CHAPTER VIII

A COMPARATIVE STUDY OF THE JURISDICTIONAL ASPECTS OF THE SOUTH-WEST AFRICA ADVISORY OPINIONS AND JUDGMENTS.

I. Contentious Jurisdiction

Of the four cases on South-West Africa mentioned above only two were judgments given in contentious proceedings. These were the 1962 and 1966 Judgments.

Firstly these Judgments show that before the Court can entertain and effectively dispose of proceedings instituted before it, two conditions must be satisfied:

(1) There should be a justiciable issue disclosing rights and duties to be appertioned between the Parties.

(2) The matter should be such that the Court has jurisdiction in respect of it.

Secondly, the existence of a justiciable issue does not per se confer (contentious) jurisdiction, but the absence of a justiciable issue automatically negates such jurisdiction. Thus before the Court can pronounce on the matter before it, it must be shown to have jurisdiction in addition to and independently of the existence of a justiciable matter.

Thirdly, in the exercise of the I.C.J.'s contentious jurisdiction a matter is justiciable when it discloses rights and obligations between the parties before it. The rights of the party initiating the proceedings will illustrate the nature of its legal interest in the dispute. Generally, legal interest will involve a material interest and the right to bring an action will depend on whether or not a material injuria to the state or to its national(s) is proved. In exceptional cases the justiciability of an issue will not depend on the existence of a strictly individual or material interest. International law admits claims for the application of certain kinds of treaties in which all the Parties have a common objective regardless of material injury.

The term "parties" must be read as referring to only those bodies which have an international legal personality recognised by the Court for the purpose of suing and being sued in international law. This is confirmed by Article 34(1) of the Statute of the I.C.J. which provides that only "States" can be parties in cases before the Court.

Fourthly, if the presence of a justiciable issue does not ipso facto confer automatic or compulsory contentious jurisdiction, there remains the question of what is that factor which, in addition to a justiciable issue, is essential for the exercise of the Court's contentious jurisdiction. The reasoning of the I.C.J. in the South-West Africa cases shows that that additional factor is the

principle of consent. Even though a dispute discloses legal rights and duties capable of apportionment between the parties the Court will be loathe to make a judicial pronouncement in respect thereof if the defendant State has not consented to the Court's jurisdiction over the matter before it. So deeply embedded is the principle of consent in the jurisprudence of the Court that it has resorted to dubious methods of "implying" consent where no clear acceptance of the Court's contentious jurisdiction can be shown on the part of a defendant State. The Court has made this "implied" consent the basis of its jurisdiction when there have been alternative grounds which were far more persuasive, on which the Court could have based its jurisdiction. It is necessary to make a short digression from the South-West Africa cases to illustrate the point.

In the Corfu Channel Case[26] the United Kingdom initiated proceedings against Albania upon a recommendation of the Security Council of the United Nations acting under Article 36 of the Charter. Albania disputed the jurisdiction of the Court in a letter addressed to it. The Court construed this letter as implying a waiver by Albania of any jurisdictional objections, and decided that it had jurisdiction. It is submitted that this was rather a strained interpretation of the letter and the reasons of the Court regarding jurisdiction remain questionable. The Court could have more plausibly based its jurisdiction on the recommendation of the Security Council.

It can be argued that a recommendation of the Security Council under Chapter 6 of the Charter can have binding effect in certain circumstances. As this argument is not immediately relevant to the question being discussed it is not pursued any further.[27] It suffices to note that the Court preferred to base its jurisdiction on the principle of consent even though consent was not readily available from Albania.

In the 1962 and 1966 judgments over South-West Africa the Court made it clear that consent from South Africa was established by its signature to the Charter of the United Nations. This had the effect of a "voluntary" transfer by South Africa to the I.C.J. of the jurisdiction of the P.C.I.J. This has been explained elsewhere and shows that the Court again regarded the principle of consent as fundamental to its contentious jurisdiction.[28]

In this way the presence of a justiciable issue does not <u>per se</u> confer jurisdiction to the Court in respect of contentious matters. This is, at least, the view of the I.C.J. and its predecessor the P.C.I.J.

One can now pass on to the other part of the second submission made above, i.e. the absence of a justiciable issue <u>automatically negates</u> the Court's contentious jurisdiction.

In the 1966 case, the consent of the Respondent was clearly established. Moreover, the parties had international legal personality. Yet the Court declined to pass on to the real merits of the case and in effect held that it had no jurisdiction to do so. The reason, of course, was that there was no justiciable issue between the parties before the Court as the Applicants had no legal right or interest in the dispute.

The 1966 Judgment shows that irrespective of the consent of the parties to the Court's jurisdiction, the absence of a justiciable issue between the parties will render the Court incompetent to entertain the proceedings. The only criticism being that the 1966 case was decided on a purely jurisdictional issue when the Court was meant to be adjudicating on the merits. The entire judgment of 1966 may well have been subsumed under the 1962 judgment of the Preliminary Objections, thus requiring adjudication on the merits unnecessary. However, although the 1966 judgment is capable formally of subsumption under the 1962 judgment, the trend of the arguments in the latter judgment indicates that the Court had jurisdiction not only to decide the Preliminary Objections but also the merits. Having gone, this far, for the Court to then say that it had no jurisdiction to entertain the dispute because of lack of legal interest on the part of the Applicants, would represent a complete volte face.

It is precisely because of this difficulty that the I.C.J. attempted to rationalise this decision with its 1962 decision by arguing that the 1966 judgment was not inconsistent with the 1962 judgment: The Court tried to argue that when it decided in 1962 that it had "jurisdiction to adjudicate on the merits" it was not concerned with the "substantive rights" of the parties nor with "any question of the admissibility of the claims."[29] Thus the Court was in effect stating that the 1966 judgment was not concerned with the jurisdictional issue and that it was concerned purely with the merits, i.e. the "substantive rights" of the Applicants. Yet a Court can only adjudicate on "substantive rights" if there is a justiciable issue between the parties. The Court in the 1966 judgment in effect held that there was no justiciable issue between South Africa and the Applicants as the latter had no legal interest. It can be seen therefore, that despite the claim by the Court that it was adjudicating on "substantive rights" in 1966 it was in reality reverting to the jurisdictional issue by examining the legal interest of the Applicants. Had this examination resulted in a positive finding of legal interest, the 1966 judgment would not have rendered itself open to such criticism for then, presumably, the Court would have proceeded to adjudicate as to the substantive rights and obligations of the parties. The Court however answered the question in the negative thereby rendering itself impotent to exercise that very jurisdiction which it had affirmed itself to be competent to exercise in 1962; it halted the Applicants' claims

in limine and so disabled itself from passing on to the real merits.

Another case which illustrates the principle that the absence of a justiciable issue automatically negates contentious jurisdiction is the Case Concerning the Northern Camerouns.[30] A brief outline of the case, in so far as it is relevant to the principle presently under discussion, follows:

The Camerouns, formerly a German colony, became a Mandated territory after the 1914 - 1918 War. It was divided into two parts, the United Kingdom being responsible for one part and France for the other.

In 1945 the territory was placed under the Trusteeship System of the United Nations. The British part was divided into the Northern and the Southern sectors, the latter being administered through Nigeria. The French Mandated territory became the independent Republic of Camerouns in 1966. In the plebiscite held in the British sector the Southern part voted for incorporation into the Camerouns Republic while the Northern part eventually voted for union with Nigeria. The results of the plebiscite were duly endorsed by the General Assembly in a resolution.

The Republic of Camerouns initiated proceedings against the United Kingdom before the I.C.J. and alleged manipulation and unfair

propaganda by the U.K. in the referendum of the North. The United Kingdom lodged Preliminary Objections disputing the jurisdiction of the I.C.J. on the ground that there was no dispute between the parties before the Court. The Camerouns' Application was filed on 30th May, 1961. The Resolution of the General Assembly (mentioned above) terminated the Trusteeship Agreement on 1st June, 1961, i.e. two days after the Application. Thus by the time that the Court was in a position to render a judgment in 1963 the Trusteeship Agreement had lapsed.

The Court held that although there was a "dispute" at the date of the Application[31] "circumstances... (have) since arisen (which) render any adjudication devoid of purpose".[32] Thus the Court was saying that although it had jurisdiction on May 30, 1961 that jurisdiction lapsed after June 1 1961, the reason being that the dispute between the parties lapsed after the latter date whence the U.K., as trustee, was functus officio. On the date of judgment there was not, as between the parties before the Court, any dispute upon which the Court could adjudicate.

Although the Court did not expressly hold that it had "no jurisdiction" it was in effect proceeding along this line of thought. Equally beyond dispute is the fact that the reason for the Court declining to exercise further jurisdiction was that there were no rights and duties between the parties (and therefore there was no justiciable issue) at the date of the judgment.

This case therefore illustrates the above point that the absence of a justiciable issue automatically renders the I.C.J. incompetent to decide a dispute.

II Advisory Jurisdiction

The most striking way of contrasting the I.C.J.'s advisory jurisdiction with its contentious jurisdiction is by examining to what extent the two conditions precedent for the exercise of the Court's contentious jurisdiction are essential to the exercise of the Court's advisory jurisdiction. The degree to which they apply will illustrate the extent to which the two types of jurisdiction differ.

Whereas the exercise of the Court's contentious jurisdiction is dependent on the existence of a justiciable issue between two or more states, the position is reversed in the exercise of advisory jurisdiction: If a matter discloses the existence of a justiciable issue involving rights and liabilities between states the Court will decline to exercise its advisory jurisdiction on the ground that the matter is a contentious issue and requires the exercise of contentious jurisdiction. This is the classical approach to advisory jurisdiction which, as will be explained below, is now obsolete.

In the Eastern Carelia Case[33] the P.C.I.J. declined to give an

advisory opinion because the matter before it was considered by the Court to involve a dispute actually pending between two states and was therefore a contentious (or justiciable) issue.

