INTERNATIONAL COURT AND ISSUES ARISING OUT OF TERMINATION OF MANDATE OF SOUTH WEST AFRICA

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TO WHOM IT MAY CONCERN

Certified that the dissertation entitled "International Court and Issues Arising Out of Termination of Mandate Over S.W. Africa", submitted by Mr.Prafull Kumar Sinha in partial fulfilment of the requirements for the award of the Degree of Master of Philosophy, is his original work and may be placed before the examiners for evaluation. This dissertation has not been submitted for the award of any other degree of this University or of any other University.

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CHAPTER I

INTRODUCTION

The nature and relevance of any institution is better understood only with reference to the historical context within which it arose. The mandates system, a major institution of international society, is no exception. It is therefore proposed in this study to trace how the mandates system was created before going into the attitude of the International Court to this institution as well as to its termination.

"At the end of the First World War came the explosive power of new ideas."[1] President Wilson, on February 11, 1918 declared, "Peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game... but every territorial settlement involved in this war must be made in the interest and for the benefit of the population concerned..." The mandates system written into the Treaty of Peace was a noble attempt to translate these progressive ideals into a practical reality in respect of the colonies and territories of

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1. Sayre, Francis B., "Legal Problems Arising from The United Nations Trusteeship System", American Journal of International Law, VOL. 42, 1948, P. 264.

Germany and Turkey which it was decided to detach from them. The League of Nations Covenant, which formed part of the Treaty of Peace, contained the first binding international declaration that the well being and development of peoples "not yet able to stand by themselves under the strenuous conditions of the modern world" form "a sacred trust of civilization."[2] Under this system these detached territories were not in the ownership of any State, but were entrusted to certain states called `Mandatory states,' to administer on behalf of the League upon the conditions laid down in written agreements, called mandates, between the League and each mandatory state.

Thus the mandates system, although limited in its territorial application(as it applied only to former German and Turkish colonies), gave clear and practical expression to the international concern for dependent peoples. It was a novel experiment in the relations between a sovereign State and a territory under its control, involving new departures in international law. Previously, there had been practically no form of administration intermediate between the colony or protectorate and the dominion or sovereign State. `After annexation though the imperial master might

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2. Article 22, Paragraph 1, of the Covenant of the League of Nations.

insist that foreign states accord them (the peoples) the benefits of international law they (the Peoples) had no protection against him (the imperial master) except his humanity and sense of expediency...[3] In colonies or protectorates governed by officials from the home country the administration might take the interests and needs of the native population increasingly into consideration. Nevertheless, by reasons of their very nature and origin, colonies always have been treated as economic asset to the home country.

In other words, there were no territories inhabited by backward or less-developed populations that were governed, first and foremost, in the interests and well-being and social progress of the natives. It is in this direction that the Covenant, taking a wider view of the rights of native peoples, introduced entirely new principles. One of them was that the mandatory powers must render an account of their administration to a body which was not national, but international.

Thus the institution was an entirely new one after the First World War and came under the new international law. This law was the result and outcome of the great transforma-

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3. Wright, Q., Mandates under the League of Nations (Chicago, 1930), p.7.

tions over the years in the life of nations. The concept of dependency administration shifted from that of a right to that of a responsibility, and this was accompanied by a parallel shift in the concept of the dependent people itself - from that of a piece of property to a personality.[4] The dependent community came to be regarded as possessing something of a corporate personality: a personality as yet unprepared for independence but capable of development with the guidance of the imperial power. By the time of World War I the imperial responsibilities of trusteeship and tutelage were not merely moral in character but had crystallized into international obligations and constituted part of international law. Such a development found eventual expression in international instruments having legal force. There was, however, little provisions for supervision and enforcement of the agreement. By the end of World War I, effective international supervision had come to be generally regarded as essential in the administration of territories considered to be politically "backward."

What the mandates system, a product of this new development, did was to prevent the outright colonization or annexation of territories conquered from Germany and Turkey. It marked a compromise between conflicting opinions as to

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4. ibid., p.11.

what the political future of the conquered territories ought to be. In former wars, the conquest of colonial territory was usually followed up by the annexation of the whole or of part of the occupied territories. Even after the World War I there was a desire on the part of many of the Allied statesmen to annex the territories detached from vanquished powers. Nevertheless, a stronger movement existed in favour of the complete emancipation of oppressed peoples. President Wilson declared that the voice of the inhabitants should be heard in the determination of their future. The net result of all this was the mandates system the underlying purpose of which was development of the peoples by putting upon the mandatory the duty of assisting in the development of the territory under mandate, in order that it may be brought to a capacity for self-government and self-dependence which at that time it had not reached..."

The League had nothing to do with the assignment of the mandates or with the extent and boundaries of the territories. These were determined by the Supreme Council. The individual mandate agreements were framed to give expression in detail to the principles embodied in Article 22 of the Covenant. The mandates, after acceptance by each mandatory, were submitted to the League Council, which was

charged with the duty of seeing that their terms were in accord with the Covenant.

On December 24, 1919, agreement was reached between France, Great Britain, Italy and Japan on the one hand, and the Union of South Africa, represented by Great Britain, on the other, on the terms of the South West Africa mandate. The terms included a provision for the compulsory jurisdiction of the Permanent Court of International Justice. The draft was expressly submitted for "approval" to the League Council which was responsible for seeing whether its terms conformed to the principles embodied in the Article 22 of the Covenant. This indicates that the Council was expected not to manufacture new terms but merely to endorse an existing document. This also shows that the terms of the mandate of South West Africa were not imposed by the Council upon the Mandatory.

Since the purposes underlying the creation of the mandates system remained unfulfilled in respect of certain territories, even at the time of the drafting of the United Nations Charter, provisions had to be made in the Charter for the transfer of these territories to the new Trusteeship Council South Africa not only did not place the territory of South West Africa under the new dispensation, but also tried to fulfil its long-cherished desire to annex the territory.

It persisted in violating the terms of the mandate. After more than twenty years of frustrated attempts to persuade South Africa to follow the terms of the mandate, the General Assembly sought to terminate it.

"Termination" of a League of Nations Mandate "refers to the power of either the competent League organs, or the mandatory acting independently, to declare the Mandate terminated and to cede, annex or otherwise dispose of the mandated territory."[5] By its resolution 2145 (XXI) on 27 October 1966 the General Assembly, as a legal successor to the League Council, terminated the Mandate that had been conferred upon His Britannic Majesty to be exercised on his behalf by the Union of South Africa. Since the mandates institution was established for the fulfilment of a sacred trust and, therefore, could not be presumed to lapse before it achieved its objective, the General Assembly took care to state that "henceforth South West Africa comes under the direct responsibility of the United Nations".[6] During the course of debate on this resolution, doubts as to its legality were expressed. The questions this resolution raises are

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5. Crawford, J.F., "South West Africa: Mandate Termination in Historical Prespective", Columbia Journal of Transnational Law, Vol. 6, 1967.

6. G. A. Res., 2145 (XXI), as Quoted in Anand, R.P., International Status of S. W. Africa, Studies international Adjudication (New Delhi, Vikas, 1969).

important enough as they hold clues for application of international law to issues that may face international community in future, like the effect of termination on the rights and claims of the peoples of the territories which were once under mandates system. They require close examination which will be attempted in the present study.

Questions relating to the mandates system came before the Permanent Court only once - the Mavrommatis Palestine Concessions Case - and although the mandates system did not survive the liquidation of the League, being replaced by the International Trusteeship System set forth in Articles 75-91 of the Charter, no less than six times the new Court has had to deal with the issues involved in the Mandate for South West Africa. This in itself shows how important the issues were to the international community at large. Never in the past had any effort been made to liquidate colonialism in any part of the world through a binding judgment obtained from the International Court of Justice. This shows the high stakes involved in it from the point of view of emergence of new international order with self-determination for colonized peoples as a cardinal principle and in which race would not be a relevant factor for the acquisition of legal rights and privileges.

The study is important on another count also. The South West Africa Cases confronted the Court with no less than four sets of actors - Mandatory power, member States of the defunct League of Nations (Ethiopia and Liberia), the United Nations as a successor to the League and, most importantly, the people of the mandated territory. It was also confronted with overlapping claims going to the root of the very nature and functions of international law. A decision in the Court against `apartheid' would have been a propaganda victory for the enemies of South Africa and would force the United States and the United Kingdom, which had urged the use of legal tactics, to take a stronger stand against South Africa. If the Court had ruled that the practice of `apartheid' is inconsistent with "utmost moral well-being and social progress", it would have struck an important blow against `apartheid' in general. If South Africa had refused to alter its racial policies in the administration of South-West Africa, there would have been a call for action against South Africa from the Security Council even though no judgment had been obtained against `apartheid' within South Africa itself. As mentioned earlier, the mandates system was devised to protect certain dependent peoples, who had hitherto been generally regarded as mere objects of conquest. Therefore, the development of international law will be

considered in the present study in so far as it bears on the question of the place of dependent peoples. Conversely, the institution of mandate in international law is important also because it has exerted a strong influence on the evolution of customary international rules regarding colonized and dependent peoples - a process which culminated in international recognition of normative status of the principle of self-determination of all peoples. The present study will concentrate on how far the Court has lived up to this new development and how far it has, in turn, developed it by its judgments, or its advisory opinions, and in laying down various precedents. As Judge Alvarez said in his dissenting opinion, "The Court must, therefore, declare what is the new international law which is based upon the present requirements and conditions of the life of the peoples; otherwise, it would be applying a law which is obsolete in many respects, and would disregard these requirements and conditions as well as the spirit of the Charter which is the principal source of the new international law".[7] As the question was an entirely new one and came under new international law, it became the duty of the Court therefore to consider it, not only in the light of principles laid down in the Covenant or the Charter, but also in accordance with

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7. ICJ Reports (1950), p. 177.

the nature, aims and purposes of this law. We have also to see how far the Court has lived up to this duty, with reference to its opinions and judgments. All this will come under chapter II.

The study is important also in so far as it seeks to analyse the system which, like its successor, threw up various legal issues, holding clues for application of law to several problems that may confront international community in future, like the responsibility of the erstwhile Mandatory Power or Administering Authorities for exploitation of natural resources of territories under their tutelage. Some of these important issues will figure in chapter III which also seeks to analyse the attitude of the Court to them.

Finally, the study will conclude with a summary of the foregoing discussion as well as of the points which deserve to be highlighted. The institution of mandate is important not only from the point of view of international law, but also from the social, economic and international political points of view. Experience in South West Africa will come handy if similar study is done on status of trust territories.

CHAPTER II

International Court and the Mandate Termination

1. The Setting

The view that the Mandates constituted annexation under another name persisted in the Union and other colonial countries. One of the duties of South Africa towards S.W.Africa, under the Mandate Agreement, was to 'promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory'. The South African Government not only did absolutely nothing to promote the material, moral and social progress of the inhabitants of S.W.Africa but, in fact, treated them most cruelly and inhumanly, and kept them extremely backward in every sphere as a matter of deliberate policy. It flouted every clause of the Mandate Agreement and also extended the brutal 'apartheid' laws of South Africa to the territory.

