the territory. It could not modify the terms of the mandate without the consent of the Council of the League. It had neither dominium nor absolute freedom in its administration.

(iii) The inhabitants did not acquire the nationality of the mandatory. Oppenheim (Vol. I, 7th ed., pp. 200-201) states the position correctly thus :

> "The effect of Article 119 of the Treaty of Peace with Germany was to divest the inhabitants of South-West Africa of their former German nationality and not to invest them automatically with any new nationality. In April, 1923, the Council of the League adopted certain resolutions with regard to the national status of the inhabitants of 'B' and 'C' mandated areas, the substance of which was that they had a distinct status from that of the mandatory's nationals and, while not disabled from obtaining individual naturalization from the mandatory, did not automatically become invested with its nationality. In the case of the 'C' mandated area of South-West Africa, the mandatory, with the consent of the Council of the League and with the assent of the German Government, passed legislation offering collective naturalization to all persons of German origin, subject to the right of any of them to decline the British nationality offered to them."

(iv) A special provision was required for the purpose of *including* a mandated territory in the benefit of a general treaty signed by the mandatory, while if the mandated territory had become part of the territory of the mandatory a special provision would have been necessary to exclude it from the operation of the territory.

(v) The administration of the territory was to be disinterested. The mandate, according to the terms of Article 22 of the Covenant, "was a system of 'tutelage' and tutelage implied a disinterested activity. Further, it was stated, in the reply of the Allied and Associated Powers to the observations of the German delegation on the condition of peace, that the Allied and Associated Powers are of opinion that the colonies should not bear any portion of the German debt nor remain under any obligation to refund to Germany the expenses incurred by the Imperial administration of the Protectorate—in fact, they consider that it would be unjust to burden the natives with a debt which appears to have been incurred in Germany's own interest and that it would be no less unjust to make this responsibility rest upon the mandatory Powers, which, in so far as they may be appointed trustees by the League of Nations, will derive no benefit from such trusteeship." The mandatory was obliged to use all the revenue and profits from the property of the mandated territories for the benefit of the territories. It could not hold any of the property of the mandated territory in full dominium.

7. In this connexion it is respectfully submitted that South Africa could not dispose of, or annex, the territory even with the consent of the Council of the League. This point needs elaboration. Reasons for this submission are as follows :

(*a*) Article 7 of the Mandate provided that "the consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate". This visualized a modification and not an annihilation of the mandate, which had been granted and accepted before the Council confirmed it. The Council had confirmed the Mandate, not in exercise of the powers conferred by paragraph 8 of Article 22 of the Covenant, but by an implied request from the Principal Allied and Associated Powers. By asking the Council to confirm it, the Principal Allied and Associated Powers had not transferred to it the right to give consent to the annihilation of the mandate.

(*b*) The words "the terms of the Mandate" only referred to the articles of the Mandate, and the mandatory was not nominated by any of the articles of the Mandate. Article 1 only specified the territory. Paragraph 2 of the preamble of the Mandate speaks of the "formulation in the following terms", and the terms were contained in the articles which followed the preamble.

(*c*) Article 7 of the Mandate has to be read in the light of paragraph 8 of the Article 22, which provided for a definition by the Council of the degree of authority, control and administration to be exercised by the mandatory at the stage of the creation of the mandate if the terms had not already been agreed upon. Read in this light, Article 7 is a limitation of the powers of administration which had been conferred on the mandatory, and it is only the powers of administration which could be modified with the consent of the Council.

8. Where did sovereignty in respect of South-West Africa lie on the eve of the Second World War ? It has been seen that, by Article 119 of the Treaty of Versailles, Germany renounced in favour of the Principal Allied and Associated Powers all her rights, titles over her overseas possessions, which included South-West Africa, and that South Africa got certain rights defined in the mandate to be exercised under the supervision of the League.

Various views have been expressed on the above question. Following are among the numerous answers that have been given. Sovereignty lay :

(i) in the mandatory ;

(ii) in the mandatory, acting with the consent of the Council of League ;

(iii) in the Principal Allied and Associated Powers ;

(iv) in the League ;

(v) in the inhabitants of the mandated area.