The conditions for the exercise of contentious jurisdiction have already been discussed. One of these conditions is that both parties must have international legal personality, i.e. only States can be parties before the Court in contentious disputes. When the Court is acting in its advisory capacity at least one of the "parties" will never be a state since under Article 96 of the Charter the "party" which is competent to seise the Court will either be the General Assembly, as happened in the 1971 Opinion or a specialised agency of the United Nations. Since none of these bodies possess international legal personality for the purpose of suing and being sued, the Court cannot exercise contentious jurisdiction in a matter referred to it by any of these bodies.

In the 1971 Opinion on Namibia, South Africa put forward the argument that the question submitted by the Security Council was a "dispute" (or a justiciable issue) pending between South Africa and other States. South Africa was in effect arguing under the classical theory that the presence of what it considered to be a justiciable issue negatived the Court's advisory jurisdiction. The Court did not make a finding that there was such a dispute but maintained that the mere fact that the Court would pronounce on certain legal issues did not "convert" the case into a dispute.[34]

The implication was that there was no dispute. It is unclear what the Court would have done if it had found a dispute to exist. Would it, for example, have refused to surreptitiously decide a contentious matter (without exercising the appropriate jurisdiction) under the guise of an Advisory Opinion and thereby substitute its advisory jurisdiction for its contentious jurisdiction? This question merits separate treatment and is therefore discussed next.

III. Justiciable Issues and Advisory Jurisdiction

The 1971 Opinion falls in between the two extremeties of the "Interpretation of Peace Treaties" Opinion where it was held that an opinion can be given even if it relates to a "legal question actually pending between States",[35] and the Eastern Carelia Case where the principle enunciated was that an Advisory Opinion cannot be given if there is a dispute pending between states.[36]

Judge Dillard, in his Separate Opinion in the 1971 Case, said: "It may be suggested that the simplest point of distinction between the Eastern Carelia Case and the present case lies in the fact that to render the opinion in the former would have constituted a disguised form of compulsory jurisdiction over a non-member of the League of Nations quite apart from the practical difficulties to be encountered in attempting to deal with contro-

verted facts in the absence of one of the parties. In the present case, while South Africa registered objections, she was yet a vigorous advocate and offered the Court optimum co-operation."[37]

However the principal South African objection to the competence of the Court raises the more substantive question of whether a state can successfully prevent the giving of an advisory opinion on any question by simply proving that the matter before the Court discloses a dispute between itself and another state or a number of states. It is submitted that the answer must be in the negative and that the doctrine of the 1923 Advisory Opinion on Eastern Carelia must be deemed to have been displaced by the amendments made in 1927 and 1929 respectively to the Rules of the P.C.I.J. and Statute of the P.C.I.J.

In 1923 the Rules of the P.C.I.J. did not provide for the appointment of judges ad hoc when advisory opinions were sought on matters disclosing a dispute between two or more states. It was therefore natural that the Court should wish to avoid giving advisory opinions in such contentious or quasi-contentious disputes. In 1927, what was then Article 71 of the Rules of the P.C.I.J. was amended by the addition of a paragraph permitting the appointment of judges ad hoc when an advisory opinion was sought on a question relating to an existing dispute between two or more States.[38] In 1929 the Statute of the P.C.I.J. was amended by the adoption of Article 68 providing that in advisory proceedings the

Court may be guided by the provisions of the Statute applying to contentious cases.

These amendments, it is submitted, represent a current of thought moving in the direction of a deliberate - albeit cautious - attempt to diminish the importance of the doctrine of the consent of states to the jurisdiction of the Court.

The decision in the Eastern Carelia Case was based on the doctrine that the Court ought not to give advisory opinions in disputes which affect the rights and duties of states without their consent and participation. The provision of judges ad hoc to be appointed by a State whose rights were involved in a question submitted for an advisory opinion can be viewed as a compromise between two opposing trends of thought - one in favour of introducing advisory opinions freely and without the consent of affected states, and the other representing the classical doctrine described by the Eastern Carelia Case.

If the interests of a state were involved in a question submitted for advisory opinion the appointment of a judge ad hoc would assure the State concerned that its interests would be viewed through the perspective of one thoroughly familiar with them - even if the judge ad hoc expressed his opinion in a dissenting capacity, this would have, to quote Judge Dillard again, "added rather than detracted from the probative value of the Opinion."[39]

The political desirability of the device of judges ad hoc is one thing, it is however not consistent with the idea of the Court as an independent tribunal which does not represent any particular national interest. On the other hand, the partiality of one judge is unlikely to sway the decision of the Court as a whole which proceeds on the majority principle. At the same time the institution of a judge ad hoc emphasises the principle that not only must justice be done but must be seen to be done.

The fact that the Rules of the Court provided for the appointment of judges ad hoc in Advisory Opinions on questions of a contentious (or justiciable) nature indicates that the Court could - as from 1927 at least - exercise its advisory jurisdiction in such matters.

Article 36 of the Statute of the I.C.J. provides that the jurisdiction of the Court comprises - inter alia - "all matters specially provided for in the Charter of the United Nations...." These words are new in the sense that they did not appear in the Statute of the P.C.I.J. The inference to be drawn is that they must have been intended to mean something more than was specified in the Statute of the P.C.I.J. and the sweeping nature of the phrase "all matters specially provided for in the Charter of the United Nations" leaves little doubt that the jurisdiction of the Court was intended to be as wide as possible.

It may be argued that Article 36 refers to contentious matters only and that therefore the above quoted words, although they may be of some significance to the Court's contentious jurisdiction, are of no relevance to the Court's advisory jurisdiction. However, Article 36 does not necessarily lend itself to such a narrow interpretation; it refers to "the jurisdiction of the Court" and does not limit itself to contentious jurisdiction. Moreover, this Article appears in Chapter II of the Statute entitled "COMPETENCE OF THE COURT" which again seems to indicate a reference to the general jurisdiction of the Court encompassing both types of jurisdiction. In any case, even if Article 36 is construed as referring to contentious jurisdiction only, Article 68 of the Statute provides that "in the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognises them to be applicable."[40] Thus the Court is given a virtual carte blanche to make any provision in the Statute governing contentious jurisdiction - including Article 36 - applicable to the Court's advisory jurisdiction to the extent that it is inherently capable of such application. This marks the culmination of the trend to assimilate advisory jurisdiction with contentious jurisdiction.

In the Peace Treaties Case, the I.C.J., after affirming the principle of consent as crucial to its contentious jurisdiction, added:

"The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States... no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion...."[41]

It must also be noted that the constitutional basis of the I.C.J. is not the same as that of the P.C.I.J. The latter was not a part of the League of Nations whereas the I.C.J.'s Statute is an integral part of the Charter and the I.C.J. is an organ of the United Nations.[42] This implies a duty on the part of the I.C.J. to co-operate with the other organs of the United Nations; particularly the General Assembly and the Security Council, in all legal questions arising during the course of the exercise of their functions under the Charter. Thus if an organ seeks legal clarification on any aspect of its functions it has the right to seek an advisory opinion from the I.C.J. which has corresponding obligations to give the opinion - and this even if it involves pronouncing upon issues on which radically divergent views exist between two or more states.

To return to the South-West Africa Opinion of 1971, South Africa requested the appointment of a judge ad hoc to sit on the Bench on the grounds that there was a dispute between it and other states.[43] The Court by its Order of 29 January, 1971 rejected South Africa's request. The rejection implied that the Court did not consider that there was a legal question pending between two or more states within

Article 83 of its Rules.[44]

At the time of the Order of January 1971 the Court had not yet given its Advisory Opinion (which was given on June 21, 1971). It is submitted that the Opinion did disclose a dispute of a contentious nature between South Africa and other states. This dispute consisted of several questions: the legality of the resolutions of the General Assembly and the Security Council; whether or not South Africa had violated its obligations under the Mandate; the survival of the Mandate and the legality of the termination of the Mandate by the General Assembly. On all these questions South Africa had views which conflicted with the views of the majority of states of the United Nations, while the nature of the question presented to the Court could not be answered by it without pronouncing on these questions directly or indirectly.

Under Article 68 of the Statute the Court should, in the exercise of its advisory functions, be guided by the provisions of the Statute applying to contentious cases to the extent that it recognises them to be applicable. In view of this article, and in view of Article 83 of the Rules as well as the contentious nature of the question before the Court, it should have acceded to the South African request for a judge ad hoc.[45]

The purpose of Article 68 of the Statute is to console the State whose interests are affected in an advisory opinion that these

interests will not be ignored. In such situations the Rules recognise the right of a State to participate in advisory proceedings by appointing a judge ad hoc under Article 31 if the Court does not already include upon the Bench a judge of that State's nationality. This is the objective situation resulting from Articles 68 and 31 of the Statute, Article 83 of the Rules and the nature of the question before the Court. Indeed the Court has the power to appoint a judge ad hoc even if Article 83 of its Rules is not invoked. But even when Article 83 of the Rules is invoked, the Court has to consider whether the request for advisory opinion relates to a legal question actually pending between two or more states, not in case it should declare its lack of jurisdiction, but in order to take that factor into account in the procedure to be followed and with respect to the applicability of the rules concerning judges ad hoc to be appointed under Article 31 of the Statute and generally, in the exercise of its discretion under Article 68 of its Statute.

For this reason a categorical finding by the Court that the question submitted to it in 1971 clearly disclosed legal questions of a contentious (i.e. justiciable) nature would not have negated its jurisdiction to give the Opinion, nor would such a finding have affected the answer actually given by the Court.

On the other hand, by refusing a judge ad hoc the Court in effect prejudged the question irremediably. It implied that there was no

legal question within Article 83 of its Rules so that questions such as whether a dispute existed, what it consisted of and who the parties might be were all disposed of *in limine litis*. Yet the Court, when delivering its Opinion in 1971, expressly stated that it was making no specific finding as to the existence of a dispute[46] - a question which it had already impliedly decided by rejecting the South African request for a judge *ad hoc*.