The Mandate Agreement also provided that the mandatory power' would have full power of administration and legislation over the territory subject to the mandate as an integral portion of his territory[1] and might apply laws of the Union of South Africa to the territory, subject of such

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1. Art.2 of the Mandate Agreement for S.W.Africa

local modifications as circumstances might require. Net realising that the rights of the Mandatory power , like those of trustees, have their foundation in his obligations and that they are nothing more than "tools given to him in order to achieve the work assigned to him"[2] i.e. the sacred trust of civilization, the South African Government treated the words "as an integral portion" as giving it the competence to annex the territory of S.W.Africa into its own territory. Throughout the period of existence of the League of Nations the South African Government acted as though it had legal sanction to annex the territory. It tried to extend its sovereignty over it by incorporating a clause to that effect in various legislative enactments and international treaties. The League of Nations objected to such extension of sovereignty over S.W.Africa and succeeded in persuading the South African Government to bring about necessary modifications in the treaties and legislative enactment where such illegal extension of sovereignty had been made implicitly or explicitly. The South African Government regularly furnished annual reports on its administration of S.W.Africa to the League of Nations, and these

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2. Brierly, J.L, "Trusts and Mandates", British Yearbook of International Law, 1929, pp. 218-219.

reports were considered by the Permanent Mandates Commission.

Although the Sough African Government was violating the terms of the mandate both in letter and spirit during the days of the League itself, yet it was cooperating with the world organisation by furnishing annual reports on the territory and reversing some of its actions which sought to extend South African sovereignty over the territory. This cooperation was, however, missing when the United Nations came into being.

After the demise of the League of Nations, the United Nations Charter did not provide for continuation of the Mandates system. Instead, it established a very similar system of trusteeship which, unlike the mandates system, explicitly envisaged self-government or independence as a goal for all territories--a goal that clearly conflicted with the desire of the South African Government to incorporate the territory within its sovereign jurisdiction.

While all the other Mandatory powers agreed to change with the time and either granted independence to the mandated territories or entered into trusteeship agreement placing them under trusteeship system, South Africa sought to fulfill its long cherished desire of terminating the mandate, freeing itself of all the obligations arising therefrom, and

annexing the territory under it, a step which the South African representative at the first United Nations General Assembly said was ardently desired by the inhabitants of the Territory. However, the new World Organisation, right from its very first session in 1946, concerned itself with the future of the mandate territories and was eager to goad them on to independence within the shortest possible time. A resolution of the General Assembly envisaging that all mandated territories be placed under the trusteeship system provided for in the United Nations Charter was ignored by South Africa. Instead of placing S.W.Africa under the trusteeship system, the South African Government unabashedly made even a formal request to the General Assembly that it be allowed to annex the territory of S.W.Africa, arguing that the words "as an integral portion", used both in Article 22 of the League Covenant and the Mandate Agreement relating to S.W.Africa clearly provided for the merger of the mandate territory with South Africa. The General Assembly rejected this interpretation as well as its request for permission to incorporate the Territory into South Africa. It repeatedly appealed to the South African Government to place S.W.Africa under the trusteeship system as other mandatory powers had done. The South African Government did not comply with these appeals. It also stopped furnishing

annual reports on the territory after submitting one in 1946.

Another volley was fired by the South African Government when, in the years immediately following the dissolution of the League, it declared that the mandate itself had expired. As a logical consequence of this reasoning, it ought to have vacated the territory of S.W.Africa voluntarily because its right to be present there as its administrator had no other legal sanction than the mandate agreement which it now claimed had expired. Unfortunately, the South African Government wished to retain the territory but was not willing to fulfill its obligations as a Mandatory. Earlier, the South African Government had refused to forward petitions from the people of S.W.Africa, saying the such a right presupposed a supervisory jurisdiction which, in its view, was not vested in the United Nations with regard to the territory.

These announcements, in their totality, presented a picture of defiance and a mood of challenge on the part of the South African Government to the United Nations. Earlier, there was a single issue, viz. whether or not South Africa was morally and/or legally obliged to convert the mandate into a trust territory. The additional issues that now arose included South Africa's refusal to hold itself

accountable to the United Nations for its administration of S.W.Africa, and its unilateral repudiation of the mandate conferred upon it by the League of Nations.

The General Assembly realised that, in order to solve the problem of S.W.Africa it would first have to pull down the facade of legalism behind which the South African Government had taken shelter when it declined to place the territory under trusteeship and also refused to submit to international supervision. It was with this object that the International Court of Justice was approached for its advisory opinion.

2. Attitude of the Court to issues relating to the termination of mandate.

In the light of serious attempts on the part of the Government of South Africa to declare the Mandate as having lapsed, to repudiate all the international obligations arising therefrom, and to annex the territory under it, the General Assembly referred to the Court certain questions, like the validity or otherwise of the claim of the Union of South Africa unilaterally to alter the status of the Territory. Right from the beginning, the attitude of the Court to the question of termination had been clear. The Court said that the Union of South Africa acting alone did not

have the competence to alter the international status of the Territory, and that the existence of this international status survived the disappearance of the supervisory organ, i.e., the League of Nations. However, the issues involved in the 1950 Opinion was international status of the Territory, and the competence of the Union of South Africa,i.e., the Mandatory power unilaterally to terminate the Mandate, and not the competence of the relevant U.N. organs acting alone to do so. Judge Alvarez in his dissenting Opinion pointed to the possibility of the General Assembly making admonitions, and if necessary, revoke the mandate in case a mandatory state did not perform the obligations resulting from its mandate, under Article 10 of the Charter.

(i) International Status of South-West Africa:

The Advisory Opinion which the General Assembly asked of the Court proved to be a landmark. It was the first in a series of advisory opinions on South West Africa, and on which all others were based. It enjoys an exceptional importance because it was here that the Court, for the first time, expressed its philosophy on the Mandate Question, a philosophy which was elaborated in the subsequent opinions. The following questions referred by the General Assembly were sought to be answered by the Court:

"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 S.W.Africa, or, in the event of a negative reply, where does the competence rest to determine and modify the international status of the territory?"[3]

The Court declared unanimously that South-West Africa continued to be a "territory under the international mandate assumed by the Union of South Africa"[4] in 1920. Discarding the analogy of private law concepts of mandates, trust or tutelage, the Court held that the international rules regulating the Mandate created by Article 22 of the Covenant of the League of Nations "constituted an international status for the Territory recognised by all the Members of the League of Nations" [5] ; that the obligations created by the Mandate did not depend upon the existence of the League

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3. ICJ Reports(1950), p.129.

4. ibid, p. 128.

5. ibid, p.132.

of Nations; and that "they could not be brought to an end merely because this supervisory organ ceased to exist."[6] The concept of international status of S.W.Africa overreaching in its legal effects the states parties to the original treaty was elaborated in detail in a separate opinion by Judge Sir Arnold McNair. He put it in the form of a general proposition. "From time to time it happens that a group of great Powers or a large number of States both great and small, assume a power to create by a multilateral treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties and giving it an objective existence."[7] He referred to the report of the Commission of Jurists, appointed in 1920 by the Council of the League, in the case of the Aaland islands in which they based their findings on the fact of a "special international status" for the Islands with the result that "every state interested [including Sweden which was not a party] has a right to insist upon compliance" with the obligations created by the treaty in question. Thus there is assumed to be a method of creating binding obligations which is independ-

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6. ibid, p. 133.

7. ibid, p.133.

ent of the will of any particular state bound by them. In the opinion of the Court, that legislative character, independent of subsequent acceptance of the treaty in question, appeared more prominently. The 'Mandates' were thus clearly given the complexion of a status independent of the continued existence of the parties of the original treaty which gave rise to it. The doctrine of international status amounted to an affirmation of international legislation. For status implies an areas of operation not limited to the original contracting parties or to contracting parties generally. Status operates 'erga omnes'.

What it meant was that the Union of South Africa continued to be a territory under the international mandate assumed by South Africa; that it could not use the disappearance of the League of Nations or even the extinction of the erstwhile States parties to it as a pretext for terminating the mandate, freeing itself from the obligations arising therefrom, and annexing the territory under it (the mandate), and that the Mandate, having an objective existence, these obligations were binding not only on the original contracting parties -- whether these be the Members of the League of Nations or the Council of the League of Nations--but also on the international community at large,

being a "scared trust of civilization", independently of the existence of the League.

The Court, after having come to the conclusion that S.W.Africa continued to be a territory under the international Mandate assumed by South Africa was confronted with another question, whether the continuation of that status, the central aspect of which was supervision by the League of Nations of the administration of the mandated territory, implied-after the demise of the League of Nations -- continued supervision by the United Nations. Answering Question (a), the Court held by twelve votes to two that South Africa continued to have the international obligations stated in Article 22 of the Covenant and in the Mandate Agreement, and the obligation to transmit petition and annual reports with supervisory functions to be exercised by the United Nations and judicial supervision to be exercised by the Court. To hold otherwise would have meant to deprive of effect most-though not all-of the meaning naturally attached both to the main pronouncement of the Court and to the system of mandates conceived as a status[8] While the principle that the

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8. Some effectiveness would still have remained with it by reasons of the succession by International Court to the compulsory jurisdiction conferred upon the Permanent Court of International Justice by Article 7 of the Mandate as also Article 37 of the Statute of the ICJ.

powers of the Mandatory power are exercised in the interest of the population of the territory concerned constituted an affirmation of a moral and political principle to which general recognition was given, its essential novelty lay in the recognition of the machinery of international supervision intended to secure the effectiveness of the system. To hold that the system continued but that its international supervision ceased to operate because the very supervisory organ was no longer there would have reduced to a form of words the main aspects of the opinion.

The Court held that the continued status of S.W.Africa as a mandated territory required the continuation of international supervision and of the duty to render reports to an international organ. In holding this, the Court considered as irrelevant the circumstance that the supervisory functions of the League with regard to those mandated territories which were not placed under the trusteeship system was not expressly transferred to or assumed by the United Nations. It held that as the United Nations had another, though not identical, international organ fulfilling the functions of supervision, these functions devolved upon it. "While as a rule the devolution of rights and competencies is governed either by the constituent instruments of the organisations in question or by special agreements or deci-

sions of their organs, the requirement of continuity of international life demands that succession should be assumed to operate in all cases where that is consistent with or indicated by the reasonably assumed intention of the parties as interpreted in the light of the purpose of the organisation in question.[9]

In its decision, the Court found that the Article 80, paragraph 1,of the Charter "presupposes that the rights of states and peoples shall not lapse automatically on the dissolution of the League of Nations."[10] The Court rejected the notion that "the obligation to submit to supervision has disappeared merely because the supervisory organ had ceased to exist..."[11]

The Assembly of the League of Nations,in its Winding Up Resolution on 18 April 1946, recognized that the League's functions with regard to the mandated territories would come to an end, but noted that chapters XI, XII and XIII of the Charter embody principles corresponding to those declared in Article 22 of the Covenant. It further took note of the intentions of the mandatory states to continue to administer

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9. Oppenheim, International Law A Treatise vol. 1 (London: ELBS, 1955), p. 168.