9. It seems clear that the mandatory did not acquire any higher rights than contained in the mandate and Article 22 of the Covenant. The rights conferred by these documents on South Africa are rights of administration and much less than rights of sovereignty. This aspect has already been examined in paragraph 6 of this statement.

10. Sovereignty did not lie in the mandatory acting with the consent of the Council of the League of Nations, because, as stated in paragraph 6 of the statement, the League could not give a valid consent to the annexation, cession or disposal of the mandated territory.

11. The League did not acquire any sovereign rights in the territory or over the peoples of the territory. The provision that the mandatory had to exercise tutelage *on behalf of the League* only means that the right of tutelage, which South Africa was entitled to exercise, was to be exercised subject to the supervision of the League. The League was functioning as an instrument of civilization, whose sacred trust it had been declared to be in paragraph 1 of Article 22. It was the exercise of the tutelage that was being entrusted by the Principal Allied and Associated Powers to the mandatory with the implied direction that it was the mandatory which was primarily responsible for the actual exercise of the rights, while the function of the League was limited to the supervision of this exercise of the right. But both were only performing the function of carrying out the tutelage and nothing more. The League had no authority to determine who the mandatory should be. It had no authority to change the mandatory and, as has been stated above, it could not have been given a valid consent to a change in the status of the mandated territory. In conclusion, it is respectfully submitted that the League did not have any sovereign rights over the territory.

12. This leaves either the Principal Allied and Associated Powers or the peoples of the mandated territory as having the sovereignty. It is respectfully submitted that the Principal Allied and Associated Powers did not retain any sovereignty in their hands for the following reasons:

They created a system by which peoples of the mandated territory could gradually grow to a fuller stature with the assistance of the mandatory. This was the underlying policy of the Powers and was given expression to in Article 22 of the Covenant. The term "tutelage", the words "not yet able to stand by themselves" "until such time as they are able to stand alone", "development of such peoples forms a sacred trust of civilization", "the rendering of administrative advice and assistance", "administration of the territory", and the words "can be best administered", all show that the abovementioned Powers created a system by which, apart from the gradual development of the peoples, no other act was necessary on the part of anybody for them to become independent.

13. In what manner have subsequent events modified the position outlined above? In 1945, the United Nations (which did not include all the signatories to the Covenant of the League of Nations nor even all the "Principal Allied and Associated Powers") adopted the Charter of the United Nations, Chapter XII of which deals with the international trusteeship system. Article 75 of the Charter provided for the establishment under the authority of the United Nations of an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. The trusteeship system was to be applied, *inter alia*, to "territories now held under mandate". The Union of South Africa made a reservation during the discussions on the Charter to give notice at the appropriate time of the termination of the mandate over South-West Africa in the territory of the Union; but did not sign or ratify the Charter subject to this reservation. Its signature or ratification do not show any reservation.

14. During the first part of the First Session of the United Nations General Assembly in January-February, 1946, most of the mandatories expressed their willingness to place territories held by them as mandated territories, under the international trusteeship system, but the South-African delegate stated his Government's intention of consulting the people of the Territory of South-West Africa on the form which their future government should take. The Assembly at the same session unanimously adopted a resolution, *inter alia*, inviting "the States administering territories held under mandate to undertake practical steps, in concert with other States directly concerned, for the implementation of Article 79 of the Charter (which provides for the conclusion of agreements on the terms of the 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".

15. At its final session in Geneva in 1945, the Assembly of the League of Nations adopted on 18 IV 46 a resolution, the operative part of which reads:

> "The Assembly....
>
> 3. Recognizes that, on the termination of the League's existence, its function 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."