In this respect the 1950 Advisory Opinion is interesting. The Court came very close to admitting that there was a contentious issue, but it nevertheless gave an Advisory Opinion. However the points to note here are that the issue was one between South Africa and the General Assembly (which does not possess international personality). Secondly, the relevant question from the General Assembly itself expressly requested the Court to pronounce upon whether or not South Africa had any international legal obligations. Thirdly the General Assembly was lawfully authorised under the Charter to request Advisory Opinions and had done so according to law.

So far attention has been focussed only on what might be called the "negative" aspects of the I.C.J.'s advisory jurisdiction. It has been seen how under the classical approach the presence of a justiciable issue as defined above renders the Court *incompetent* to exercise advisory jurisdiction. It was also shown how this approach

is now obsolete and does not serve as a useful guide in distinguishing between the two types of jurisdiction.

What then are the positive factors which confer advisory jurisdiction? The answer is, in part, provided by the 1971 Opinion on Namibia. The Court held that it ought not in principle to refuse to give an advisory opinion especially since under Article 92 of the Charter it is the "principal judicial organ of the United Nations".[47] The Court held that so long as the matter disclosed a "legal question"[48] the Court would feel free to give an opinion even if in doing so it would have to make certain fact findings and pronounce on legal issues upon which different and opposing views existed.[49]

The other factor is of course that only certain bodies have the legal competence to move the I.C.J. to give an advisory opinion under Article 96 of the Charter.

The principle of consent of an interested State is not per se relevant in the exercise of advisory jurisdiction. It only becomes incidentally relevant once a matter is determined by the Court to be contentious - in which case the Court may, according to the discretion vested in it under Article 68 of its Statute, apply such rules governing contentious proceedings as it deems applicable, including those relating to the appointment of a judge ad hoc as explained above.

Finally, it should be noted that in advisory proceedings, even when they relate to questions pending between States, there are no "parties" in the sense in which States are parties in contentious proceedings. However States or organisations can in advisory proceedings provide the Court with information by means of written or oral communications.[50] However, decisions of the Court in contentious proceedings are binding[51] and under Article 94 paragraph 2 of the Charter the Security Council of the United Nations can take cognisance of any non-compliance with a judgment. This theoretically opens the way for steps to be taken by the Security Council against the defaulting state under Chapter VI or Chapter VII of the Charter.[52]

On the other hand, advisory opinions are not endowed with binding force either for the requesting organ or organisation, or for the States and organisations which provide information. This does not however mean that advisory opinions are of no legal force at all. As held by Judge Moore, and approved by Judge Winiarski, in the Peace Treaties Case: "if the opinions are treated as mere utterances and freely discarded, they will inevitably bring the Court into disrepute....

"(T)he Court must, in view of its high mission, attribute to them great legal value and a moral authority."[53]

Indeed as far as the doctrinal authority of Advisory Opinions and

judgments is concerned the pronouncement of the Court under either must enjoy equal authority. As Judge Visscher has observed:

"Dans le plan de leur autorité doctrinale, il n'y a guère de distinction à faire entre arrêts et avis."[54]

PART III

THE LEGAL SITUATION OBTAINING UNDER THE CHARTER OF THE UNITED NATIONS

CHAPTER IX:

THE APPLICABILITY OF CHAPTER XII OF THE CHARTER TO THE TERRITORY OF SOUTH-WEST AFRICA

I. Obligations under Chapter XII

In the 1950 Opinion on the International Status of South-West Africa the I.C.J., dealing with the second question put to it by the General Assembly, held that territories under Mandate were not by the Charter automatically placed under the new International Trusteeship System, which, according to Articles 75 and 77, applied only to territories placed thereunder through Trusteeship Agreements.[55]

It is proposed here to discuss the extent to which Chapter XII of the Charter is applicable to the South-West Africa Mandate and the nature of the Mandatory's obligations under Chapter XII. The Court stated as indicated above that there was no automatic substitution of the Trusteeship System to the Mandates after the dissolution of the League of Nations. In discussing the applicability of Chapter XII a critical evaluation will be made of the I.C.J.'s handling of this issue in 1950.

The Court held that Chapter XII was applicable to South-West Africa only in so far as that territory could be placed under the Trusteeship System of the United Nations. The Court construed the language of Article 75 and 77 as not imposing a duty to place the territory under the Trusteeship System. The Court drew attention to what was in its opinion the permissive wording of Article 75: "as may be placed thereunder".[56]

The Court also observed that a Trusteeship Agreement presupposed the consent of both parties, so that Article 77 paragraph 2 was construed by the Court as presupposing agreement not only as to the particular terms of Trusteeship Agreements but also as to which territories would be brought under the Trusteeship System.

Dealing with the argument that Article 80 paragraph 2 of the Charter imposed on Mandatory States a duty to negotiate Trusteeship Agreements, the Court held that there could be no obligation to negotiate an agreement without an obligation to conclude it.[57] Paragraph 2 of Article 80 in the Court's opinion merely stated that the first paragraph of the same article should not be interpreted as a ground for delaying the negotiation and conclusion of agreements for placing mandated territories under the Trusteeship System as provided for in Article 77. The wording of Article 77 was however

permissive and not compulsory on the question of Trusteeship Agreements. For these reasons the Court concluded that South Africa was under no obligation to conclude a Trusteeship Agreement in respect of the territory of South-West Africa.

There is however room for the contrary argument. It can be argued that the more significant words of Articles 75 and 77 are imperative rather than permissive, so that South Africa has an obligation to conclude a Trusteeship Agreement. Article 75 of the Charter says: "The United Nations shall establish under its authority an international Trusteeship System...."[58] Article 77 says: "The Trusteeship System shall apply...."[59]

Judge De Visscher who dissented with the majority of the Court in the 1950 Opinion, had similar views although he limited his argument by holding that the provision of Chapter XII did not impose an obligation on South Africa to conclude a Trusteeship Agreement in the sense that it was free to accept or to refuse the particular terms of a draft agreement.[60] Judge De Visscher held nevertheless that the provisions imposed an obligation on South Africa to take part in negotiations in good faith with a view to concluding an agreement.[61]

Difficulties of interpretation have arisen over the word "voluntarily" which appears in Article 77 only in respect of

territories in category (c). The Court in 1950 dismissed the argument which Judge Krylov, dissenting, appeared to support, that this word, used only in category (c) of Article 77, showed that the placing of other territories under Trusteeship was compulsory. The Court was of the Opinion that the word "voluntarily" was added ex abundanti cautela and as a further assurance of "freedom of initiative to states having territories falling within that category".[62]

Judge De Visscher, while not accepting the argument rejected by the majority Opinion, gave a different interpretation which is at the same time a more convincing interpretation than that of the majority. He construed the word to refer to the unilateral act of a state deciding to place a territory under the Trusteeship System BEFORE concluding an agreement under Chapter XII.[63] He submits that "it would be distorting the natural meaning of the word "voluntarily" and depriving it of its signification in the context to treat it as an equivalent of by agreement, thus making it a synonym to the terms 'by means of Trusteeship Agreements' which appear at the beginning of Article 77, or the terms 'a subsequent agreement' in paragraph 2 of the same article. The Trusteeship Agreement is a condition common to the three categories of territories enumerated by Article 77... whereas... the voluntary decision...

in category (c), is a condition peculiar to the last category. The decision precedes the agreement!"[64] In this way the term "voluntarily" in category (c) showed that it was only the conclusion of Trusteeship Agreements under category (c) of Article 77 that was free from any pre-existing obligation, even in the realm of negotiations; for there need never be any negotiations at all in placing a territory in this category under the Trusteeship System. In Judge De Visscher's opinion, the absence of pre-existing obligations in respect of territories falling under category (c) becomes understandable if that category is compared with the other two categories in Article 77. The territories under categories (a) and (b) reflected an international element or an international interest in one way or another: territories under category (a) were already subject to an international regime while those under category (b) had been won by the Allied Powers from defeated enemy States. For this reason, Judge De Visscher maintains, territories under the latter two categories were "prima facie the necessary objects of regulation by international agreement",[65] hence the obligation on Mandatory Powers to enter into negotiations for the conclusion of Trusteeship Agreements. Whereas the position of territories in category (c) was different, and for this reason complete freedom was, in his opinion, left to states responsible for their administration to place them

"voluntarily" under the Trusteeship System and "consequently to consent to negotiations to that effect or to refuse to take part in such negotiations".[66]

Does Judge De Visscher's argument imply the absence of pre-existing obligations in the conclusion of Trusteeship Agreements under category (c) ONLY if the territories in that category have first been placed under the Trusteeship System? It is submitted that he should not be so understood for he says earlier: "The term 'voluntarily'... shows that it is only with regard to territories in category (c) that the conclusion of a Trusteeship Agreement has been contemplated by the Charter as being free from any pre-existing obligation, even in the realm of negotiations."[67] This statement is not qualified or its meaning restricted to instances where territories are "voluntarily" placed under the Trusteeship System before conclusion of an agreement. Thus Judge De Visscher should be understood as saying that states have no obligation either to negotiate or conclude agreements in respect of territories administered by them and falling in category (c) of Article 77. Such an obligation arises under categories (a) and (b) only because territories under these two categories have an "international element" (to use Judge De Visscher's words). If territories under category (c) are ex hypothesi those territories not

involving any international interest then the necessity for international regulation and supervision becomes inapplicable.

This comparison between the differing interpretations to the word "voluntarily" in Article 77(1)(c) given by the minority Opinion and by the dissenting Judge De Visscher has been made to lay the framework for the argument to be made below that South Africa CAN be considered to be under an obligation to conclude an agreement with the United Nations in respect of South-West Africa.