10. See f.n.3, p.134.

11. ibid, p. 136.

the territories in accordance with the obligations contained in the Mandates until other arrangements should be agreed upon between the United Nations and the Mandatory Powers". This resolution, the Court said, presupposed" that the supervisory functions exercised by the League would be taken over by the United Nations"[12]

The competence of the General Assembly to exercise such supervision is derived from the provisions of Article 10 of the Charter which authorises the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the members of the United Nations. For these reasons the Court concluded that the General Assembly was legally qualified to exercise the supervisory functions previously exercised by the League, and that the Union of South Africa was under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it.

The Court also held that the right of petition, which the inhabitants of South-West Africa had acquired by reasons of adoption by League Council of certain rules relating thereto, was maintained by Article 80, paragraph 1, of the Charter. But in order to avoid being accused of legislating in this matter, the Court tried to diminish the severity of

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12. ibid, p. 137.

this transfer of supervision to the United Nations Charter by adding that the degree of supervision to be exercised by the General Assembly should not... exceed that which applied under the Mandates system and should conform as for as possible to the procedure followed in this respect by the Council of the League of Nations."[13]

However, Judge McNair, in his separate opinion, described as 'pure inference'[14] the automatic succession by the United Nations to the rights and obligations of the League as the Charter contained no provision for a succession such as was contained in Article 37 of the Statute of the Court which operated in the case of the compulsory jurisdiction of the Permanent Court as in regard to the Mandates.

On Question(b) the Court divided its decision into two parts: holding (1) unanimously that chapter XII of the Charter provided a means whereby the territory of S.W.Africa might be brought under the trusteeship system; and (2) deciding by eight votes to six, that chapter XII of the Charter did not impose upon South Africa a legal obligation

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13. ibid, p. 138.

14. ibid, p.159.

to place the territory under the trusteeship system.[15]

The Court was deeply divided on part (2) of Question (b). The majority of the Court refused to read into the relevant provisions of the Charter a degree of effectiveness to the point of holding that South Africa was under an obligation to conclude a trusteeship Agreement in respect of the mandated territory of S.W.Africa. In view of the permissive language of Articles 75 and 77 and the reference thereto in Article 79 of the Charter, the Court held that it could not be said that South Africa was under a legal obligation to place Sough-West Africa under the trusteeship system. The Court rejected the argument with respect to Article 77, whereby the inclusion of the word "voluntarily" in Article 77 (1) (C) coupled with its absence from the first two categories in the same paragraph, would show that the placing of mandated territories and other territories detached from enemy states in world war II under trusteeship system was compulsory.[16]

The opinion shows that while the Court went a long way towards safeguarding the effectiveness of the text of the Mandate Agreement, it did not go all the way to make it foolproof. The Court, however, did state "it was expected

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15. ibid, p. 144.

16. ibid, p. 139.

that the mandatory states would follow the normal course indicated by the Charter, namely, conclude trusteeship Agreements."[17]

However, from the point of view of the more general efficacy of this part of the Charter and of the purpose of the system of mandates that particular limitation of the opinion of the Court was without decisive importance. For once the Court had affirmed the principle of continuing international supervision as well as of the international status of the territory unmodified and unmodifiable except in accordance with the Charter,the problem of the formal conclusion of trusteeship agreements acquired a symbolic rather than practical significance. In fact a closer analysis of the minority of judges who asserted the existence of a legal obligation suggests that the distance separating them from the Opinion of the majority of the Court was more apparent than real.

The Court held, with respect to Question(c), that South Africa "acting alone has not the competence to modify the international status of the territory of S.W.Africa, and that the competence to determine and modify the international status of the territory rests with the Union of South

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17. ibid, p.140.

Africa acting with the consent of the United Nations." In finding this, the Court rejected the argument that, as a result of dissolution of the League, the rules laid own in Article 26 of the Covenant for amending provisions of the Covenant, including Article 22, became inapplicable. Article 7 of the Mandate agreement, in requiring the consent of the Council of the League for any modification of its terms, brought into operation for this purpose the same organ which was invested with powers of supervision.[18] Those powers of supervision now belonged to the General Assembly. Besides that, Articles 79 and 85 of the Charter required that a trusteeship agreement be concluded by the mandatory Power and approved by the General Assembly before the International Trusteeship System might be substituted for the Mandates system. These articles also gave the General Assembly authority to approve alterations or amendments of Trusteeship Agreement. 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[19] This conclusion was supported, in the view of the Court, by the action taken by the General Assem-

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18. ibid, p. 141.

19. ibid, p.142.

bly as well as the attitude adopted by the South Africa, whose representative had stated before the Fourth Committee of the General Assembly that any decision taken by the Union as to the status of S.W.Africa 'would be submitted to the General Assembly for judgment'.[20] According to the Court, this position constituted recognition by South Africa of "the competence of the General Assembly in the matter"[21] The Court concluded that "competence to determine and modify the international status of South-West Africa rests with the Union acting with the consent of the United Nations."[22]

Judges McNair and Read, in separate opinions, concurred on the question of obligatory submission of mandated territories to the trusteeship system. As to Question (a) Judge McNair rejected the notion of automatic succession by the United Nations to the rights and functions of the League Council as to administrative supervision of the Mandate. Judge McNair, along with Judge Read, did conclude, however, that the judicial supervision of the exercise of the Mandate had been "expressly preserved by means of Article 37 of the Statute of the International Court of Justice", which

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20. ibid, p.142.

21. ibid, p.142.

22. ibid, p.143.

"effected a succession by the International Court to the compulsory jurisdiction conferred upon the Permanent Court by Article 7 of the Mandate."[23] Judge McNair rejected the applicability of the concept of sovereignty.

> "What matters in considering this new institution is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it. The answer to that question depends on the international agreements creating the system and the rules of law which they attract. Its essence is that the Mandatory acquires only a limited title to the territory entrusted to it..."[24]

Judge Read stated that " there was no arrangement agreed between the Union and the United Nations, in the matter of reports, accountability and supervision."[25] In his view, "Such a succession could not be implied, either in fact or in law, in the absence of consent, express or implied by the League, the United Nations and the Mandatory Power."[26]

Judge de Visscher, in his dissenting opinion, held that although the provisions of chapter XII of the Charter did not "impose on the Union of South Africa a legal obligation to conclude a Trusteeship Agreement," they did impose on the

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23. ibid, p. 158.

24. ibid, p.150.

25. ibid, p. 171.

26. ibid, p. 172.

Union of South Africa an obligation to take part in negotiations with a view to concluding an agreement?[27] "It is impossible," he held, "to reconcile" permissive provisions of Articles 75, 77 and 79 "with Article 80, paragraph 2, and with the clear intent of the authors of Charter to substitute the Trusteeship System, without admitting that the mandatory Power, while remaining free to reject the particular terms of a proposed agreement", had "the legal obligation to be ready to take part in negotiations and to conduct them in good faith with a view to concluding an agreement."[28]

However, Judge Alvarez went even beyond Judge de Visscher in holding that South Africa, under Articles 75, 77 and 80(2) of the Charter, "has the legal obligation to negotiate and conclude an agreement with the United Nations to place South-West Africa under Trusteeship." He also stated that even if it was admitted that South Africa was under no legal obligation to conclude this agreement, it had at any rate the political international obligation or a duty to conclude such an agreement[29] However, Judge Alvarez's opinion is unique in referring to the possibility of the

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27. ibid, p.186.

28. ibid, p.188.

29. ibid, p. 185,

General Assembly "revoking the Mandate[30] in case a mandatory State did not perform the obligations resulting from its Mandate.

The dissenting Opinion of Judge Krylov was similar to that of Judge de Visscher, but placed greater reliance on Article 80(2) as implying the "existence of a legal obligation to negotiate with a view to concluding"[31] Trusteeship Agreement. Krylov also stated that the only alternative to the placement of a mandated territory under the trusteeship system would be for the territory to be proclaimed independent.

Lauterpacht stressed the application of the doctrine of effectiveness in the interpretation of treaties, stating that the succession of the United Nations to the duties of the League in the area of mandates might be justified on grounds of the needs for "continuity of international life" and was no more than an example of legitimate application of the principle of effectiveness to basic international instruments."[32] According to him, the essential novelty of the Mandates and Trusteeship systems "lay in the machinery

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30. ibid, p. 182.

31. ibid, p. 191.

32. Lauterpacht, H., The Development of International Law by the International Court, (London, 1958), p. 280

of international supervision intended to secure the effectiveness of the system", Therefore, "to hold that the system continued but that its international supervision ceased to operate would have been, to a large extent, to reduce to a form of words the main aspects of the decision." The practical limitation on the principle of effectiveness was, however, recognized by the Court in its conclusion that chapter XII of the Charter did not impose upon South Africa a legal obligation to place the territory under the trusteeship system."

A close examination of the Advisory Opinion of the Court reveals that there were many points which went in favour of South West Africa:

(a) Firstly, the Court stated that if the mandate lapsed, as the South African Government had contended, the latter's authority would equally have lapsed. If it were so, the South African govt. had no right to be in South West Africa. This meant that its presence there was illegal and the United Nations would be within its competence if it took necessary steps to remove her from the territory.

(b) Secondly, the Court clearly declared that the South African Government was under an obligation to forward petitions and submit annual reports to the United

Nations on her administration of the Territory. As the Charter did not provide for co-existence of the old mandate and new trusteeship systems, the problem of the legal hiatus between the Covenant and the Charter remained not settled. The Court obviated this legal hiatus by providing for the existence of supervisory functions, so crucial for the existence of the mandates system.

(c) Thirdly, the supervisory authority was to be the United nations as successor to the League of Nations and the South African govt. was under an obligation to recognise it as such.

(d) Fourthly, the provisions of chapter XII of the Charter were applicable to the territory in the sense that they showed the way to bring the territory under trusteeship system.

However, there were many points in the Opinion which went against the United Nations and restricted its freedom of action. These points are as follows:

(a) The Court had declared that the supervision by the United Nations should not exceed that which was permitted to the League of Nations and should conform as far as possible to the procedure followed in this respect

by the Council of the League of Nations. This pronouncement of the Court made it very difficult, if not impossible, for the United Nations to perform the supervisory duties in accordance with the provisions of its own Charter. As the fundamental difference between these two organs lay in the voting majorities required under the Charter and unanimity under the Covenant, the Court made no suggestion how to reconcile the two. Thus, the advisory opinion was "a wilful and conscious effort to conceal a virtual dissensus under the deceptive guise of an agreed enigmatic formula"[33] which legally strengthened the arguments of the Union. It is an incontrovertible fact that the Trusteeship System and the Mandates System introduced international supervision over the colonies detached from enemy states during the two world wars with the sole purpose of preventing annexation or incorporation of the territory into the Mandatory state. The Court in a way ignored the moral aspect of the question and the spirit of the Charter[34]. Many supervisory duties permissible to the United nations under the provisions of the Charter

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33. Verzijl, J.H.W., as quoted in R.N.Chowdhuri, International Mandates and Trusteeship Systems A Comparative Study, (The Hugue, 1955, Martinus Nijhoff), p.171.