16. In the second part of the First Session of the United Nations General Assembly, the delegate of the Union of South Africa asked the Assembly (in December, 1946) to approve of the incorporation of South-West Africa in the territories of the Union of South Africa. The Union delegate pleaded "physical contiguity" and "ethnological kinship" in favour of incorporation, adding that the wishes of indigenous inhabitants of South-West Africa had been ascertained by South Africa in a democratic manner and that they were in favour of annexation by a preponderating majority. The Assembly, however, rejected the proposal and by its Resolution of 19 XII 46 recommended that the Territory of South-West Africa be placed under the international trusteeship system, asking South Africa to propose a trusteeship agreement therefor. The resolution also noted South Africa's assurance to continue to administer the Territory in the spirit of the Mandate till an agreement on the subject was reached. The Union delegate promised to submit reports on their administration of South-West Africa for the information of the United Nations.

17. The matter came up for consideration at the Second Session of the United Nations General Assembly, 1947. The Assemby reiterated its previous stand.

18. Since South Africa did not submit a draft agreement for placing South-West Africa under the trusteeship system, as envisaged by the United Nations General Assembly resolution, the question was again considered in the 3rd Session in 1948. The Union delegate contended that South Africa was not accountable to the United Nations for any action in respect of South-West Africa, since, with the dissolution of the League of Nations, the mandate had lapsed and the United Nations could not automatically become the legatee of the League of Nations. He spoke of the Union delegate's reservation (mentioned in para. 13 above) and quoted from President Wilson's speech at the Paris Conference, 1919, to show that South-West Africa was envisaged eventually to "find its destiny within the future boundaries of the Union".

The General Assembly adopted a resolution maintaining its previous resolution on the subject and expressing regret that the recommendations (for a draft agreement to place South-West Africa under the trusteeship system) had not been carried out.

19. Again in 1949, South Africa not only failed to propose an agreement, but also refused to submit reports on the administration of South-West Africa, alleging that the reports submitted had been subjected to malicious and hostile criticism of the actions of the Union of South Africa. Further, the Union of South Africa enacted a measure called the South-West Africa Affairs Amendment Act,

1949, for "a closer association" of South-West Africa with the Union.

20. In its Fourth Session held in 1949, the United Nations General Assembly adopted two resolutions on this question.

The first "reiterates in their entirety" the previous resolutions and calls upon South Africa to submit reports on the administration of South-West Africa ; and

The second decides to submit the question to the International Court of Justice for advisory opinion.

21. The following question arises in connexion with the contentions of the Union of South Africa :

When the League of Nations ceased to exist, did the position as existing on the eve of the Second World War change, and if so, in what respects ? It is respectfully submitted that the only respect in which the position has changed is that Article 6 of the Mandate and the first portion of Article 7 of the Mandate have become incapable of being complied with. In other respects, the rights and obligations of the mandatory are exactly the same as they were before. The result is that the mandatory is not obliged to submit an annual report under Article 6 and that it cannot modify the terms of the Mandate at all because the procedure by which it could have modified the terms of the Mandate has ceased to be applicable. One of the "securities for the performance of the trust" which was embodied in paragraph 7 of Article 22 of the Covenant by the submission of an annual report, and in the Mandate, has ceased to exist ; but the obligation of South Africa to carry out the trust remains in full force. It is in this light that the Resolution of the Assembly of the League of Nations adopted on the 18th April, 1948, should be read. The League of Nations could not confer its powers under Article 22 of the Covenant and the Mandate to the United Nations because they were in the nature of securities devised for the performance of the trust, which securities would cease to exist on the termination of the League's existence. Therefore, there is no force in the contention that the termination of the League's existence has in any manner modified the status of the territory of South-West Africa and the international obligations of the Union of South Africa arising therefrom. It is submitted that, with the exception of the obligation to furnish annual reports to the Council, all other obligations remain intact.

22. The position mentioned in the foregoing paragraph was accepted by the Prime Minister of South Africa in a speech made on the 15th March, 1946, in the Union House of Assembly, when referring to the suggested conclusion of an agreement placing South-West Africa under the international trusteeship system. He stated that "until such an agreement has been concluded the old position holds, the *status quo* remains".

23. It is respectfully submitted further that the Charter of the United Nations and particularly Chapter XII impose on the Union of South Africa an obligation in the nature of a legal duty to place the mandated Territory of South-West Africa under the international trusteeship system.