It is submitted that it is highly improbable that category (c), a category so obviously dissimilar in wording and therefore in meaning from categories (a) and (b), would have been added to Article 77 without any purpose or as the Court in the majority Opinion of 1950 would have it, "out of an abundance of caution".[68] The imperative wording of Articles 75 and 77 (quoted above) prevent South Africa, as a signatory to the Charter, from refusing to engage in any form of dialogue with the United Nations for the conclusion of a Trusteeship Agreement. Thus states administering any of the territories mentioned in Article 77 have an obligation to commence negotiations for the conclusion of Trusteeship Agreements UNLESS this obligation is specifically waived or suspended by the Charter in respect of any particular category or categories of territory. There

is such a specific waiver in respect of category (c) so that the obligation does not apply to that category. But as the territory of South-West Africa does not fall under category (c), and as, in fact, it falls under category (a), the obligation of the Mandatory to commence negotiations with the United Nations for the conclusion of a Trusteeship Agreement continues.

Even Judge De Visscher's view that the Mandatory is under an obligation to negotiate as opposed to "conclude" an agreement is open to challenge. He submits that certain words of Articles 75, 77 and 79 are permissive so that "the Mandatory Power (is) free to accept or to reject the terms of a proposed agreement."[69] He thus views a Trusteeship Agreement as something "proposed" by the United Nations unilaterally while the Mandatory remains "free to accept or reject the terms" of the Agreement. However a Trusteeship Agreement is not given "ready-made" to the Mandatory for its acceptance or rejection but is a product of negotiation by <u>both</u> parties, and the end product is as much a product of the United Nations as of the Mandatory. No wonder, then, that Judge De Visscher is forced to reach the conclusion that "it is impossible... to reconcile these permissive provisions (i.e. of Articles 75, 77 and 79) with Article 80 paragraph 2, and with the clear intent of the authors of the Charter to substitute the Trusteeship System for the

Mandates System...."[70]

It is submitted that the distinction drawn by the majority opinion and by Judge De Visscher between the negotiation of an agreement and its conclusion would be meaningful if there is an absence of obligation to negotiate; that given the obligation to negotiate the distinction between negotiation and conclusion is in practice more apparent than real. An obligation to negotiate implies the good faith of both the parties who must make reciprocal concessions in the interest of arriving at a common agreement. Thus if there is an obligation to "negotiate" (as Judge De Visscher himself held[71]) then both parties must in good faith make concessions and arrive at some reasonable compromise acceptable to both.

Moreover Article 80 paragraph (2) provides: "Paragraph 1 of this Afrticle shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated territories under the Trusteeship System as provided for in Article 77."[72] It will be seen that the paragraph does not refer to "the negotiation" of agreements only. Had this been the case there would have been some arguments for the view that "negotiation" does not mean "conclusion". It is reasonable to deduce from Article 80 that paragraph 2 which mentions "the conclusion" in addition to "the

negotiation" had in view the end product of negotiation, i.e. a concluded agreement.

This is particularly so in the South-West Africa dispute. The opening of negotiations and their object in this case would be only to apply principles forming part of a pre-established international regime - the rules of which bound South Africa as a Mandatory, as the I.C.J.'s unanimous decision in respect of question (C) shows.[73] The opening of these negotiations - to implement a pre-existing international regime-was intended to be the decisive step towards the conclusion of an agreement.

Thus Judge Krylov, dissenting, says: "In barring expressly the possibility of postponing or delaying the negotiation and the conclusion of Trusteeship Agreements, Article 80 paragraph 2, implies the existence of a legal obligation to negotiate with a view to concluding such agreements. Any other interpretation would deprive Article 80 paragraph 2, of any meaning whatever, which would be contrary to a well-established rule of interpretation of international treaties."[74]

Judge Alvarez, another dissenting judge, went a step further than any other judge of the Court and asserted that ".... South Africa is under a legal obligation not only to negotiate this (i.e. Trusteeship) Agreement, but also to conclude it." He further said: "This obligation derives from the spirit of the

Charter which leaves no place for the future co-existence of the Mandates System and the Trusteeship System. The latter alone must exist...."[75]

As for the permissive wording of Articles 75 and 77, Judge Alvarez argued that this could be used to support the argument that there is no obligation to conclude the agreement as well as for the argument that such an obligation exists.[76]

Judge De Visscher cited a case decided by the P.C.I.J. to support his view that an obligation on the part of South Africa to negotiate did not involve an obligation to conclude an agreement.

The case was the P.C.I.J.'s Advisory Opinion on "Railway Traffic Between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)"[77] This case involved relations between Lithuania and Poland. The Council of the League of Nations adopted a resolution on December 10, 1927, which read in part as follows: "The Council of the League of Nations

Declares that a state of war between two Members of the League is incompatible with the spirit and the letter of the Covenant, by which Lithuania and Poland are bound... (and).... Recommends the two Governments to enter into direct negotiations as soon as possible in order to establish such relations be-

tween the two neighbouring states as will ensure 'the good understanding between nations upon which peace depends'...."[78]

Poland took the view that this resolution accepted by both governments established an obligation on Lithuania not only to negotiate but also to conclude an agreement with Poland for the re-opening of the Landwarów-Kaisiadorys railway sector to traffic.

The P.C.I.J. held that under the resolution the two governments must "not only enter into negotiations, but also pursue them as far as possible, with a view to concluding agreements.... But an obligation to negotiate does not imply an obligation to reach an agreement...."[79] so that Lithuania was not under an obligation to conclude an agreement to re-establish the railway sector in question.

Judge De Visscher cited the above dictum in support of the arguments that South Africa was likewise not under an obligation to conclude a trusteeship agreement over South-West Africa.

The above P.C.I.J. case does not however support Judge De Visscher's argument since it is clearly distinguishable from the South-West Africa case. The alleged obligation to conclude an agreement in the "Railway Traffic Case" was contained

in a mere resolution of the Council of the League - whereas the obligation in question in the South-West Africa case is contained in an international treaty, namely the United Nations Charter. A short digression is necessary to explain the latter part of this proposition.

A. *The Treaty-Making Power of the United Nations*

It is necessary to distinguish between two juridical positions resulting from the Charter: (a) That the terms of the Charter constitute an agreement between each individual member of the organisation on the one hand and the United Nations on the other. This is assuming that the United Nations has international personality and treaty-making power. The I.C.J. seems to have supported this position in the case concerning the "Reparation for Injuries Suffered in the Service of the United Nations";[80] and (b) That the terms of the Charter constitute an international agreement between each United Nations Member State and every other, on a bilateral as well as a multi-lateral basis.

For the purpose of holding that South Africa's obligation in respect of South-West Africa is international in character either position (a) or (b) above can provide an adequate juridical basis for the argument. But when the discharge of that

international obligation is considered it can be seen that only position (a) above can serve as a proper legal foundation since the obligation is to be discharged by executing an agreement between South Africa and the United Nations. This is possible only if the United Nations has treaty-making powers.

In examining the legal basis of such a power it is necessary to give a brief consideration to the treaty-making power of the League of Nations. This question is of great significance in view of the theory of the transmission of powers of the League to the United Nations.

Assuming that the United Nations' General Assembly was not to exercise a greater degree of supervision than that previously exercised by the League,[81] it could be be argued that if the Mandates could not be classified as "treaties" between the League and the Mandatories then there is no legal basis for the argument that Mandates should now be replaced by Trusteeship Agreements between the United Nations and the remaining Mandatories.

For the League to be able to be a "party" to the Mandate Agreements it must have had legal personality - at least for the purposes of the conclusion of the Mandate Agreements.

Wright describes three theories prevailing in the 1920's

regarding the legal nature of the League of Nations: (1) that the League had no personality at all; (2) that the League was a partnership or a purely contractual association; (3) that the League was a corporation or a legal personality.[82]

After considering the weight of authority behind each theory he concluded that the last theory was the most generally accepted and he cites numerous authorities who supported this theory.[83] Lending his own support to this theory Wright observes:

"The Covenant clearly gives the Council power to act for the League in regard to Mandates; thus we may consider that the confirmation and definition of the mandates by the Council made the League, as a corporate personality, a party to these acts along with the Principal Powers and the Mandatories."[84]

This is quite consistent with the submissions made in Chapter VI regarding the international status of Mandates. It was there submitted that Mandates were international "treaties" in the usual sense of that term and that the Mandatory on the one hand and the League on the other were parties to these treaties. The Mandates could not have possessed an international status if the League did not possess an international legal personality at least for purposes of the conclusion of these agreements.

If the Mandate Agreements possessed an international status,

and if the League had the corporate international personality to conclude these Agreements, and if the United Nations was to have inherited the supervisory powers of the League, the United Nations must be deemed to have the legal capacity to conclude Trusteeship Agreements. If not, the entire Trusteeship System envisaged by Chapter XII of the Charter of the United Nations collapses.

There are dicta of the I.C.J. to support the view that if the United Nations has a power to do a certain act which act can only be done on the international plane then it must be deemed to have the international personality at least for the purposes of doing the act in question. Referring to the United Nations, the I.C.J. in the "Reparation for Injuries Case," said that the United Nations "... must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[85]

In the "Certain Expenses Case" the I.C.J. held that the expenses in question were validly incurred as they were within the purposes of the United Nations. In this way the Court found that the United Nations could bind its Members on the international plane by doing an act which is in pursuit of its lawfully authorised purposes. The Court said that if the United

Nations "... takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organisation."[86] In other words, if an act of an Organisation is done in pursuit of one of the recognised purposes of the Organisation it will be deemed to have the legal competence or capacity to do the act in question. The I.C.J. had affirmed this principle long before the "Certain Expenses Case" in 1949 in the "Reparation for Injuries Case":

"It must be acknowledged that its (i.e. the United Nations') Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged."[87]

Using the same principle, as the creation of an international Trusteeship System is clearly one of the lawfully authorised purposes of the United Nations, it must be deemed to have the requisite competence to carry out that purpose. In so far as this purpose can only be pursued on the international plane and because the complex of rights and duties thereunder cannot operate, to borrow the I.C.J.'s phrase in the "Injuries Case", "except upon the international plane and as between parties possessing international personality", the United Nations must be regarded as possessing the requisite international capacity

to implement the Trusteeship System.[88]

The foregoing clarifies the differences in the nature of the "obligation" in the "Railway Traffic Case" decided by the P.C.I.J. in 1931 and the South-West Africa Case. The obligation to conclude a Trusteeship Agreement in the latter case is contained in an international treaty between South Africa and the United Nations as two distinct international personalities. Whereas the obligation" to negotiate in the former case was embodied in a mere resolution of an organ of the League. The practice of the United Nations is that the resolutions of its organs are not generally internationally binding except under certain carefully defined circumstances. There is no reason for not extending this principle to resolutions of the organs of the League. In the "Railway Traffic Case" the resolution concerned merely "recommended" certain action - no-where under the Covenant could a recommendation of an organ of a League bind its Members, and ordinary usage of the verb "to recommend" does not imply an obligation.