34. Vide Article 87 (C) of the U.N. Charter.

could not now be performed by it because they were not permissible to the League itself under the provisions of the Covenant. Hence, if the United Nations still performed those duties with respect to the territory, it could be accused of exceeding the supervision exercised by the League. For example, the Trusteeship Council, in spite of having an authority under the Charter to send visiting missions to the trust territories, could not do so just because the League of Nations was no empowered to do so. Similarly, it could not grant oral hearings also because the League of Nations had not done so. The Court's ruling helped the South African Government to put forward unreasonable demands and also to reject various schemes of supervision put forward by various committees established by the General Assembly for the purpose of implementing the Advisory Opinion of the Court.

(b) The Court had also declared that the South African Government was under no legal obligation to place S.W.Africa under trusteeship. No other pronouncement of the Court was more damaging to the efforts of the United Nations in regard to South-West Africa than this particular one. In fact, all efforts of the United Nations to bring South-West Africa under trusteeship

ceased after the Court's declaration that the Union of South Africa had no legal obligation to do so. The Court's pronouncement strengthened the position of the Sough African Government which had always maintained that it had no legal obligation to place South West Africa under trusteeship. Her allies had supported her on this point. The ruling of the Court naturally went in their favour and against those countries which were all along arguing that South Africa had a legal obligation to place South-West Africa under trusteeship.

(c) The Court had also ruled that the parties must be free to accept or reject the terms of a contemplated agreement and that no party could impose its terms on the other party. This pronouncement of the Court also weakened the efforts of the United Nations to bring South West Africa under its trusteeship by an agreement with the South African Government.

(d) The Court had also stated that the competence to determine and modify the international status rested "with the Union of South Africa acting with the consent of the United Nations."[35] The adoption of this ingenuous formula, rightly observed Prof. J.H.W. Verzijl, "wrong-

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35. See f.n.3, p.144.

ly shifted" "the weight of the combined judicial operation from a collective decision of the Organisation granting a request to a unilateral act of the Mandatory gracefully endorsed by the Organization."[36] This pronouncement of the Court, no doubt, meant that South Africa could not bring about unilateral modification in the status of South West Africa but it left it unclear as to whether the United Nations too could bring about any unilateral modification in its status in case of serious breach of mandate on the part of the mandatory power.

Thus we find that, while the Opinion clarified certain legal aspects of the problem, it also made the solution of the problem more difficult by certain of its declarations.

In view of the fact that the Advisory Opinion of 1950 was neither wholly favourable nor wholly unfavourable to the United Nations, it was difficult for the General Assembly to decide whether to accept it or reject it. Technically speaking, advisory opinions are binding neither upon the states nor upon the organs of the United Nations that had sought them. The organ of the United Nations that had sought a

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36. Verzijl, J.H.W., as quoted in Chowdhuri, R.N., Internationa Mandates and Trusteeship systems A Comparative Study, (The Hague, 1955), p.171.

particular opinion would not be deemed to be acting illegally if it opposed the opinion given or if it adopted contrary conclusions on a question of law to which the Court had given an answer. Advisory opinions are "merely opinions and merely advisory.[37] Nevertheless, the advisory opinions have certainty more than moral value and their influence is tremendous.[38] Their persuasive character and substantive authority is also great because they are judicial pronouncements of the highest international tribunal. Therefore, the General Assembly and the Security Council would not be in a very good position before the world if they paid no attention to an advisory opinion after obtaining it. Far worse than the rejection of an advisory opinion in toto after having obtained it at its own initiative would be the situation in which the Assembly decided to accept only these parts of an opinion which were favourable to it and reject those which were not. Hence, as far as the 1950 Opinion was concerned, there was no option for the General Assembly but to accept it in its entirety, in other words, to accept the chaff along with the wheat, vide Resolution 449(V) A of 13

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37. Fitzmaurice, G.G., "The law and Procedure of the International Court of Justice," British Yearbook of International law, 1952, p. 53.

38. Antonio Savelez de Bustamante, The World Court, (New York, 1925), p. 264.

December 1950.

South Africa, however, accepted only those points of the Opinion which were favourable to it and which vindicated its stand, and rejected those which were not.[39] While it accepted the point that the provisions of Chapter XII of the Charter did not impose any legal obligation on South Africa to place the territory under the new dispensation of the trusteeship, it refused to accept the rest mainly on the ground that with the dissolution of the League, which had conferred the title on her with regard to South-West Africa, the mandate no longer existed, and also because the United Nations could not exercise its duties of supervision and control on the territory as it was not a legal successor to the League. While adopting the 1950 Opinion, the General Assembly established an 'ad hoc' Committee "to confer with the Union of South Africa concerning the procedural measures necessary for implementing the advisory opinion."[40] It soon became clear that far from cooperating with the Committee, South Africa was going to ignore the Opinion and proceed with its original policy although without taking any formal step to annul the Mandate and absorb the Territory. In

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39. Chowdhuri, R.N., International Mandates and Trusteeship Systems A Comparative Study, (The Hague, 1955), p.171.

40. Resolution 449 (V), 13 December, 1950.

order to find some way to facilitate the operation of the United Nations as a supervising authority, the General Assembly established in 1953 a Committee on South West Africa to exercise, in relation to that territory only, the functions formerly performed by the Permanent Mandates Commission, examining information, reports and petitions, and reporting to the Assembly on conditions in the Territory.[41] This Committee was also instructed to prepare a set of rules with regard to the receipt and examination of reports and petitions conforming as far as possible to the procedure followed in this respect by the Assembly, the Council and the Permanent Mandates Commission of the League.

These instructions were in conformity with the opinion of the Court delivered in 1950:

> "The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System."[42]

But there arose certain practical difficulties in view of the fact that in the League Council voting was by unanimity while Rule F of the General Assembly provided that questions relating to reports and petitions concerning South West Africa should be treated as "important" questions

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41. Resolution 794 A (VIII).

42. See f.n.3, p.138.

within the meaning of Article 18(2) of the Charter and, therefore, required a two-thirds majority.

This article was in contradiction with the unanimity rule of the League. Consequently, the Union of South Africa contended that, since the unanimity rule applied to the Council of the League, the replacement of this rule by that which laid down the two-thirds majority implied a greater degree of supervision than that which applied under the Mandates System and thus went against the 1950 opinion of the Court.

On 23 November 1954, the General Assembly asked the Court if article F relating to the voting procedure corresponded to an exact interpretation of the opinion of the Court given in 1950 and, in case of a negative reply, to indicate the voting procedure that the General Assembly was to follow in that respect.

(ii) Voting procedure on South West Africa, 1955:

The International Court of Justice, on June 7, 1955, gave the Advisory Opinion which proved to be second milestone in clarifying the issues relating to the Mandates System.

It held that "to transplant upon the General Assembly the unanimity rule of the Council of the League would not be simply the introduction of a procedures but would amount to a disregard of one of the characteristics of the General

Assembly.[43] Since the General Assembly derived from the Charter its competence to exercise its supervisory functions, "it is within the framework of the Charter that General Assembly must find the rules governing the making of its decisions in connection with those functions.[44] The Court concluded that Rule F adopted on October 11, 1954 by the General Assembly in its Resolution 844 was a "correct interpretation"[45] by the General Assembly of the requirement of the Advisory Opinion of 1950.

If Judge Lauterpacht gave a separate opinion it is because, unlike the Court which pronounced only on the one substantive question asked by the General Assembly, he believed that the judicial function required that opinions and judgments should have rendered in such a way that they carried conviction and clarified the law. Consequently, he held that, to answer the question, the Court was obliged in its reasoning to study a variety of legal questions and to answer them, especially because the members of the General Assembly, including the Union of South Africa, relied upon them.

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43. ICJ Reports (1955), p.75.

44. ibid, p.76.

45. ibid, p.77.

Following this reasoning, Lauterpacht explained in detail the answers to the main questions which, in his opinion, were pertinent. The main questions which he treated were following:

1. Did the unanimity rule prevail in the Council of the League of Nations as the supervisory organ of the Mandates system?
2. Could the General Assembly follow a voting procedure different from the one laid down in Article 18 of the Charter?
3. In matters of supervision, did the General Assembly decisions have the same legal affect as those of the Council of the League of Nations?

On the basis of a profound study of principles and practice relating to these questions Judge Lauterpacht answered them exhaustively. On the first question, he reached the conclusion that the practice of the League Council did not support the view according to which the unanimity rule applied in such a manner that the Mandatory enjoyed a veto right. He deemed it more appropriate to say that, even considering that such right had existed in the beginning of the League, it became out-dated and null and void.

As regards the second question, his answer was in the affirmative, to wit that the General Assembly's voting system on the question of reports and petitions could be transformed to some other voting procedure more rigorous than that of two-thirds majority, though excluding the absolute unanimity rule. But this conclusion in his opinion, was conditioned by his answer to the third question which was that the General Assembly's decisions did not have the same juridical effect as those of the League Council. Consequently, he was of the opinion that the substitution of the unanimity rule by the two-thirds majority rule did not imply a degree of supervision higher than that which obtained under the Mandates system.

Thus it is the principle of effectiveness which is the basis of his interpretation. It is obvious that if no conflict existed between Lauterpacht and the Court, it is because they were inspired by the principle of effectiveness. This also applies to the advisory opinion rendered in the "Admissibility of Hearings case.

(iii)Admissibility of hearings of petitioners, 1956:

The 1955 Opinion, in practice, made little difference in the situation. The Union of South Africa refused to implement the advisory opinion of the Court given in 1950

and to co-operate with the United Nations. With regard to submission of reports and transmission of petitions in conformity with the procedure laid down in the Mandates system, the Mandatory having persisted in its refusal to co-operate, the Committee on South-West Africa found itself obstructed in the examination of petitions. With a view to discharging its responsibilities, the Committee adopted rules of procedure one of which provided for oral hearings for the inhabitants of South West Africa. However, at no time during the period of the League had the Permanent Mandates Commission accorded hearings to petitioners. In view of doubts expressed on the legality of this measure, on December 3, 1955, the General Assembly requested the Court for an advisory opinion on the question whether the Committee on South West Africa would be conforming to the advisory opinion rendered by the Court on July 11, 1950, in case it granted oral hearings to petitions on questions relating to the territory of South West Africa.