24. Paragraph 2 of Article 80 of the Charter states that paragraph 1 of this article shall not be interpreted as giving grounds for delay or postponing of the negotiations and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77. The Prime Minister of South Africa put the construction of paragraph 2 as follows: "That was to prevent a situation where the mandatory says 'I do not want to make an agreement at all'.... 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.* This is how I understand it...." (Extract from the debates of the 15th March, 1946, in the Union Assembly.) This, it is respectfully submitted, is the correct interpretation of paragraph 2 of Article 80. It implied an international obligation to negotiate and conclude agreements for placing territories under the trusteeship system and not to stand outside the trusteeship system. A subsequent individual agreement is necessary for placing a territory held under mandate under this system, but there is an obligation on the mandatory to negotiate and conclude an agreement in this respect. Until such agreement has been concluded, Article 80, paragraph 1, preserves the rights of the States or peoples and the terms of the existing instruments. The chapter thus proceeds on the fundamental basis that there are certain territories held under mandate. In other words, the existence of the mandate and its continuance till an agreement is concluded are recognized. South-West Africa did not therefore become a *res nullius* as contended by South Africa. It is submitted that the negotiation and conclusion of a trusteeship agreement is one of the international obligations which South Africa must fulfil.

25. It has been contended that the Union of South Africa made a reservation during discussions on the draft of the Charter to give notice at the appropriate time of the termination of the mandate over South-West Africa and the incorporation of South-West Africa in the territory of the Union. It is further contended that by virtue of this the Union of South Africa is not bound by any of the provisions of Chapter XII of the Charter in so far as they are repugnant to the reservation. It is respectfully submitted that a reservation made during the discussions of a multilateral treaty does not affect the operation of the treaty

unless reservation has also been made at the time of the signature of the treaty and duly attached to the signature and recorded in a *procès-verbal* or protocol of signatures or unless reservation is attached to the ratification. A reservation is the refusal of an offer. But an offer is not made in the case of a multilateral treaty, until the treaty is offered for signature. Therefore, a reservation made previous to the making of an offer cannot have any legal effect. The Union of South Africa, having not renewed its reservation at the time of signing the Charter or at the time of its ratification under Article 110 of the Charter (which, at any rate, does not provide for a limited ratification), cannot derive any advantage from the reservation made during the drafting of the Charter.

26. 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.

27. The answer to the question relating to the competence to modify the international status of the Territory of South-West Africa follows from what has been stated above. In view of the submissions that (*a*) the Mandate subsists and that the administration and the future development of the Territory must take place in accordance with the Mandate in so far as it is applicable now, (*b*) sovereignty rests with the peoples of the territory, (*c*) that South Africa is obliged to conclude a trusteeship agreement, South Africa is not competent to modify the international status of the Territory. No other authority except the peoples of the Territory can have any competence to modify the status, and this modification must take place in accordance with the provisions of Chapter XII of the Charter.

28. It is, in conclusion, respectfully submitted that the Court may be pleased to answer the questions referred to it in the following manner :

(*a*) That the Territory of South Africa is a mandated territory and the Union of South Africa has the international obligation to carry out the provisions of the Mandate, excepting Article 6 and the first portion of Article 7. In particular, the Union of South Africa continues to have the following international obligations in respect of the Mandate of South-West Africa :

(i) Not to (directly or indirectly) incorporate or annex the Territory of South-West Africa in its territory ;

(ii) To further the well-being and development of the inhabitants of the Territory so that they may be able to stand alone ;

(iii) To carry out the obligations under Articles 2, 3, 4 and 5 of the Mandate ;

(iv) To negotiate and conclude an agreement for the placing of the Territory under the international trusteeship system ;

(v) To furnish reports to the General Assembly in accordance with its declaration dated the 23rd July, 1947 ;

(*b*) That the provisions of Chapter XII of the Charter are applicable inasmuch as they impose an obligation in the nature of a legal duty on the Union of South Africa to place the Territory of South-West Africa under the international trusteeship system and to negotiate and conclude an agreement for that purpose ;

(*c*) That the Union of South Africa has no competence to modify the international status of the Territory of South-West Africa ; but it is the peoples of the mandated territory, when they are in a position to stand alone, who alone can determine and modify the international status of the territory.