It is not surprising therefore that the P.C.I.J. in the above case was not prepared to hold that the League's resolution of December 10, 1927 imposed an obligation on Lithuania to negotiate and conclude an agreement with Poland for the re-establishment of the railway.

An alternative ground pleaded by Poland was Article 23(e) of the Covenant. This Article provided: "Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League...."

Poland argued that the above article imposed an obligation on Lithuania as a signatory to the Covenant, to conclude the agreement in question with Poland.

Prima facie this serves as a very powerful argument in Poland's favour. It was submitted earlier that the United Nations' Charter can be regarded as an international treaty between each of its Member States and the United Nations (as a separate international person), and between each Member. The argument can be extended to the League Covenant which can be regarded as an international treaty between each individual member of the League and the League itself and between every member of the League. Yet the Court held that even Article 23(e) of the Covenant did not impose an obligation on Lithuania to conclude the agreement in question.[89]

Does the P.C.I.J.'s rejection of Poland's argument under Article

23(e) of the Covenant also imply a rejection of the argument that the Covenant of the League was not an international instrument establishing international obligations? If the answer is in the affirmative, the validity of the above submission that the Charter of the United Nations is an international treaty between South Africa and the United Nations could come into serious doubt.

Poland had argued "that Article 23(e) of the Covenant constitutes an international engagement, obliging the Lithuanian State to open this (i.e. the Landwarów-Kaisiadorys railway) line".[90]

The P.C.I.J. was of course not directly concerned with the international character and status of the Covenant. However, its rejection of the Polish argument based on Article 23(e) of the Covenant does <u>not</u> imply a rejection of the argument that the Covenant was an international treaty between Lithuania and the League, and simultaneously between Lithuania and Poland, giving rise to international obligations. This is clearly supported by the reason given by the P.C.I.J. for rejecting the Polish argument. The Court said: "But it should be observed that Article 23(e) of the Covenant - whatever may be the obligations which do arise from it for States Members of the League of Nations - does not imply any specific obligations for these States to open any particular lines of communication."[91]

The use of the words "whatever may be the obligations which do arise from it (i.e. the Covenant) for States Members of the League of Nations" is significant for it shows that the Court was not finding that Article 23(e) did not contain an international agreement as contended by Poland. The reason for not holding Lithuania under the obligation in question was because Article 23(e) did "not imply any specific obligations for these States to open any particular lines of communication". Indeed it is possible to draw the inference a contrario that had Article 23(e) been specific enough it would have sufficed to impose an international obligation on Lithuania.

If the P.C.I.J. cannot be said to have rejected the view that the Covenant was an international treaty, the argument that the Charter of the United Nations is an international treaty emerges unscathed.

Summary

One may, in view of the foregoing, summarise the arguments so far as follows: (1) South Africa, in view of the term "voluntarily" in Article 77(1)(c) of the Charter of the United Nations, is under an obligation to place the territory of South-West Africa under the Trusteeship System as the territory falls in category (a) of Article 77(1).

(2) South Africa is in view of this and in view of Article 80 paragraph 2 under an obligation not only to negotiate for a Trusteeship Agreement but also to conclude it.

(3) South Africa, by virtue of its membership of the United Nations, is a party to an international treaty vis-a-vis the United Nations and each of its Members.

(4) As such South Africa's obligations are international in character.

(5) Such a situation is to be distinguished from one where a resolution of an organ of the United Nations (or of the League) "recommends" a given course of action.

(6) The obligation in (4) above is always binding while that in (5) above is not generally binding.

(7) The resolution of the League in the "Railway Traffic Case" referred to "negotiations" only whereas Article 80 paragraph 2 of the Charter (the ultimate source of the obligation to conclude a Trusteeship Agreement) refers to "the negotiation and conclusion of agreements" so that whatever may be the arguments under the above resolution, Article 80 must be regarded as envisaging the end product of negotiation, namely, a concluded Trusteeship Agreement.

(8) The "Railway Traffic Case" is distinguishable from the South-West Africa Case on the ground that Article 23(e) of the Covenant was not specific enough to impose particular obliga-

tions, whereas the Charter of the United Nations is quite specific in that it devotes an entire Chapter to the establishment of the International Trusteeship System, while the articles of Chapter XII of the Charter including Article 80 paragraphs 1 and 2 make constant reference to trusteeship agreements.

(9) South Africa may be said to be under an international obligation (a) to the United Nations and (b) to every Member State of the United Nations to conclude a Trusteeship Agreement over South-West Africa, while the source of that obligation is the Charter of the United Nations.

Other Legal Grounds Within Chapter XII and Outside It For The Obligation To Conclude a Trusteeship Agreement

It may be argued that the juridical link between South Africa's obligation to account to the United Nations in respect of the Territory of South-West Africa and its obligations under the old regime created by the Mandate System is provided by Article 76 and Article 80 paragraph 2 of the Charter. Article 76 provides in part that the "basic objectives of the trusteeship system (are) in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter...."

The Mandatory must therefore show its willingness to implement Article 1 by entering into negotiations for the conclusion of a

Trusteeship Agreement in respect of South-West Africa not only because Article 76 expressly refers to Article 1 but also because such an Agreement appears to be the most practicable means of implementing the principle of self-determination[92] affirmed in Article 1 paragraph 2.

It might however be argued that Article 76 expressly links Article 1 with "the trusteeship system" so that Article 1 is not applicable to territories NOT placed under the trusteeship system; that since South-West Africa is not a territory subject to the trusteeship system, Article 1 is not applicable in respect of it so that South Africa is under no obligation to implement Article 1.

There are four arguments available to rebut this genre of argument, the first two are based within Chapter XII of the Charter while the third and the fourth arguments are based outside Chapter XII and are independent of it.

Firstly, as shown in the previous section the obligation exists independently of any Mandatory Power's willingness to place its mandated territory under the Trusteeship System, and the refusal of a Mandatory to do so constitutes a breach of an international obligation. It is this type of breach which has resulted in South-West Africa not being brought under the trusteeship system. South Africa cannot plead its own international delict either as

a justification for the existing state of affairs or as a defence against the argument made above concerning its obligations under Article 1 via Article 76. It is a commonly accepted principle of the principal legal systems of the world that one cannot plead one's own wrongdoing as a defence to a charge against a particular act or situation resulting from that originally illegal act. The P.C.I.J. affirmed a similar principle in its Advisory Opinion on the "Jurisdiction of the Courts of Danzig". It held that a State cannot avail itself of an objection which would amount to a reliance on the non-fulfilment of an obligation imposed on it by an international engagement.[93]

Therefore, Article 76 still applies as does Article 1 and South Africa is under an obligation to implement Article 1 through a Trusteeship Agreement.

Secondly, Article 80 paragraph 1 provides in part that "nothing in this Chapter shall be construed in or of itself to alter in any manner... the terms of existing international instruments to which Members of the United Nations may respectively be parties." The phrase "nothing in this Chapter" obviously includes all the provisions of the Charter in general and, in this context, Article 76 in particular. The phrase "the terms of existing international instruments to which Members of the United Nations may respectively be parties" arguably includes the terms of the Mandate if the

Mandate is deemed to be an "existing international instrument".

The I.C.J. in its 1950 Opinion clearly regarded the South-West Africa Mandate as an existing international instrument in answering question (a) of the General Assembly. This question has already been discussed in detail elsewhere[94] and will not therefore be discussed here. It suffices to emphasise only the following: (A) The Court in 1950 considered itself to have jurisdiction under Article 37 of its Statute since Article 80 paragraph 1 of the Charter preserved Article 7 of the South-West Africa Mandate from lapsing. (B) It will be noted that the opening words of Article 37 of the Statute of the I.C.J. are "treaty or convention in force" - a reference to valid international treaties. Therefore, the I.C.J. could have validly exercised jurisdiction in the 1950 Opinion only (1) if the Mandate was an international treaty and (2) if the Mandate was still valid and "in force" within Article 37, and was an "an existing international instrument" within Article 80 paragraph 1.

Thus as Article 80 paragraph 1 of the Charter provides that "nothing in this Chapter shall... alter in any manner... the terms of existing international instruments" to which United Nations Members may be parties, it precludes South Africa, as a Member of the United Nations that is a party to the Mandate - an existing international treaty[95] - from arguing that Article 76 of the

Charter renders inapplicable the provisions of Article 1 of the Charter. This is because, in respect of South-West Africa, the important parts of Article 1 are paragraphs 2 and 3 whose aims coincide substantially with the humanitarian objectives of certain terms of the Mandate itself, notably the 2nd paragraph of the Preamble making reference to Article 22 of the Covenant, Article 2 and Article 5. A denial by South Africa of the applicability of Article 1 of the Charter to South-West Africa would also mean a denial of the applicability of the above terms of the Mandate - which South Africa has always been precluded from doing by virtue of Article 80 paragraph 1 of the Charter.