On June 1, 1956, the Court handed down an advisory Opinion which held that "the grant of oral hearings to petitioners by the Committee on South-West Africa would be consistent with the Advisory Opinion of the Court of 11 July 1950". The General Assembly was thus held competent to grant oral hearings to petitioners who had already submitted

written petitions, provided that the General Assembly found that "such a course was necessary for the maintenance of effective international supervision of the administration of the Mandated Territory."[46] Although the right of petition was not expressly conferred upon inhabitants of the mandated territories by Article 22 of the Covenant, or by the Mandate Agreement, it became a part of the Mandates System by a resolution of the League Council in January 1923. Under this resolution, the Court found, the Council was competent to authorize the Permanent Mandates Commission "to grant oral hearings to petitioners, had it seen fit to do so."[47] Thus, although the power to grant oral hearings to petitioners was never actually exercised by the Council, the fact that it had authority to do so meant that, the General Assembly as successor to the supervisory functions of the League Council, had this power "passed' along with those powers which were explicitly enumerated in Article 22 and the Mandate Agreement. The Court rejected the theory that "the taking over by the General Assembly of the supervisory authority formerly exercised by the Council of the League has the effect of crystallizing the Mandates System at the point

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46. ICJ, Reports (1956), p. 32.

47. ibid, p. 29.

which it had reached in 1946."[48]

The five dissenting judges stressed that the former procedure of the Permanent Mandates Commission did not include oral hearings, and concluded that such hearings by the Committee on South West Africa "would not be consistent with the Opinion given by the Court in 1950."

Lauterpacht gave a separate opinion, not because he was in disagreement with the philosophical inspiration of the Court but for the reason that the opinion might be construed to mean that the Committee on South West Africa was entitled to grant oral hearings even when the necessary co-operation on the part of South Africa was forthcoming. Consequently, his reply was that the hearings must be granted to petitioners only when the Mandatory Government refused its co-operation to the United Nations in the execution of the Mandate.

To reach this conclusion he asked the following question: In view of the non-co-operative attitude of the Mandatory, what was the factual position with regard to the sources of information which were at the disposal of the supervisory authority and which were indispensable for the smooth working of the supervisory role and the implementation of the 1950 Opinion of the Court? He observed that in the first place, the annual report of the mandatory power

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48. ibid, p. 29.

which was provided for by the Court in its Opinion of 1950 and which formed an integral part of the League of Nations system had disappeared. The result was that the supervisory authority was deprived of an authentic source of information which was one of the two main bases of supervisory system.

The second principal means of supervision was petitions sent by the inhabitants of the Mandated Territory. It was an important source of information. In this respect, he believed that following the attitude of non-co-operation adopted by the Mandatory, the efficacy of this source of information was considerably reduced. It was in the light of these observations that he posed the crucial question as to whether hearings, which he admitted were not in vogue during League days, were really necessary. In other words, the question was whether hearings would entail, in the context of the situation before the Court, going beyond "the degree of supervision" as defined by the 1950 Opinion. He deduced the conclusion that hearings were necessary in order to complete the sources of information which had become incomplete because of the attitude of the Union of South Africa and that consequently they would not entail going beyond "the degree of supervision" as laid down in the 1950 Opinion.

Thus we find that the principle of effectiveness which was the basis of the Court's Opinion was equally the basis of the conclusion of Lauterpacht. The only difference is that since the opinion of Lauterpacht represented the ideas of a single judge, his explanation is more detailed. We also see that the dialectical process between positivism and naturalism during this period slowed down.

(iv) Ethiopia and Liberia V. South Africa (Preliminary Objections) 1962.

These advisory opinions had certainly gone a long way towards clarifying the legal situation but being advisory opinions these were not technically binding on South Africa. The political conflict between the majority in the General Assembly and the Union started growing sharper. At its eleventh session (1956), the General Assembly decided to look for new ways to ensure that South Africa fulfil the obligations incumbent on it under the Mandate. After detailed consideration of this aspect, in 1959, it drew the attention of member States to the possibility of their bringing a contentions case against the Union relying on the jurisdiction clause contained in the Mandate agreement. The purpose underlying the recourse to the contentions procedure in 1960 was to eradicate the ambiguity which is characteristic of the formally binding quality of the advisory opin-

ions, and to obtain a binding decision on broadly similar grounds in the form of a judgment which could be brought before the Security Council for "execution". They seem to have had two major ends in view - a pronouncement by the Court to the effect that the policy of 'apartheid' was contrary to international law, and that the breaches of the Mandate perpetrated by South Africa must be remedied. The Court, in its judgment of December 21, 1962, on the Preliminary objections, held that it had "jurisdiction to adjudicate upon the merits of the dispute."[49] In so holding,, the Court in effect rejected the principal contention of South Africa that the Mandate had lapsed". The Court further held that "though the League of Nations and the Permanent Court of International Justice have both ceased to exist, the obligations of [South Africa] to submit to the compulsory jurisdiction of that Court was effectively transferred to this Court before the dissolution of the League of Nations."[50] Thus the Court decided in effect that the compromissory clause in Article 7 of the Mandate Agreement continued in effect despite the dissolution of the League, and that South Africa had assumed the obligation to accept

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49. ICJ Reports (1962), p. 347.

50. ibid, p. 334.

the compulsory jurisdiction of the International Court of Justice.[51] However, in the light of the result which the Court reached in its decision on the merits in the South West Africa cases in 1966, the discussion of termination of mandate over S.W.Africa in the 1962 Judgment is of limited practical significance. Besides, the issues involved in the cases were legal rights or interests of other states in the due administration of the mandated territory, and their competence to remedy the situation through binding decisions of the Court. The applicant states did not ask the Court to rescind the Mandate on the basis of South Africa's alleged violation of it. But here, we are basically concerned with the Court's attitude to the question of termination of Mandate or the competence of the General Assembly unilaterally to order termination of the mandate of South West Africa which, of course, was not the subject-matter of the contentious cases here.

(v) Ethiopia and Liberia V. South Africa (Merits), 1966.

The case continued in accordance with the normal procedure, and after extremely lengthy pleadings, became ready for hearing on 23 December 1964. The complicated submissions by Ethiopia and Liberia covered all of the grievances

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51. ibid, p. 335.

of the African States against South Africa as to the manner in which administration was being carried on in South West Africa. On both sides, the submissions were directed to the merits of the dispute. The Court, however, found that there was one matter which appertained to the merits but which had an antecedent character, namely, the question of the applicants' standing in the present phase of the proceedings which it defined as their legal right or interest regarding the subject-matter of the claim as set out in their final submissions. On this the Court found in its judgment of July 18, 1966 that the Ethiopia and Liberia lacked a legal right or interest in the subject-matter of the present claims, and accordingly, by the president's casting vote-the votes being equally divided - it decided to reject the claims.[52] The explanation of this apparent reversal of the 1962 decision is that there the Court was solely concerned with the question of jurisdiction, while here the issue was the applicants' entitlement to bring the claim over which, in other respects, the Court would have jurisdiction.

The Court expressly stated, however, that it was not deciding the question whether South Africa's mandate over South West Africa was still in force. Nor did the Court deal with the question which had been argued in the briefs and

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52. ICJ Reports (1966), p. 51.

oral argument as to whether South Africa had violated its various obligations under the Mandate Agreement. The question of mandate termination was not discussed by the Court, though the dissenting opinion of Judge Jessup and Judge Koo dealt with such questions as the creation of the Mandates System, self-determination, and the obligations under the "sacred trust".

The surprising result of 1966 caused something of a shock, and the General Assembly, in its resolution 2145(XXI) of 27 October 1966, decided that the Mandate for South West Africa was terminated and assumed direct responsibility for the Territory until its independence. In 1968, the African States brought the question of South West Africa to the Security Council. On 25 January 1968 the Security Council adopted resolution 245(1968) in which it backed the General Assembly's 1966 decision. This was followed by resolution 246 (1968), censuring Sough Africa for its refusal to abide by its earlier resolutions. Further resolutions were passed in 1969, and on 30 January 1970, in resolution 276(1970), the Security Council established an 'ad-hoc' sub-committee to study ways and means for the effective implementation of the Council's resolutions. One of the recommendations of this sub-committee was to approach the Court for advisory opinion. Consequently, the Security Council, by its resolu-

tion 284(1970) on 29 July 1970, asked the Court as to what were the legal consequences for States of continued presence of South Africa in Namibia notwithstanding Security Council resolution 276(1970).

(vi) Termination of the Mandate and the 1971 Opinion.

The Court, in response to the request of Security Council, delivered its Advisory Opinion on 21 June 1971. Although the Court was asked to state the legal consequences for states of continued presence of South Africa in Namibia as a result of termination of mandate by General Assembly vide its resolution 2145 (XXI) and re-affirmed by the Security Council by its resolution 276(1970), the Court gave full consideration also to the related question whether the act of termination itself was legally justifiable and valid. The Court did so because the legal consequences could ensue only from an action which itself was legally defensible. If the basic act from which the consequences are purported to flow is itself found to be illegal, the consequences themselves cannot be legal. Thus we find that, unlike in the 1950 Opinion when the Court was confronted with only one aspect of 'termination', i.e., the competence of the Mandatory unilaterally to alter the international status of South West Africa, in 1971 the Court considered it to be its

judicial function to go into another dimension to 'termination' i.e., the competence of General Assembly as successor to the League Council unilaterally to terminate the Mandate on account of breach.

Central to the question of the validity of the resolutions on termination and the illegality of South Africa's presence in Namibia were the issues of the power of the League to revoke a mandate without the mandatory's consent and the succession of the United Nations to such power. In giving its opinion on these issues, the Court went into a detailed examination of the nature of the League of Nations mandates, particularly those of class "C", and rejected the view that they were intended to be irrevocable and amounted to little more than veiled annexation. The Court ruled that the mandate was terminable without the mandatory's consent in the event of a serious breach of the mandatory's obligations and that the United Nations had succeeded to the League's power of termination. The fact that the General Assembly was not a judicial organ did not mean that the United Nations, acting through it as the competent organ, could not pronounce as the supervising institution on the conduct of the mandatory and act accordingly.

In considering the nature and meaning of the mandate as an institution the Court stressed the concept of "the scared

trust of civilization" and in assessing its scope and meaning adopted a dynamic view of the law:

> "Furthermore, the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all "territories whose peoples have not yet attained a full measure of self-government (Article73)." Thus it clearly embraced territories under a colonial regime.... A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which "have not yet attained independence..."
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> "All these considerations are germane to the Court's evaluation of the present case. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant - "the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned - were not static, but were by definitions evolutionary, as also, therefore, was the concept of the 'sacred trust.' The parties to the Covenant must consequently be deemed to have accepted them as such..." That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation...."[53]

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53. ICJ Reports (1971), p.31.

This passage, besides stressing a dynamic conception of international law, is noteworthy for several other reasons. First, this asserted the existence of a legal rule of self-determination in general international law and not following only from the Charter provisions. This Opinion supports the view that it is a legal and not merely a "moral" or political right. Second, it attached importance to the Declaration on the Granting of Independence to Colonial Countries and Peoples as a stage in the development of international law concerning non-self-governing territories. The weight of the Court's authority is thus thrown on the side of those who regard certain General Assembly "declarations" as law-making and not merely recommendatory.

