I.C.J.

Communiqué 50/30.
(Unofficial)

The following information from the Registry of the International Court of Justice has been communicated to the Press:

On July 11th, 1950, the Court gave an advisory opinion on the International Status of South-West Africa, referred to it by Resolution of the General Assembly of the United Nations on December 6th, 1949.

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

by 12 votes to 2 that the Union of South Africa continues to have the international obligations resulting from the Mandate, including the obligation to submit reports and transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations and the reference to the Permanent Court of International Justice to be replaced by reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court;

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

by 8 votes to 6 that the Charter does not impose on the Union of South Africa a legal obligation to place the Territory under Trusteeship;

and finally, unanimously that the Union of South Africa is not competent to modify the international status of South-West Africa, such competence resting with the Union acting with the consent of the United Nations.

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The circumstances in which the Court was called upon to give its opinion were the following:

The Territory of South-West Africa was one of the German overseas possessions in respect of which Germany, by Article 119 of the Treaty of Versailles renounced all her rights and titles in favour of the Principal Allied and Associated Powers. After the war of 1914-1918 this Territory was placed under a Mandate conferred upon the Union of South Africa which was to have full power of administration and legislation over the Territory as an integral portion of the Union. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants.

After the second world war, the Union of South Africa, alleging that the Mandate had lapsed, sought the recognition of the United Nations to the integration of the Territory in the Union.

The United Nations refused their consent to this integration and invited the Union of South Africa to place the Territory under Trusteeship, according to the provisions of Chapter XII of the Charter.

The Union of South Africa having refused to comply, the General Assembly of the United Nations, on December 6th,1949, adopted the following resolution:

The General Assembly,

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

Considering ...

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.

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In the opinion given today the Court examined first if the Mandate conferred by the Principal Allied and Associated Powers on His Britanic Majesty, to be exercised on his behalf by the Union of South Africa, over the Territory of South-West Africa was still in existence. The Court declared that the League was not a "mandator" in the sense in which this term is used in the national law of certain states. The Mandate had only the name in common with the several notions of mandate in national law. The essentially international character of the functions of the Union appeared from the fact that these functions were subject to the supervision of the Council of the League and to the obligation to present annual reports to it; it also appeared from the fact that any Member of the League could submit to the Permanent Court of International Justice any dispute with the Union Government relating to the interpretation or the application of the provisions of the Mandate.

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

The ...

The obligations of the first group represent the very essence of the sacred trust of civilization. Their raison d'être and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. This view is confirmed by Article 80, paragraph 1, of the Charter, maintaining the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the trusteeship system. Moreover, the resolution of the League of Nations of April 18, 1946, said that the League's functions with respect to mandated territories would come to an end; it did not say that the Mandates themselves came to an end.

By this Resolution the Assembly of the League of Nations manifested its understanding that the Mandates would continue in existence until "other arrangements" were established and the Union of South Africa, in declarations made to the League of Nations as well as to the United Nations, had recognized that its obligations under the Mandate continued after the disappearance of the League. Interpretation placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.

With regard to the second group of obligations, the Court said that some doubts might arise from the fact that the supervisory functions of the League with regard to mandated territories not placed under the new trusteeship system were neither expressly transferred to the United Nations, nor expressly assumed by that Organization. Nevertheless, the obligation incumbent upon a Mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. It could not be concluded that the obligation to submit to supervision had disappeared merely because the supervisory organ had ceased to exist, when the United Nations had another international organ performing similar, though not identical, supervisory functions.

These general considerations were confirmed by Article 80, paragraph 1, of the Charter, which purports to safeguard not only the rights of States, but also the rights of the peoples of mandated territories until trusteeship agreements were concluded. The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions on any matters within the scope of the Charter, and make recommendations to the Members of the United Nations. Moreover, the Resolution of April 18th, 1946, of the Assembly of the League of Nations pre-supposes that the supervisory functions exercised by the League would be taken over by the United Nations.

The right of petition was not mentioned in the Covenant or the Mandate, but was organized by a decision of the Council of the League. The Court was of opinion that this right which the inhabitants of South-West Africa had thus acquired, was maintained by Article 80, paragraph 1, of the Charter, as this clause was interpreted above. The Court was therefore of the opinion that petitions are to be transmitted by the Government of the Union to the General Assembly of the United Nations, which is legally qualified to deal with them.