Paragraph 2 of Article 1 of the Charter refers to the principle of self-determination of peoples as one of the principles which the United Nations shall strive to promote. The corresponding reference to a similar concept in the Mandate System is in Article 22 of the Covenant referred to specifically by the Preamble and in Article 2 of the Mandate. The philosophy behind the "tutelage" created by Article 22 in respect of territories "inhabited by peoples not yet able to stand by themselves" was the preparation of these people for self-government or self-determination.

Paragraph 3 of Article 1 of the Charter refers to the promotion of human rights and fundamental freedoms for all without dis-

tinction as to race, sex, language or religion. A similar idea is reflected generally under Article 2 paragraph 2 of the Mandate in the words "the material and moral well-being and... social progress of the inhabitants" which the Mandatory undertook to promote. Further, Article 5 of the Mandate specifically obliged South Africa to promote "freedom of conscience and the free exercise of all forms of worship" while Article 22 paragraph 6 of the Covenant expressly refers to South-West Africa which the Mandatory is to administer "subject to the safeguards above mentioned in the interests of the indigenous population" - the safeguards" being "the maintenance of public order and morals" and the "freedom of conscience and religion" and "the prohibition of abuses such as slave trade...." etc. referred to in Article 22 paragraph 5 of the Covenant.

Thus if the South-West Africa Mandate was an existing international treaty then South Africa was under an obligation to observe its terms. South Africa however has actually been in breach of these terms. The basic illegality of its administration of the territory was pointed out as early as in 1929: "The definite purpose of the Union Government is to erect South-West Africa into a fifth province of the Union which would mean definitely a complete assimilation of native policy to that in the Union, which now adopts the principle of colour bar excluding natives from

skilled work. It is clear that such unification would run counter to the terms of the Mandate, and that strictly speaking it should be possible only if the Mandated territory is first advanced to the rank of freedon from mandate."[96] The existence of this breach makes the conclusion of the Trusteeship Agreement all the more imperative.

It is therefore submitted by way of conclusion that, in view of Article 80 paragraph 1 of the United Nations' Charter, South Africa could not deny the validity of the Mandate Agreement by invoking the dissolution the League of Nations. Nor could she deny the international character of the obligations thereunder. She could not, further, deny the applicability of Article 1 of the Charter via Article 76 to the mandate territory at least in so far as Article 1 coincided with the terms the Mandate as shown above.

It is now proposed to discuss the other two arguments based outside Chapter XII of the Charter for the view that South Africa is under an obligation to conclude a Trusteeship Agreement. As a member of the Organisation and as a signatory to its Charter, South Africa has, as explained above, incurred an international treaty obligation to observe its terms. South Africa is therefore, independently of Chapter XII, bound to promote Article 1, or at least, to do nothing to contravene the provisions thereunder. Not

only has South Africa not promoted or implemented Article 1 in relation South-West Africa, but, as explained above, has actively breached it.

If the Mandatory were to reverse its policies in favour of independence and self-determination for South-West Africa there would be compliance with Article 1 and there would then be no need for a Trusteeship Agreement. In the absence of such a development however, a Trusteeship Agreement is the only practical way of ensuring the development of the territory along the lines envisaged by Article 1.

Judge Krylov, who dissented with the Majority of the Court in 1950, suggested that a "territory under Mandate need not necessarily be placed under the Trusteeship System, because it may be proclaimed independent (and this is the only other possibility)". This supports the submission that if self-determination were granted to South-West Africa there would be compliance with Article 1, displacing the need for a Trusteeship Agreement. Thus in the absence of that only other possibility materialising, the obligation to conclude a Trusteeship Agreement prevails.

Finally, South Africa can be said to be under a similar though not identical obligation under another Chapter of the Charter, namely, Chapter XI. Under this Chapter "Members of the United

Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and to this end:

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

(b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions...."[97]

Hans Kelsen, who is of the opinion that Mandate Agreements ceased to be valid with the dissolution of the League, nevertheless argues that only the section of the Charter dealing with non-self-governing territories (i.e. Chapter XI) would be applicable to a former Mandate not placed under trusteeship.[98]

Indeed Premier Smuts after promising in 1946 to continue to submit reports to the United Nations proposed to send the first report under Chapter XI of the Charter - particularly Article 73(e).[99] In this way, "since the Union had neither annexed South-West

Africa nor placed it under the trusteeship system, South Africa presumed it had the same responsibilities which all United Nations Members had regarding non-self-governing territories."[01]

Chapter XI, particularly Article 77, refers to all non-self-governing territories generally, including trust and mandated territories. The wording of Article 73 is broad enough to render itself available to such generalised application. The relevant portion of Article 73 is "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government...." The same article then declares that these Members accept the "sacred trust" of developing these territories. This shows that mandate and trust territories could not have been intended to be excluded from the purview of Chapter XI.

Chapter XI therefore is another basis, independent of Chapter XII, for South Africa's compulsory international accountability over South-West Africa. This is despite the fact that it contains no reference to the trusteeship system - which is not of any consequence since the objectives of Chapter XI and the trusteeship system under Chapter XII are substantially the same.

Contemporary realities of Southern African politics show that

South Africa is not prepared voluntarily to discharge its international obligations over South-West Africa, and that the only non-violent means of ensuring compliance by the Mandatory with the principle of self-determination remains in obliging it to conclude a Trusteeship Agreement over the territory. To hold otherwise would be to support the status quo whereby the territory is in practice neither under the Trusteeship nor the Mandate system and is administered in circumstances that amount to a virtual annexation of that territory into that of the Mandatory - a situation patently inconsistent with the original objects of the Mandate System.[02]

The unlikelihood of South Africa's compliance with a call to conclude a Trusteeship Agreement cannot of course affect the legal position.

Finally it is submitted that Chapter XI upholds the policy and spirit, if not the letter, of the Mandate and Trusteeship system and, if only for this reason, it can be regarded as a source of the obligation to conclude a trusteeship agreement. In this regard reference may be made to two authorities. The first is the case of "The Blonde"[03] where it was held that in any analysis of the legal and constitutional basis of international instruments the primary duty of the Court is to attend to the objects and purposes of the document concerned and to avoid "a quibbling

interpretation" and "a merely pedantic adherence to particular words" and "to discover and to give effect to all the beneficient intentions" embodied in the instrument. The best way to give effect to the purposes of the Mandate for South-West Africa is to define the formula for the fulfilment of the sacred trust in a trusteeship agreement.

Lee warns that if the words "a sacred trust of civilisation are to be ignored then the mandatory system is a fraud from beginning to end, and merely a new method of imposing imperialistic will upon subject people."[04]

If it was the policy of the Mandate System to prevent annexation and the "imperialistic" domination of world Powers over weaker nations there is a certain irony in the situation in which South Africa finds itself especially when it is recalled that the immediate source of the concept behind the Mandate System was the brochure entitled, "The League of Nations - A Practical Suggestion" by that soldier-Statesman of none other than South Africa itself, General Jan Smuts.

The Implications of the Court's Answers to the First and Third Questions in the 1950 Opinion

There are strong arguments for the view that in the light of

the I.C.J.'s holding in respect of question (a), South Africa does have an obligation to conclude a Trusteeship Agreement over South-West Africa particularly since the Court, in answering the first question, relied on Article 80 paragraph 1 of the Charter. This is examined below. The answer of the Court to question (a) renders its answer to question (b) contradictory as will be seen presently.

It will be recalled that under the first question, the Court's answer was that South Africa had 2 types of international obligations, one corresponding to the "sacred trust of civilisation" which survived the League's demise, and the other relating to the "securities for the performance of this trust". The Court had held that supervision was an essential part of the Mandate System,[05] so that the sacred trust of civilisation could be effectively implemented. The necessity for supervision continued despite the disappearance of the supervisory organ under the Mandate System. In the Court's view Article 80 paragraph (1) confirmed this as it purported to safeguard "not only the rights of states but also the rights of the peoples of mandated territories until Trusteeship Agreements are concluded."[06]

The underlined words show that the Court viewed the provisions of Article 80 paragraph 1 as a transitional arrangement awaiting the conclusion of Trusteeship Agreements.[07]

The Charter, including Article 80, was signed on 26 June, 1945. The League of Nations still existed at this date. Before its dissolution the trusteeship system and Article 80 could not be implemented. As the states involved in the creation of the United Nations and the dissolution of the League of Nations were practically the same, it was possible to frame the Charter with the forthcoming liquidation of the League in mind.

Article 80 could not be applied at once. It had no function until the League was dissolved. The mandates were still exercised on behalf of the League and until its dissolution they could not be converted into trusteeship agreements, or come under the supervision of the United Nations. However as the dissolution of the League was imminent, there was going to be a period of inter-regnum - the time of dissolution of the League and the conclusion of trusteeship agreements to give formal recognition to the supervisory powers of the United Nations - when there was going to be a certain amount of uncertainty regarding the juridical standing of the Mandatories and the status of their territories. It was envisaged that eventually the Mandates would lapse. For this reason Article 80 instituted the transitional regime whereby the rights of States and peoples under the then existing international instruments were to be preserved until the trusteeship agreements were concluded. This had the dual purpose of

eliminating any potential uncertainties of the nature mentioned above and at the same time preserving the life of the Mandates until the trusteeship agreements were concluded.

Article 80 paragraph 1 uses the words "until such (trusteeship) agreements have been concluded". Thus Article 80 was to be applicable after the dissolution of the League and until the conclusion of such agreements; and it was not applicable, in relation to the Mandates, after the conclusion of the agreements.

To deny the correctness of the above interpretation or to contend that with the dissolution of the League the Mandates lapsed together with the obligations of the Mandatories would be to deprive the article of all practical meaning. A method of interpretation is surely unacceptable if it leads to the conclusion that an entire article in the Charter is totally pointless. Indeed Field Marshall Smuts, the Prime Minister of the Union of South Africa replied to a question put to him on the meaning of paragraph 2 of Article 80 by saying:

"That was to prevent a situation where the Mandatory says: 'I do not want to make an agreement at all'. He takes this position, that the League of Nations having disappeared we are now free, that we can do what we like."[08]

In the transitional period South Africa was internationally responsible for its mandate. Its obligation to submit to the supervision of the General Assembly does not appear to be viewed by the Court as a temporary feature but rather, the Court regarded the General Assembly as having permanently succeeded the League Council in matters of supervision of mandated and trust territories. This was the new form of "security for the trust" conceived by the Court.