Having determined that the General Assembly had the power to terminate the mandate for cause, the Court put particular stress on the general right of termination of any agreement by reason of its breach. Reaffirming the view it had stated in 1962 Judgment that the mandate "..... in fact and in law, is an international agreement having the character of a treaty or convention"[54], the Court attached significance to the pertinent provisions in the Vienna Convention on the Law of Treaties which was drawn up in 1969 but was not in force till the time of giving of the Opinion for

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54. ibid, p. 47.

lack of a sufficient number of ratifications or accessions:

> "The rules laid down by the Vienna Convention on the law of Treaties concerning termination... may in many respects by considered as a codification of existing customary law on the subject. In the light of these rules, only a material breach of a treaty justifies termination, such breach being defined as :
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> (a) a repudiation of the treaty not sanctioned by the present convention; or
> (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty (Art.60,[55] para.3).

The Court, having said so, pointed out that General Assembly Resolution 2145 (XXI) determined that both forms of material breach had occurred in that case. By stressing that South Africa "has, in fact, disavowed the Mandate",[56] the General Assembly declared in fact that it had repudiated it. The resolution in question had, therefore, to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroyed the very object and purpose of the relationship.

The Court then referred to "the general principle of law that a right of termination is presumed to exist in respect of all treaties, except as regards provisions relat-

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55. ibid, p.47.

56. ibid, p.47.

ing to the protection of the human person contained in treaties of a humanitarian character". It "has its source outside of the treaty, in general international law."[57]

Answering South Africa's argument that "the consideration set forth in paragraph 3 of resolution 2145 (XXI) of the General Assembly, ..., called for a detailed factual investigation before the General Assembly could adopt resolution 2145 (XXI) or the Court pronounce upon its validity, the Court held that the failure of South Africa to comply with the obligation to submit to supervision and to render reports, an essential part of the mandate, cannot be disputed in the light of determinations made by this Court on more occasions than one. In relying on these, as on other findings of the Court in previous proceedings concerning South West Africa, the Court adheres to its own jurisprudence."[58]

Having decided that the General Assembly had validly terminated the Mandate, the Court held "that South Africa has no other right to administer the Territory." Several points emerged in the course of Court's reasoning with respect to the termination of mandate. First, the Court unequivocally affirmed the rule of general international law authorizing termination of a treaty on account of material

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57. ibid, p.47.

58. ibid, p.50.

breach by the other party. Second, the Court in upholding this rule relied in part on the Vienna Convention on the Law of Treaties as being in many respects a codification of existing customary international law on the subject. Third, the principle of termination stated in the Convention was applied by the Court to the relations between a state and an international organization, although the Vienna Convention in its terms is applicable only to agreements between states, the applicability of its norms to agreements between states and other subjects of international law being expressly reserved under articles 1, 2 and 3 of the Vienna Convention. This conclusion, however, is not free from doubt, since the Court also spoke of "a relationship between all members of the United Nations on the one side, and each mandatory power on the other," and of an obligation assumed by the mandatories "vis-a-vis all United Nations Members".[59] Fourth, the Court did not refer to 'apartheid' or any other racist measures of the mandatory as a material breach of the mandate justifying its termination. The breach seen by the Court as justifying the termination of the mandate was South Africa's failure "to comply with the obligation to submit to supervision and to render reports."

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59. ibid, pp.45-46.

CONCLUSION

The foregoing discussion on the role that the Court played in this transformation through its opinions suggests certain conclusions. We see that, although neither Article 22 of the Covenant of the League of Nations nor individual mandate agreements contained any specific reference to termination of mandate by the League, this did not come in the way of the Court's undertaking a review of the purposes underlying the creation of this basic international instrument and applying the principle of effectiveness to it. The conclusion of the Court in 1950 that South West Africa continued to be a territory under the international mandate and that the continued status of South West Africa as a mandated territory required the continuation of international supervision was no more than an example of legitimate application of the principle of effectiveness to basic international instruments. In the absence of the duty of the mandatory Power to render report to an international organ, for example, the "rights of the peoples" under this system "would not be effectively safeguarded". Thus the Court, in order to render effective the instruments before it, i.e., the mandate instruments, read into them an agency of supervision different from the one originally contemplated.

Although the supervisory functions of the League with regard to the mandated territories not placed under the new Trusteeship System were neither expressly transferred to, nor assumed by, the United Nations, the General Assembly was held to be legally qualified to exercise the supervisory functions previously exercised by the League with regard to South West Africa.

The same consideration, i.e., to render effective the mandate instruments, underlay the reasonings of the Court when it held that South Africa did not have the competence unilaterally to alter the status of the territory. To hold otherwise would have meant to deprive of effect all of the meanings attached to the main pronouncements of the Court, and to allow South Africa to jeopardise the "rights of the peoples".

The 'Status Opinion' was not directly concerned with termination, as distinct from supervision, but in the light of the rationale behind the Opinion, United Nations practice, and the South African request to the General Assembly for permission to annex the territory of South West Africa, there can be little doubt that the General Assembly had the authority to terminate the mandate.

It is true that the Article 22 of the League Covenant as well as the individual mandate agreements contained no

specific reference to revocation, it cannot, however, be assumed that because the matter was not dealt with, revocation was legally impossible. The possibility of revocation was not included in the mandate instruments, but it was not excluded either, and in the absence of express or clearly implied exclusion of it, revocation was 'annexed to the relationship' and a legal possibility under the mandates system. The Court in the 'Namibia Opinion' had little difficulty in assenting to the existence of power of revocation for fundamental breach, exercisable by the General Assembly as a successor to the League Council.

As we have seen earlier, as a follow-up to the 1966 'decision' or 'non-decision' of the Court, the General Assembly, by its resolution 2145 (XXI) on October 27, 1966, terminated South Africa's right to administer the Territory of S.W. Africa. During the course of the debate on this resolution doubts as to its legality were expressed. Neither the terms of the Mandate, nor Article 22 of the League Covenant, envisaged revocation as a sanction available for non-fulfilment of the terms of a Mandate by the Mandatory. Besides, there was no judicial pronouncement that South Africa was in breach of its fundamental provisions enabling the other party to revoke the mandate, and in the absence of such a judicial pronouncement, it was not clear if the

General Assembly had the authority to make a determination on the compatibility of 'apartheid' with the provisions of the mandate. Moreover, in 1950, the Court had held that the competence to "modify the international status of South West Africa" rested "with the Union of South Africa, acting with the court of the United Nations."

Besides the question of legality, the resolution raises several other questions requiring close examination which will be attempted in the next chapter.

Chapter III

Legal Issues Arising Out of Termination of Mandate

The view that a decision of the Permanent Court, that the conduct of the Mandatory Power violated its obligations under the Mandate, was a prerequisite for the termination of a mandate was based on the assumption that the Court had jurisdiction over a dispute between a Mandatory Power and a Member of the League relating to the policy pursued by the Mandatory Power towards the inhabitants of the Territory. These expectations were destroyed by the judgment of the Court in 1966 when it held that it was unable to entertain a dispute between an ex-member state of the League and a Mandatory Power over the latter's treatment of the indigenous inhabitants of the mandated territory. The Court indicated that the political organs of the League had been the appropriate agencies, not the Court itself, for deciding on the issue. In 1950 the Court had found that the United Nations had succeeded to the supervisory functions of the League. The combined effect of the Court's two pronouncements on South West Africa, i.e., those of 1950 and 1966, could only be that it was for the General Assembly, as

successor to the League Council, to decide whether or not 'apartheid' violated the provisions of the Mandate.

Although recourse to the Court for an advisory opinion on the lawfulness of 'apartheid' under the Mandate had been considered desirable by the Committee on South West Africa in its Report of 1957, it was even then clearly foreseen that the Court might decline to give an opinion in accordance with the rule laid down in the Eastern Carelia case that advisory machinery of the Court should not be used in an actual dispute between states. This belief that the Court might decline to give an opinion was confirmed by the decision of the Court in 1966. Therefore, the General Assembly was reluctant to refer the matter back to the Court. Despite some expressions of doubts about the legality of such an action, warnings against any hasty steps, and suggestions against adopting inoperative or ineffective resolutions,[1] the General Assembly adopted Resolution 2145(XXI) on 27 October 1966 whereby it declared that

> "South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South-West Africa and has, in fact, disavowed the Mandate."

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1. Anand, R.P., Studies in International Adjudication, (New Delhi, 1969), p.146.

As a result of this finding it decided that

> "the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and henceforth South-West Africa comes under the direct responsibility of the United Nations."

1. The authority of the General Assembly to terminate the Mandate

Although neither Article 22 of the Covenant of the League of Nations nor the individual mandate agreements contained any reference to the right of the League to revoke a mandate, the underlying policies of promoting the independence of mandated territories through self-determination and the international accountability of the mandatory power suggest that the League Council would have been able to revoke a mandate in the event of a mandatory power failing substantially to fulfil its obligations. This is also supported by the law of treaties which permits the innocent party to renounce a treaty in the event of a fundamental breach. And, as the Court found in 1962, the Mandate for South West Africa was a treaty between the League, represented by the Council, and South Africa. Hence the League of Nations enjoyed the right to renounce the Mandate Agree-

ment in the event of a violation of the obligations under it.

In its Advisory Opinion of 1950, the Court held that "the General Assembly of United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory."[2] By this it was meant that the General Assembly had authority to exercise all the supervisory functions which the League might have exercised, and not just those which the League actually exercised-including the right of revocation. It must also be said that the 1950 Opinion of the Court that South Africa acting alone did not have the competence to modify the Mandate and that it could do so only with the consent of the United Nations could not be interpreted as precluding the right of the United Nations to terminate the Mandate, for the Court then was simply re-affirming the continued existence of Article 7(1) of the Mandate for South West Africa. The question of the right of the United Nation, acting alone, to terminate the Mandate was not considered by the Court. The only reference to revocation was found in the dissenting opinion of Judge Alvarez who maintained that the General Assembly had this

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2. ICJ Reports(1950), p.137.

right under Article 10 of the Charter.[3]

2. Consequence of termination of Mandate

There are several issues that arose out of termination of mandate. We will have to analyse some of them one by one, and the Court's attitude to them as revealed in its opinions given from time to time.

(1) Legal Consequences for States of Termination

Although General Assembly resolution 2145 (XXI) was 'binding' in the sense that it registered the collective will of all who voted for the resolution in terminating the Mandate, the powers of the General Assembly vis-a-vis non-consenting States fell in the category of recommendations. Acting under its supervisory authority and in accordance with its voting procedures it could end the Mandate but it could not generate an obligation on South Africa to withdraw or engage the responsibility of member States to co-operate in effecting a withdrawal.[4]

It is for this reason that it enlisted the co-operation of the Security Council which, under the Charter, is empowered to take legally binding decisions. While the Security Council resolution 276 (1970), as well as its

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3. ibid, p.182.

4. ICJ Reports (1966), p.164

previous resolutions 264 (1969) and 269 (1969), endorsed General Assembly resolution 2145 (XXI), it did not 'validate' it since it was already valid. Since it was valid, it had legal consequences of its own in regard to continued existence of South Africa in Namibia. What the Security Council resolutions did was to convert a recommendation into a binding decision operative as against non-consenting States. We have already seen how the General Assembly, as a successor to the League Council, was legally justified in making a determination on the compatibility of 'apartheid' with the obligations of South Africa under the Mandate as also in terminating the Mandate. Thus the termination of the Mandate by the General Assembly and its endorsement by the Security Council converting the resolution into a binding obligation serves to justify the following conclusions which the Court reached in 1971:

> (1) that the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;
> (2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of, or concerning, Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

(3) that it is incumbent upon States which are not members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.