Therefore, South-West Africa is still to be considered a territory held under the Mandate of December 17th, 1920. The degree of supervision by the General Assembly should not exceed that which applied under the Mandates System. These observations apply to annual reports and petitions.

Having regard to Article 37 of the Statute of the International Court of Justice and Article 80, paragraph 1, of the Charter, the Court was of opinion that this clause in the Mandate was still in force, and therefore that the Union of South Africa was under an obligation to accept the compulsory jurisdiction of the Court according to those provisions.

With regard to question (b) the Court said that Chapter XII of the Charter applied to the Territory of South-West Africa in this sense, that it provides a means by which the Territory may be brought under the trusteeship system ...

system.

With regard to the second part of the question, dealing with the manner in which those provisions are applicable, the Court said that the provisions of this chapter did not impose upon the Union of South Africa an obligation to put the Territory under Trusteeship by means of a Trusteeship Agreement. This opinion is based on the permissive language of Articles 75 and 77. These Articles refer to an "agreement" which implies consent of the parties concerned. The fact that Article 77 refers to the "voluntary" placement of certain Territories under Trusteeship does not show that the placing of other territories under Trusteeship is compulsory. The word "voluntary" used with respect to territories in category (c) in Article 77 can be explained as having been used out of an abundance of caution and as an added assurance of free initiative to States having territories falling within that category.

The Court considered that if Article 80, paragraph 2 had been intended to create an obligation for a Mandatory State to negotiate and conclude an agreement, such intention would have been expressed in a direct manner. It considered also that this article did not create an obligation to enter into negotiations with a view to concluding a Trusteeship Agreement as this provision expressly refers to delay or postponement "of the negotiation and conclusion", and not to negotiations only. Moreover, it refers not merely to territories held under mandate but also to other territories. Finally the obligation merely to negotiate does not of itself assure the conclusion of Trusteeship Agreements. It is true that the Charter has contemplated and regulated only one single system, the international Trusteeship system. If it may be concluded that it was expected that the mandatory States would follow the normal course indicated by the Charter and conclude Trusteeship Agreements, the Court was unable to deduce from these general considerations any legal obligation for mandatory States to condlude or negotiate such agreements. It is not for the Court to pronounce on the political or moral duties which these considerations may involve.

With regard to question (c) the Court decided that the Union had no competence to modify unilaterally the international status of the Territory. It repeated that the normal way of modifying the international status of the Territory would be to place it under the Trusteeship System by means of a Trusteeship Agreement, in accordance with the provisions of Chapter XII of the Charter.

Article 7 of the Mandate required the authorisation of the Council of the League for any modifications of its terms. In accordance with the reply given to question (a) the Court said that those powers of supervision now belong to the General Assembly of the United Nations. Articles 79 and 85 of the Charter required that a trusteeship agreement be approved by the General Assembly. By analogy it could be inferred that the same procedure was applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the trusteeship system.

Moreover, the Union of South Africa itself decided to submit the question of the future international status of the territory to the "judgment" of the General Assembly as the "competent international organ". In so doing, the Union recognised the competence of the General Assembly in the matter. On the basis of these considerations, the Court concluded that competence to determine and modify the international status of the Territory rested with the Union, acting in agreement with the United Nations.

Sir Arnold McNair and Judge Read appended to the Court's Opinion a statement of their separate opinions.

Availing themselves of the right conferred on them by Article 57 of the Statute, Judges Alvarez, De Visscher and Krylov appended to the Opinion statements of their dissenting opinions.

Vice-President Guerrero declared that he could not concur in the Court's opinion on the answer to question (b). For him, the Charter imposed on the South African Union an obligation to place the Territory under Trusteeship. On this point and on the text in general, he shared the views expressed by Judge De Visscher.

Judges Zoricic and Badawi Pasha declared that they were unable to concur in the answer given by the Court to the second part of the question under letter, (b) and declared that they shared in the general views expressed on this point in the Dissenting opinion of Judge De Visscher.

The Court's opinion was given in a public hearing. Oral statements were presented on behalf of the Secretary-General of the United Nations by the Assistant Secretary-General in charge of the Legal Department, and on behalf of the Governments of the Philippines and of the Union of South Africa.

The Hague, July 11th, 1950.