However if the essence of the new system was to preserve the international obligations of the Mandatory from lapsing and if supervision by the General Assembly was to be a permanent feature of this new system, and if the effect of Article 80 paragraph 1 was to be of a transitional nature only as the Court itself seems to imply,[09] then there exists a logical necessity that the obligations of the Mandatory be incorporated in a new instrument between itself and the United Nations. This is a fortiori so when it is realised that the new supervisory authority is an organ of the United Nations.

Such an instrument would place the Mandatory's obligations on a much more solid foundation instead of basing these obligations solely on the rather nebulous concept of "the survival of a sacred trust of civilisation".

The Court was prepared to take the bold step of substituting the

General Assembly of the United Nations with authority to supervise the administration of Mandated territories in place of the Council of the League. This substitution, it is submitted, can be justified on sound legal principles. After the defeat of Germany and the signing of the Treaty of Versailles, it was originally the Supreme Council of the Allies which actually conferred Mandates. This happened even before the League of Nations was created. The highest international authority at that time was the Supreme Council of the Allied and Associated Powers. Yet all the Mandatories agreed to exercise their respective Mandates in the name of the League. The League's authority to supervise Mandates was never challenged as that was the new international authority which had succeeded the Supreme Council. For this reason, it is submitted, the United Nations is the highest international legal authority succeeding the League which must therefore be deemed to have taken over the functions of the League in just the same way as the League took over the functions of the Supreme Council of the Allies.

It will further be recalled that Bentwich's opinion is that the Mandatory has a "dual Mandate" - on behalf of the inhabitants of the territory and on behalf of the "International Society".[10] The trust on behalf of the latter, if not the former, survives to this date no matter how many times the formal structure of

the institution where the International Society is represented changes. Therefore the demise of the Supreme Council of the Allies and later of the League could not affect the international responsibilities of the Mandatories to the International Society as presently constituted.

The I.C.J., in the 1950 Opinion, arrived at a similar conclusion but for the following reason: "It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions."[11]

This is clearly an assertion that the United Nations as a successor to the League had overall responsibility for such supervision while one of its organs, the General Assembly, was to have particular authority to supervise. Having come this far it would have been a comparatively insignificant step for the Court to hold that the Mandatory had an obligation to conclude a Trusteeship Agreement with the United Nations. The Court said:

"It may (thus) be concluded that it was expected that the mandatory States would follow the normal course indicated by the Charter, namely, conclude Trusteeship Agreements. The Court is, however, unable to deduce from these general considerations any legal

obligations for mandatory States to conclude or to negotiate such agreements. It is not for the Court to pronounce on the political or moral duties which these considerations may involve."[12]

Against this, the words of Judge De Visscher are partinent: "I cannot readily believe that the authors of the Charter would have warned the mandatory powers, by means of an express and particularly emphatic provision, that the negotiation and conclusion of Trusteeship Agreements could not, by reason of the status quo temporarily guaranteedunder Article 80 paragraph 1, 'give grounds for delay or postponement' if the scope of this provision amounted simply to the expression of an expectation or, at the most, of a wish or an advice. The terms of Article 80, paragraph 2, do not favour this interpretation."[13]

However despite the Court's unwillingness "to pronounce on (the) political or moral duties" of South Africa it in fact, while answering the first question, did exactly what it professed it would not do when it answered the second question.

In answering the first question the Court held that the "raison d'être and original object" of the sacred trust remained despite the disappearance of the League. This is a clear departure from the narrow legalistic approach advocated by the Court in answering the second question. South Africa, according to the

Court continued to have international obligations since the original object of the Mandate remained unfulfilled. In declaring this the Court was attempting to give precedence to the policy and spirit of the Mandate in view of the changed circumstances of the international political situation after the war. An even more radical departure was the substitution of the General Assembly for the Council of the League on the ground that "the necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandate System".[14] The Court even cited Article 80 paragraph 1 in support although this Article makes no reference to the supervision of mandated territories by the United Nations.[15]

It is therefore submitted that, in the answer to the second question, a holding by the Court that South Africa was under an obligation to conclude a Trusteeship Agreement with the United Nations would have been no more a "political" decision than was its answer to the first question that South Africa's international obligations continued because the purpose of the sacred trust had to be fulfilled and that South Africa was under an obligation to submit to the supervision of the General Assembly since there was a "necessity" for such supervision.

Judge Fitzmaurice of the I.C.J., in his powerful dissenting opinion in the 1971 Case on South-West Africa, held that it was a

non sequitur to hold on the one hand that the General Assembly inherited the League Council's supervisory functions but that the Mandatory (South Africa) was under no obligation to conclude a Trusteeship Agreement on the other hand.

"It (i.e. the above holding) was tantamount to saying that although (as the Court found later in the same Opinion.....) mandatories were not obliged to place their mandated territories under trusteeship, yet for all practical purposes they had to accept United Nations supervision just the same whether or not they had placed the territories under trusteeship. This does not make sense. The result was that in effect the Court cancelled out its own finding that trusteeship was not obligatory.... The absence of any legal obligation to place mandated territories under trusteeship implied a fortiori, as a necessary implication, the absence of any legal obligation to accept United Nations supervision in respect of Mandates, or the one would be defeated by the other."[16]

Judge Fitzmaurice's argument is however at the other extreme: In his opinion not only did South Africa not have an obligation to conclude a trusteeship agreement, there was also no devolution of supervisory powers from the League to the United Nations. This argument is inconsistent with the contention of the present writer that South Africa is under an obligation to conclude a Trusteeship Agreement with the United Nations by reason of the fact that the United Nations inherited the Powers of the League in

relation to the supervision of Mandates. But Judge Fitzmaurice's argument shows that the decisions of the I.C.J. in 1950 on these two questions are contradictory from either point of view. The decision should have been EITHER that the United Nations did not inherit the supervisory powers of the League so that South Africa was under no obligation to conclude a Trusteeship Agreement OR that the United Nations inherited the supervisory powers of the League making the conclusion of a Trusteeship Agreement between South Africa and the United Nations obligatory. Since the I.C.J. found that the General Assembly did inherit the supervisory powers of the League it should also have found the Mandatory under an obligation to conclude the agreement.

This would have been quite consistent with the declaration of a delegate of South Africa itself at Geneva in 1946, made in relation to the Mandatory's proposal to incorporate the territory of South-West Africa into the territory of the Union. The delegate pledged that pending consideration of the proposal (which was eventually rejected) South Africa would in the meantime "... continue to administer the territory scrupulously in accordance with the obligations of the mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held." The delegate further declared: "The disappearance of (the) organs of the League concerned with the supervision of

mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with..... full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory."[17]

The statement shows firstly that South Africa was of the view that, firstly, it would honour its obligations without supervision (of the Mandates Commission); secondly that the League's dissolution would not "diminish" its responsibilities regarding the Mandate and thirdly that it would conclude "other arrangements" concerning the territory after the dissolution of the League.[18]

When considering the competence of South Africa to modify the international status of South-West Africa the Court held that the former had no power to modify the status of the territory because the status was a product of international rules regulating rights, powers and obligations relating to the administration of the territory and supervision of that administration as embodied in Article 22 of the League Covenant and in the Mandate itself.[19] Article 7 of the Mandate, the Court pointed out, required the

consent of the Council for the modification of the terms of the Mandate. South Africa therefore, in the Court's opinion, could not unilaterally modify the international status of South-West Africa.

The Court then went on to hold that the competence to modify the status of the territory lay in the General Assembly as this was the new supervisory organ. Under Article 7 of the Mandate it was the supervisory organ which had power to authorise modification of the terms of the Mandate. As the powers of supervision now belonged to the General Assembly that organ must, the Court held, also have the power to alter the terms of the Mandate, especially since under Articles 79 and 85 of the Charter Trusteeship Agreements have to be approved by the General Assembly which also had the authority to approve alterations or amendments of Trusteeship Agreements.[20]

It is submitted that if it is an organ of the United Nations that is to have the final word on the modification of the terms of the Mandate and indeed the international status of the Territory itself, the need for embodying this in an agreement is all the more imperative and it serves as another argument in support of the view that South Africa is under an obligation to conclude an agreement with the United Nations.

The United Nations was obviously intended to have effective con-

trol over the Trusteeship System and it was to this end (as the Court held) that the General Assembly was not only to have the power to supervise and receive annual reports but also to have final power in any question relating to the alteration of the terms of the Mandate or the international status of the territory. To paraphrase Judge De Visscher's view, the Charter had created an international regime which would never have had more than a theoretical existence if Mandatory Powers considered themselves under no obligation to convert their Mandates into Trusteeship Agreement.[21]

Judge De Visscher makes the following comment on Article 80 paragraph 2:

"What Article 80, paragraph 2 intended to prevent was that a mandatory Power, while invoking on the one hand the disappearance of the League of Nations, should refuse on the other hand to recognise the United Nations or to consider submitting itself to the only regime contemplated in the Charter, namely, the Trusteeship System".[22]

This again confirms the submission made above that the source of the obligation to conclude trusteeship agreements is Article 80 of the Charter of the United Nations.

CHAPTER X

THE SUPERVISORY POWERS OF THE GENERAL ASSEMBLY

Whereas the previous Chapter focussed attention on the obligation of Mandatories to conclude Trusteeship Agreements the central theme of the present Chapter is the nature of the supervision of the General Assembly itself. The degree of similarity between the supervision of the League and of the United Nations and the extent to which they differ is discussed first. The relevance to the Charter of the Unanimity Rule in the Covenant is discussed next. The third and fourth questions respectively discuss the legal implications of the termination of the Mandate for South-West Africa by the General Assembly and its effect on the status of the territory.