5. EXPOSÉ DU GOUVERNEMENT POLONAIS

En me référant à la Résolution de l'Assemblée générale des Nations Unies, adoptée à la IVme Session, le 6 décembre 1949, au sujet de la situation juridique dans le Sud-Ouest africain, et conformément à la décision du Président de la Cour internationale de Justice en date du 30 décembre 1949, j'ai l'honneur de communiquer l'opinion de mon Gouvernement :

1) Mon Gouvernement maintient dans toute son étendue l'attitude qu'il avait prise lors des sessions précédentes de l'Assemblée générale des Nations Unies au sujet de l'obligation où se trouve l'Union sud-africaine de soumettre le Territoire du Sud-Ouest africain à la tutelle des Nations Unies.

Comme l'avait déjà constaté le délégué de la Pologne à la IVme Session de l'Assemblée générale, la consultation de la Cour internationale de Justice sur cette question n'avait aucun fondement de fait ni aucun fondement juridique. Lors de la Ire Session de l'Assemblée générale, les Nations Unies avaient déjà adopté une Résolution, en date du 14 décembre 1946, recommandant que « le territoire sous mandat du Sud-Ouest africain soit placé sous le régime international de tutelle » et invitant le Gouvernement de l'Union sud-africaine à soumettre à l'examen de l'Assemblée générale un accord de tutelle pour ledit territoire.

A la IIme Session de l'Assemblée générale, les Nations Unies se sont reportées à cette résolution, et, ayant constaté que l'Union sud-africaine ne l'a pas mise à exécution, ont réaffirmé la recommandation que le Sud-Ouest africain soit placé sous un système de tutelle et ont invité le Gouvernement de l'Union sud-africaine à présenter un accord de tutelle, en exprimant l'espoir que le projet d'un tel accord serait discuté à la IIIme Session de l'Assemblée générale. (Résolution du 1er novembre 1947.)

Étant donné que le Gouvernement de l'Union sud-africaine n'a pas mis à exécution les résolutions de la Ire et de la IIme Session de l'Assemblée générale, les Nations Unies ont adopté le 26 novembre 1948, à la IIIme Session, une résolution, dans laquelle elles constatent avec regret que les recommandations n'ont pas été exécutées.

Bien que cette résolution se soit bornée à exprimer un regret, alors que le fait, de l'avis de mon Gouvernement, constitue une violation de la Charte, elle qualifie cependant clairement l'état de choses.

2) Il en résulte que l'Assemblée générale a pris au cours des trois sessions une position claire et sans équivoque, reconnaissant l'obligation indiscutable où était le Gouvernement de l'Union

sud-africaine de placer ce territoire sous le système de tutelle, c'est-à-dire de le soumettre au chapitre XII de la Charte des Nations Unies. L'Assemblée a donné par conséquent à l'article 77, paragraphe 1 *a*, la seule interprétation possible qui résulte de l'esprit de la Charte. Dans cet état de choses, mon Gouvernement considère qu'il n'est pas juste que cette question soit traitée par la Cour internationale de Justice, étant donné que, comme il est prévu dans les fondements de la Charte, tout organe des Nations Unies a le droit d'interpréter les dispositions de la Charte dans le cadre de ses compétences.

L'Assemblée générale, dans l'exercice de ses compétences, a constaté l'obligation pour l'Union sud-africaine de placer sous tutelle ledit territoire et de conclure un accord de tutelle, ayant ainsi tranché la question.

3) En adoptant sur ce point une attitude de principe, mon Gouvernement ne peut passer sous silence d'autres faits, liés à l'histoire de ce problème. Lors de sa Première Session, l'Assemblée générale a déjà constaté et a reçu l'assurance qu'en attendant la conclusion de l'accord de tutelle, le Gouvernement de l'Union sud-africaine continuera d'administrer ledit territoire dans l'esprit des principes établis par le mandat. L'Assemblée générale s'est opposée catégoriquement à l'incorporation de ce territoire. (Résolution du 14 décembre 1946.)