"A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence."[5] "South Africa, being responsible for having created and maintained a situation which the court found to have been validly declared illegal", had "the obligation to put an end to it".[6] It was, therefore, under an obligation to withdraw its administration from the Territory of Namibia. By maintaining an illegal situation which it became after the termination, and occupying the Territory without title, South Africa incurred "international responsibilities arising from a continuing violation of an international obligation". It also remained "accountable for any violations of its international obligations, or of the rights of the people of Namibia". The fact that South Africa, after termination of its mandate, had no title to administer the Territory did not "release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory". "Physical control of

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5. ICJ Reports (1971), p.54

6. ibid, p.54.

a Territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States".

The combined effect of the actions of the General Assembly in terminating the Mandate and of the Security Council in endorsing it has it that the member States of the United Nations came under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They were also under an obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia, subject to certain considerations. For example, the non-recognition of South Africa's administration of the Territory should not result in depriving the Namibians of any advantages flowing from international co-operation. While official acts performed by the South African Government on behalf of or concerning Namibia after termination of the Mandate were illegal and invalid, this invalidity did not extend "to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."[7] Thus, subject to these human considerations,

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7. ibid, p.56

member States came under obligation to abstain from entering into treaty relations with South Africa in all cases in which the South African Government purported to act on behalf of or concerning Namibia. With respect to the then existing bilateral treaties, member States were required to abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involved active intergovernmental co-operation. With respect to multi-lateral treaties, the same rule could not apply to certain general conventions such as those of a humanitarian character, the non-performance of which might adversely have affected the people of Namibia. It was to be for the competent international organs to take specific measures in that respect.

"Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276(1970), are under obligation to abstain from sending diplomatic or special mission to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there." They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations did not imply any recognition of its authority with regard to Namibia.

As far as non-member States were concerned, although Articles 24 and 25 of the Charter did not apply to them, they were called upon in paragraphs 2 and 5 of resolution 276 (1970) to give assistance in the action which had been taken by the United Nations with regard to Namibia. The termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia, the court opined, were opposable to all States in the sense of barring 'erga omnes' the legality of a situation which was maintained in violation of international law : in particular, no State entering into relations with South Africa concerning Namibia could "expect the United Nations or its members to recognize the validity, or effects of such relationship, or of the consequences thereof."[8]

As regards the general consequences resulting from the illegal presence of South Africa in Namibia, all States were expected to "bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted."[9]

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8. ibid, p.56.

9. ibid.

(ii) Effect of Termination on the status of the Territory

It was held in the 1950 Opinion that, despite the dissolution of the League, the mandate agreements continued to be "existing international instruments" under Article 80, paragraph 1, of the Charter. However, General Assembly Resolution 2145 formally terminated the mandate for South-West Africa raising a question as to whether the mandate over South West Africa was still an "existing" instrument.

Generally speaking, termination of a mandate or trusteeship agreement is declared only after a plebiscite is held under the auspices of the competent supervisory organ - be it the League or the United Nations. For example, separate plebiscites were held in the northern and southern parts of the Cameroons under British administration on 11 and 12 February 1961, and the General Assembly adopted resolution 1608(XV) endorsing the results of the plebiscites and deciding that Trusteeship Agreement in respect thereto shall be terminated, on 21 April 1961. However, in this specific case of South West Africa, what the Resolution 2145(XXI) did was that, it only theoretically placed S.W. Africa under the direct responsibility of the United Nations, the question of the withdrawal of the mandatory and substitution in its place of the United Nations' control followed by a plebiscite was held over till the report of

the 'Ad Hoc' Committee, created by the same resolution, on the "practical measures" required for the actual administration of the territory was received. Without self-determination, which was the ultimate goal of mandates system, the status of the territory was to remain intact. The General Assembly, while declaring "that the Mandate... is therefore terminated", re-affirmed in the same resolution "that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence". Since that objective had not been achieved, S.W.Africa remained a mandated territory having international status. The 1966 G.A.Resolution 2145(XXI) did not involve a change in the status of the territory as such. The Territory's status as a 'C' mandate remained intact because that status resulted not from the presence of the authority of the mandatory but from Article 22, paragraph 6, of the League Covenant. As long as the purpose underlying the creation of the sacred trust of the civilization remained unfulfilled, the status of the territory as a 'C' mandate was bound to be maintained. For example, if, prior to the dissolution of the League, South Africa had renounced its authority in South West Africa, the Territory would not have lost its status as a 'C' mandate, as that status was independent of the presence of the authority of the mandato-

ry in the mandated territory. It had never been challenged, except perhaps on dubious grounds by the mandatory itself, that the mandate over South West Africa survived the dissolution of the League. This must necessarily mean a) that the status of South West Africa as a 'C' mandate survived, and b) that the authority of the mandatory to continue to administer the Territory also survived. What happened in 1966 was that authority of the mandatory came to an end, but that end of authority did not involve any change in the status of the territory. As Judge Petren said in his separate opinion in 1971, "The effect of resolution 2145(XXI) was thus to withdraw from South Africa the right to administer Namibia as mandatory Power. The international status of that Territory however remained intact, and the resolution according to which the Mandate was declared terminated cannot be interpreted in any other sense".

(iii) Effects of termination on the rights and claims of the people of the Territory.

In the Advisory Opinion on Namibia and indeed in its 1950 Opinion the Court regarded the 'people' of Namibia as having rights under an international regime. Coupled with the Court's seeming recognition of self-determination as a legal right, it indicates that 'peoples' of certain territo-

ries, as distinct from states, may have right (and duties) under international law.

As a consequence of termination, South Africa came under an obligation to put on end to its presence in the Territory. By maintaining that illegal situation, and occupying the territory without title, South Africa incurred international responsibilities arising from a continuing violation of an international obligation. It also remained accountable to the people of the territory for any violation of the rights of the people of Namibia. Right from the very inception of the Mandates system the people of the Territory had a status of their own, and in the event of violation of any right of the people there to be governed according to the terms of the mandate, the Union of South Africa could have opened itself to the claims by the people of the Territory. However, after the termination in 1966, the very presence of the Union of South Africa in Namibia, being illegal, meant violation of the legal rights of the people to self-determination. Thus it may not be unreasonable to infer from the court's language in the Advisory Opinion on Namibia that South Africa may have pecuniary obligation as a result of its continued illegal presence in Namibia at least after the adoption of the binding Security Council resolution 276 (1970,) and that these obligations may include, for

example, reimbursement for the depletion of the Territory's natural resources exploited under the authority of South Africa. We can find this responsibility with reference to the Decree on the Natural Resources of Namibia, adopted in 1976 by the Council for Namibia, the only 'de jure' entity that could validly administer the Territory. Acting under powers stipulated in the resolution which established it, and invoking the Declaration on the Granting of independence to Colonial Countries and Peoples, as well as the Declaration on Permanent Sovereignty over Natural Resources, the Council for Namibia provided in the Decree that no persons or entities may 'search for, prospect for, explore for, take, extract, mine, process, refine, use, sell, export or distribute any natural resource, whether animal or mineral, situated or found to be situated within the territorial limits of Namibia without the consent and permission of the United Nations Council for Namibia...'[10] The Decree also declares "null, void and of no force or effect"[11] concessions and licenses given by South Africa, and it provides that resources removed from South Africa without the

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10. U.N. Doc. A/AC 131/33, para1, reprinted in, International Legal Material 1974, at page, 1513.

11. Ibid., para2.

Council's permission may be seized' and 'forfeited'.[12] Thus at the time the Council was an entity capable of raising on behalf of the people of Namibia issues which normally are raised by states possessing international legal personality. For example the Council conducted hearings on Namibian uranium in New York on July 7-11,1980. By allowing the natural resources of the territory to be wantonly exploited South Africa has opened itself to future claims, by the people of the Territory, which is now a full fledged state, to reimbursement for the depletion of the Territory's natural resources exploited under the authority of South Africa against the Decree adopted by the 'de jure' government of Namibia. Here we can say that if, during the life of the Mandate the mandatory has violated the terms of the Mandate Agreement which resulted in damage to the people of the territory having corporate personality, a claim for reparation would not be liquidated by the termination of the Mandate or by the fact of a plebiscite being held under the United Nations auspices.

(iv) Effects of termination on the rights and obligations of the former Mandatory Power.

The moment a mandate is terminated, the mandatory power comes under an obligation to offer to withdraw its adminis-

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12. Ibid., para,4.

tration from the territory under mandate, in consultation with the United Nations, so that a process of withdrawal and substitution in its place of United Nations' control may be agreed upon and carried into effect with the minimum disturbance of the existing administrative arrangements. It should also be agreed upon that, after the expiry of a certain period but not later than a reasonable time-limit thereafter, a plebiscite may be held under the supervision of the United Nations, which should ensure the freedom and impartiality of the plebiscite, to ascertain the wishes of the inhabitants of the territory as to their political and economic future. In case the plebiscite reveals a clear preponderance of views in support of a particular course and objective, that course should be adopted so that the desired objective may be achieved as early as possible.

If an overwhelming majority of the peoples of the territory desire closer political integration with their erstwhile mandatory state, the United Nations, being wholly committed to the principle of self-determination of peoples, could be expected readily to give effect to the clearly expressed wishes of the peoples of the territory. Should the result of the plebiscite disclose their preference for a different solution, the mandatory state should equally readily accept and respect such manifestation of the will of

the peoples concerned and should co-operate with the United Nations in giving effect to it.

Elaborating on the effect of termination on South Africa, i.e., the Mandatory state, the Court said in the 1971 Opinion that South Africa was 'under obligation to withdraw its administration from the territory of Namibia."[13] By maintaining an illegal situation, and occupying the territory without any legal justification, South Africa incurred international responsibilities arising from a continuing violation of an international obligation. In fact, after the termination of mandate over South West Africa in 1966, the very presence of the Union of South Africa in Namibia, being illegal, meant violation of the legal rights of the people to self-determination.

It was argued, though untenably, that since mandate lapsed following the termination, all the attendant obligations had lapsed as well. As the objective of the mandate remained unfulfilled, we can safely assume that mandate continued to be an existing international instrument and that, while the right of the mandatory to administer the territory lapsed, its obligation can not be deemed to have ended. The Court had declared in 1950: "The authority which

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13. ICJ Reports (1971), p. 54.

the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified."[14] On the other hand, it may be argued that the obligations of the mandatory can lapse only if its 'de facto' authority and power over the territory are surrendered.

In Judge Hidayatullah's opinion, this was the decisive argument "against South Africa, and he criticized the dissenting opinions in the 1962 case and the judgment of 1966 for consistently ignoring it. In fact, in 1971, the Court itself said:

"The fact that South Africa no longer has any title to administer the territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States." Judge Petren also says in his dissenting Opinion, "It goes without saying that, so long as South Africa remains in Namibia, it

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14. ICJ Reports (1950), p.133.

will be bound to continue to fulfil the obligations which the Mandate has laid upon it."