Par une lettre du 23 juillet 1947, le Gouvernement de l'Union sud-africaine a communiqué aux Nations Unies qu'il ne procéderait pas à l'incorporation du Sud-Ouest africain et qu'il maintiendrait le *statu quo* dudit territoire. L'Assemblée générale a autorisé le Conseil de Tutelle à examiner le rapport sur la situation dans le Sud-Ouest africain. (Résolution du 1er novembre 1947.) Malgré cela, le représentant de l'Union sud-africaine a fait connaître, le 9 novembre 1948, l'intention de son Gouvernement de former « une association plus étroite » entre le Sud-Ouest africain et l'Union sud-africaine, ce qui a constitué un premier pas vers l'annexion. L'Assemblée générale, par contre, a recommandé que l'Union sud-africaine continue à fournir des renseignements sur l'administration dudit territoire.

Nonobstant ces résolutions, le Gouvernement de l'Union sud-africaine a communiqué aux Nations Unies, par une lettre du 11 juillet 1949, qu'il ne fournirait plus de renseignements et ne transmettrait plus de rapports concernant le Sud-Ouest africain.

4) Toutes ces circonstances prouvent d'une façon irréfutable que le Gouvernement de l'Union sud-africaine non seulement a enfreint les dispositions du chapitre XII de la Charte, mais que, même dans la période transitoire dont la durée devait naturellement être brève, il a violé les dispositions du chapitre XI de la Charte. Ce Gouvernement s'est refusé à remplir les engagements qu'il avait reconnus lui-

même concernant les rapports et les renseignements sur la situation dans le Sud-Ouest africain.

Les faits et les conclusions qui en résultent n'exigent pas de commentaires.

5) En résumé, mon Gouvernement se voit obligé de constater que, contrairement aux engagements pris en vertu du mandat et aux obligations résultant de la Charte des Nations Unies, le Gouvernement de l'Union sud-africaine a systématiquement réduit le Sud-Ouest africain à un état qui, pratiquement, ne diffère pas de celui d'une colonie annexée.

Comme il résulte de la Charte des Nations Unies, les territoires visés dans le chapitre XII doivent recouvrer l'indépendance dans le plus bref délai possible. Conformément à ses principes, le droit des peuples à disposer d'eux-mêmes et la réalisation de ce droit sont à la base même de l'Organisation. Ainsi, il n'y a que deux solutions possibles pour les territoires dont il est question à l'article 77, paragraphe 1 *a* : si ces territoires sont capables de s'administrer eux-mêmes, ils doivent être immédiatement déclarés indépendants ; sinon, ils doivent être soumis au système de tutelle. Le Gouvernement de l'Union sud-africaine a appliqué, en fait, une méthode tout opposée : profitant du fait qu'il administre ce territoire, il tend à trancher la question du développement ultérieur de la population en le subordonnant encore davantage à l'Union. Il est clair, en effet, que ce n'est qu'après avoir obtenu une indépendance complète que les habitants du Sud-Ouest africain pourront, sur une base d'égalité, décider du caractère de leurs relations avec tel État ou tel autre. Ces méthodes constituent clairement une violation de la Charte.

6) Prenant en considération l'ensemble de ces faits, le Gouvernement polonais doit constater que les mesures prises par le Gouvernement de l'Union sud-africaine sont en contradiction flagrante avec la Charte des Nations Unies et avec les résolutions adoptées par l'Assemblée générale, et qu'en principe la question de la soumission du Sud-Ouest africain au système de tutelle a déjà été tranchée par la Charte elle-même et par les résolutions susmentionnées de l'Assemblée générale.

Le Gouvernement polonais exprime la conviction que dans une telle situation la Cour internationale de Justice ne prendra aucune décision susceptible d'enfreindre l'autorité des résolutions de l'Assemblée générale, adoptées conformément à la Charte des Nations Unies.