As already stated, physical control of a territory, rather than sovereignty or legitimacy of title, is the basis of a state's liability for its acts in that territory. This principle has been generally followed in the practice of states. In a world with many disputes over the legitimacy of occupation of particular territories, the importance of this principle need not be stressed. However, the Court's statement, made with reference to the situation in Namibia, should not be regarded as an attempted description of the exact scope of the principle or as meaning that it may have no qualifications or exceptions. For example, could a state completely divest itself of responsibility of complying with its treaty obligations during a certain period in a part of its territory the "physical control" over which it has voluntarily delegated to another state for that period?

3. The Binding Nature and Conclusive Effect of General Assembly Resolutions:

The supervisory authority of the General Assembly of the United Nations in respect of the mandated territory, being derived from the Covenant of the League and the Mandate Agreement, is not restricted by any provision of the Charter of the United Nations. The extent of that authority

must be determined by reference to the relevant provisions of the Covenant of the League and the Mandate Agreement. The General Assembly was entitled to exercise the same authority in respect of the administration of the Territory by the Mandatory Power as the League of Nations could have exercised, and "its decisions and determinations in that respect had the same force and effect as the decisions and determinations of the Council of the League". In exercise of this power the General Assembly, while adopting resolution 289 (IV) on 21 November 1949, recommending independence for Libya as soon as possible and in any case not later than 1 January 1952, laid down a detailed procedure for the achievement of that objective, including the appointment by the General Assembly of a United Nations Commissioner in Libya and a Council to aid and advise him, etc. "All the recommendations contained in the resolution constituted binding decisions; decisions which had been accepted in accordance with the provisions of the Charter but whose binding character was derived from Annex. XI to the Treaty of Peace with Italy."[15] Thus, in certain limited areas the General Assembly had decision making power.

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15. ICJ Reports (1962), p.163.

The termination of mandates reposes in those limited areas. It is an area which is 'sui generis'. And the exercise of the power involved no invasion of national sovereignty since it was focussed on a territory and a regime with an international status. The power was conferred on the General Assembly through the unique situation posed by the Mandate, coupled with authority granted under Article 80 of the Charter, which constituted a bridge between the League of Nations and the United Nations in so far as mandates were concerned.

CONCLUSION

Thus we find that the General Assembly succeeded to all the functions which the League Council might have exercised and not just those which the League Council actually exercised-including the right of revocation in case of breach of obligations which destroyed the very purposes of the treaty. The contention of South Africa was untenable. The fact that the General Assembly was not a judicial organ did not mean that the United Nations, acting through its competent organ, could not pronounce as the supervising institution on the conduct of the mandatory and act accordingly.

The Court went into the question of legality of the resolutions because the legal consequences could ensue only from an action, which itself was legally defensible. The Court held the resolution to be operative not only vis-a-vis South Africa and States members of the United Nations but also vis-a-vis states not members of the United Nations.

Besides the consequences of these resolutions for States, there are several other issues, answers to which can be found with reference to the Court's pronouncements. One of the most important of these issues is the effect of termination of mandate on the rights and claims of the

peoples of the mandated territories, and the concomitant obligations of the erstwhile mandatory powers. The termination of 1966 had the effect of making even the very presence of South Africa in the territory of South West Africa subject of claim for compensation by any future government of Namibia. The government of Namibia today can stake a claim for compensation without having to prove any specific injury to its material interest, as the very presence was illegal in so far as it deprived the people of the territory of their legal rights to self-determination. The Government of South Africa has pecuniary obligations as a result of its continued illegal presence in Namibia and these obligations include, for example, reimbursement for the depletion of the territory's natural resources exploited under the authority of South Africa.

CHAPTER IV

CONCLUSION

As we have seen, the late 19th Century saw the concept of dependency administration shifting from that of a right to that of a responsibility. The dependent community came to be regarded as possessing something of a corporate personality: a personality as yet unprepared for independence but capable of development with the guidance of the imperial power. There was, however, little provision for the exercise of supervision of that administration by a body which was not national but international. By the end of the World War I, effective International supervision came to be regarded as essential in the administration of territories considered to be politically "backward". Article 22 of the Covenant of the League of Nations, which was part of Treaty of Peace embodied provisions for the supervision of this administration by the League. The mandate agreements drafted as a follow-up to this were, after acceptance by each mandatory power, submitted to the League Council which was responsible for seeing that their terms were in accord with the Covenant. The purpose of the mandates system, i.e., to help the peoples, not yet able to stand by themselves, towards the goal of self-determination, remained unfulfilled in respect of certain territories, and that is why, when

United Nations Charter was being drafted, the task of the San Francisco Conference with respect to the mandated territories which had not yet obtained independence was two-fold: to elaborate a system of supervision and administration for mandated territories, and to provide a mechanism for the orderly transfer of territories from the mandates system to the newly established trusteeship System. In the first of these tasks the Conference succeeded admirably. Trusteeship System represents considerable advance over the Mandates system with respect to international supervision and accountability. The inadequacies of the Conference's treatment of the second caused innumerable complications.

It is perfectly clear that the framers of chapters XII and XIII of the Charter as well as participants at the United Nations Preparatory Commission and the final Assembly of the League of Nations, assumed that the period of transition from the Mandates System to the Trusteeship System would be brief. It was equally clear that no mandatory power but South Africa contemplated refusing to submit its mandated territories to the trusteeship system and tried to fulfil its long-cherished desire to annex the territory held under trust, in defiance of the international community and the new international order.

The basic tension in the Mandate was between the "well being" provision and the following provision which was part of the same article (Article 2):

> "The mandatory shall have full power of administration over the territory .... 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 Court played a very important role through its opinions towards clarifying the issues that were the source of this basic tension. It was confronted with overlapping claims going to the root of the very nature and functions of international law. Although the Charter did not provide for co-existence of the two systems or any mechanism for continued supervision of those mandated territories not placed under the new system, the Court reduced this legal hiatus between the Covenant and the Charter by providing for succession by the General Assembly of the United Nations to the power and functions of the Council of the League of Nations. By way of Article 80(1) of the United Nations Charter, however, the 'rights of people' under mandate was maintained. But how those rights could have been effectively maintained despite the disappearance of one supervisory body

(the League) and without any transfer of its supervising functions to the new organization (the United Nations)?

As regards the Court's attitude to the question of termination of mandate, although neither the terms of the Mandate for South West Africa, nor Article 22 of the League Covenant contained any reference to revocation, this did not come in the way of the Court's undertaking a review of the purposes underlying the creation of this basic international instrument, and applying the principle of effectiveness to it. In order to render effective the mandate instruments, the Court held that South Africa did not have the competence unilaterally to alter the status of the territory. To hold otherwise would have meant to deprive of effect all of the meanings attached to the main pronouncements of the Court, and to allow South Africa to jeopardise the "rights of the peoples." Although, in 1950, no termination of the mandatory's authority had taken place and none of the questions requested the Court to inquire into that possibility, it was clear, in the light of the rationale of the Court in that opinion, that the General Assembly had the authority to terminate the Mandate.

In 1971, however, although the Court was asked to give its opinion on the legal consequences for States of the continued presence of South Africa in Namibia, despite

Security Council resolutions declaring it illegal, it considered it to be its judicial function to consider the question as to whether the General Assembly was legally justified in declaring the Mandate terminated. The Court upheld the right of the General Assembly to terminate a relationship in case of a deliberate and persistent violation of obligations which destroyed the very object and purpose of that relationship.[1] The following points and implications, however, deserve special mention:

First, the Court (in 1971 as well as in 1950) regarded the 'people' of Namibia as having rights under an international regime.

Second, the Court affirmed the principle that physical control of a territory, rather than sovereignty or legitimacy of title, is the basis of a state's liability for its acts in that territory. But there are qualifications or exceptions. For example, could a state completely divest itself of responsibility for complying with its treaty obligations during a certain period in a part of its territory the "physical control" over which it has voluntarily delegated to another state for that period?

Thirdly, the Court stated that it was for the Security Council to determine any further measure consequent upon the

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1. ICJ Reports (1971), p. 47.

decisions already taken by it on the question of Namibia. But it failed to lend its support to the notion that as a result of the illegality of the presence of South Africa in Namibia any other state had the right to take individual action, military or other, to dislodge South Africa from the territory or to lend active assistance to any resistance movement there. Judge Ammoun, in his separate opinion, did not go so far as to uphold a right of individual armed action, but stated that a state of belligerency existed there, in which South Africa was the aggressor.

It may be mentioned here that, independence for Namibia, and with it the withdrawal of South African armed forces from the territory, was closely linked to the withdrawal of Cuban forces from Angola and of the South West African Peoples Organisation (SWAPO) forces from Namibia. Eventually, complex arrangements were agreed in 1988 and 1989, which led to independence for Namibia. Now the question is : Did the 1966 termination of mandate have the effect of making even the very presence of South Africa in South West Africa subject of claim, at least after the adoption of the binding Security Council resolution 276 (1970) by the present government of Namibia. Can the government of Namibia today stake claim in the International Court of Justice without even having to prove any specific

injury to material interest, as the very presence was illegal as declared by several resolutions of the Security Council and as confirmed by the Court in 1971. There are reasons to believe that, by the very act of depriving the people of Namibia of their right to self-determination, the Government of South Africa committed act involving international obligation. It has pecuniary obligations as a result of its continued illegal presence in Namibia, and these obligations include, for example, reimbursement for the depletion of the territory's natural resources exploited under the authority of South Africa.

APPENDIX I

Article 22 of the Covenant of the League of Nations

1. 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 will-being and development of such people form a sacred trust of civilization, and that securities for the performance of this trust should be embodied in this Covenant.

2. 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.

3. 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.

4. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their

existence as independent nations can be provisionally recognised 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.

5. Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor trafficand the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

6. These 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 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.

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

8. 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.

9. 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.

APPENDIX II

Mandate for the Administration of German South-West Africa, Conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa, Confirmed and Defined by the Council of the League of Nations---Geneva, December 17, 1920.

The Council of the League of Nations:

WHEREAS by Article 119 of the Treaty of Peace with Germany signed at Versailles on the 28th June, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her overseas possessions, including therein German South-West Africa; and

Whereas the Principal Allied and Associated Powers agreed that, in accordance with Article 22, part I (Covenant of the League of Nations), of the said Treaty, 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 the territory aforementioned,and have proposed that the mandate should be formulated in the following terms; and

Whereas His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the mandate in respect of the said territory and has

undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

Whereas, by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the mandatory, not having been previously agreed upon by the members of the League, shall be explicitly defined by the Council of the League of Nations:

Confirming the said mandate, defines its terms as follows:-

ART. 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.

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.

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 mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on the 10th September, 1919, or in any Convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

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.

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.

6. 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.

7. The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate.

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.

The present declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers signatories of the Treaty of Peace with Germany.

Made at Geneva, the 17th day of December, 1920.

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