The Nature of Supervision of the United Nations

The general consensus between the Members of the League at the time of its dissolution - as evidenced by its resolution of April 18, 1946 - that the United Nations was intended to inherit the supervisory functions of the League, the declaration by the South African delegate in the same year at Geneva that South Africa would regard the dissolution of the League "as in no way diminishing its obligations under the mandate....", the fact that Arti-

cle 80 paragraph 1 preserved the Mandate for South-West Africa from lapsing, the wide powers of the General Assembly under the Charter (particularly under Articles 10 and 14), and its powers in respect of the Trusteeship System whose objectives are basically the same as those of the Mandate System, and, finally, the fact that the Mandate System did not die with the League so that its essential feature - the need for international supervision - continues to exist: all these considerations lead to the conclusion that although neither the letter of the Covenant nor of the Charter provides for succession of the United Nations to the League, the spirit of the Covenant and the Charter (in the light of the above considerations) requires a creative interpretation of the Charter in a manner which makes it possible for the General Assembly to inherit in full the Powers of the League Council at least in so far as the supervision of Mandates is concerned. It is further submitted that in addition to such inherited powers the United Nations has also acquired such additional powers (not possessed by the League) in so far as such new powers are contained in the Charter. Each Mandatory can be deemed to have conferred such additional powers on the United Nations by the process - not unlike a novation of a previous international agreement, in this case, the Covenant - of becoming a signatory to the Charter, the new international agreement.

The question of the degree of supervision to be exercised by the

General Assembly under a Trusteeship Agreement incorporating a former Mandated territory has provoked great controversy within the United Nations and outside.

The I.C.J. held in answer to the first question in the Advisory Opinion of 1950 that although the General Assembly is the new supervisory organ the degree of supervision to be exercised by it should not exceed that which applied under the Mandates System and should conform as far as possible to the procedure followed by the Council of the League.[23]

Prima facie this presents no difficulty if the above submission concerning the additional powers of the United Nations is ignored for the time being. Thus assuming that the degree of supervision of the United Nations is not to exceed that of the League, the extent of supervision of the General Assembly under a Trusteeship Agreement can be mutually settled between the parties concerned, with the General Assembly exercising the necessary self-restraint in dilimiting its supervisory role so that its supervision is in accordance with the prescriptions of the 1950 Opinion. If the parties cannot agree on this matter, it would be one fit for submission to the I.C.J. for an authoritative Opinion. The General Assembly has the competence to invoke the advisory jurisdiction of the I.C.J. and can therefore formally table a question before the Court stating the precise nature of the disagreement.

Alternatively, it is submitted that there are good reasons for the argument that the I.C.J.'s stipulation that the degree of supervision of the United Nations should not exceed that exercised by the League was unwarranted. This stipulation, juxtaposed with the requirement made simultaneously by the Court that the procedure to be followed by the United Nations in discharging its supervisory functions should conform "as far as possible" to that followed by the League, is contradictory. If the Covenant of the League is to be strictly interpreted the procedure of the League's supervision was based on the principle of unanimity and, in most cases, the Council and the Permanent Mandates Commission depended heavily on the good-will and co-operation of the Mandatory.[24] As will be seen below, the principle of unanimity underwent a de facto amendment in so far as, in practice, it was not insisted upon by the Mandatory in matters concerning the League's supervisory powers. Such a waiver did not however affect the theoretical position as laid down by the unanimous voting rule under Article 4 paragraph 5 of the Covenant. Thus, as a matter of law, the Mandatory had the right to prevent the League from adopting methods of supervision which it considered unacceptable.

In contrast to this, the voting procedure of the General Assembly, as defined by Article 18, does not require unanimity but only a simple or two-thirds majority. Even if a two-thirds

majority is used this would effectively prevent the Mandatory from barring General Assembly resolutions or recommendations which it considers unacceptable.

In this sense the degree of supervision of the General Assembly must necessarily exceed that of the League since the General Assembly cannot, in contravention of Article 18 of the Charter, introduce the unanimity rule in supervising trust territories.

The argument that by voting on a two-thirds majority the General Assembly is conforming "as far as possible" to the procedure of the League is not of any consequence because the degree of supervision of the United Nations will be greater than that of the League as the two organisations had different voting procedures.

Apart from the voting procedures of the United Nations' General Assembly and of the United Nations' Trusteeship Council[25] the latter body possesses certain characteristics which distinguish it from the supervisory organs of the League and which could render its supervision more rigorous. Under Article 87 paragraph C the Council can, at the instance of the General Assembly, exercise a right to make periodic visitations to trust territories - including those former mandate territories brought under the new system. This right was not possessed by any of the supervisory organs of the League. Further, no

member of the United Nations administering a trust territory can deny such a right for it is an example of an additional supervisory power conferred to the United Nations and recognised by each Member by virtue of its signature to the Charter. Another difference is that the Permanent Mandates Commission of the League was composed of experts with knowledge on colonial questions and administration, whereas the Trusteeship Council consists of representatives of states which often gives it a political complexion.[26] It further enjoys a much more important place in the Charter than did the Mandates Commission in the Covenant. This is the natural result of the new developments within the United Nations, increasing the importance in international affairs of underdeveloped and non-self-governing territories.

The table below illustrates the essential difference between the nature of supervision of the League and of the United Nations.

For these reasons the I.C.J.'s two stipulations that the degree of supervision of the United Nations must not exceed that of the League and that at the same time the procedure of United Nations supervision need only conform with that of the League "as far as possible" are contradictory.[27]

The better view is therefore that the General Assembly is permitted to exercise in full the powers of supervision as defined in Chapter XIII of the Charter - particularly in Articles 87 and 88 - even if the degree of supervision - sometimes exceeds that of the League. The source of the obligation to accept the supervision of the General Assembly is each Member's signature to the Charter, the survival of the Mandate, the terms of the Charter - especially Article 80, as well as the necessity of interpreting the Charter in conjunction with the Covenant so as to give effect to the spirit of both documents as explained above.

By way of summary, it is submitted that there would be nothing novel in the proposition that the Mandatory's voluntary signature to the Charter must also in these circumstances signify its acceptance of the new supervisory functions of the United Nations as defined by the Charter. The signature operates as an estoppel against a denial of the supervisory powers of the United Nations on the ground that they are more onerous than that of the League.

SUPERVISION OF THE LEAGUE CONTRASTED WITH THAT OF THE UNITED NATIONS [28]

	International Organisation	League of Nations	United Nations
I.	Report receiving or Supervisory Body:	Council of League	General Assembly
II.	Numbers of same:	Small (between 9 and 13) and included the then permanent members of which three were Mandatories.	Potentially unlimited. In 1946 there were between 50 and 60. In 1974 there are over 125 members. Number still growing.
III.	Voting Rule: in Supervisory Organ	Unanimity, including Vote of Mandatory.	Two-thirds majority. Sometimes a simple majority suffices.
IV.	Functions of Supervisory Body.	Acceptance of reports of subsidiary organs and making of recommendations. No right of visitation in mandated territory. Power to receive petitions generally acknowledged although never exercised.	Consideration of Reports and petitions. Right of periodic visitation to trust territory. Consideration of annual report of administering authority on political, economic, social, educational advancement of trust territory.

	International Organisation.	League of Nations	United Nations
V.	Attitude and approach of Advisory Body.	Sympathetic to Mandatories. Not over-political	Unsympathetic to Mandatories - highly political.
VI.	Advisory Sub-organ	Permanent Mandates Commission.	Trusteeship Council. Committee of the Assembly or "subsidiary organ" set up under Article 22 of Charter.
VII.	Composition of Advisory Organ.	Experts acting in personal capacity, not as representatives of governments.	Representatives of governments.
III.	Functions of Advisory Organ.	Consideration of Reports in close collaboration with Mandatory. No right of visitation. Power to receive petitions. See IV.	Consideration of Reports and petitions. Right of visitation. Organ can make detailed enquiry on political, economic, social and educational advancement of trust territory and can require report in writing from administering authority.

	International Organisation.	League of Nations	United Nations
IX.	Aim of Supervisory Organ or Sub-organ.	Good administration of mandated territory.	Earliest possible bringing about of independence to the territory.

The Relevance of the Unanimity Rule of the Covenant of the League of Nations

There is what might seem at first glance a powerful argument against any transmission of powers to the United Nations in respect of mandates. It is based on the unanimity rule which operated in respect of decisions of the Council of the League of Nations.

Article 4 paragraph 5 provided: "Any Member of the League not represented in the Council shall be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of the Member of the League."

Article 5 paragraph 1 of the Covenant provided: "Except where otherwise expressly provided in the Covenant... decisions at any meeting of the Assembly or the Council shall require the agreement of all the Members of the League represented at the meeting."

The argument is that by virtue of these provisions a right of veto was conferred on the mandatories, depriving the League of any supervisory rights which were to be exercised in a manner not acceptable to any mandatory and making it impossible for the League to transmit them in a manner that would

make it obligatory on United Nations Members to accept all methods of supervision of the United Nations.

The argument goes to the very core of the controversy between South Africa and the United Nations. If it is valid South Africa does not have any obligations to bring the territory of South-West Africa under the Trusteeship System if it considers that supervision thereunder is unacceptable to it, nor does any other provision of the Charter apply to the territory except to the extent recognised by South Africa, while the termination of the Mandate by the General Assembly, if not accepted by the Mandatory, is a nullity ab initio.

The South Africa Government first raised the unanimity rule of the Covenant in 1954 before the Committee on South-West Africa[29] and before the General Assembly of the United Nations which, in October 1954, requested an Advisory Opinion from the I.C.J. on the voting procedure on questions relating to South-West Africa, in particular on the question whether the application of Article 18 paragraph 2 of the Charter was in conformity with the 1950 Opinion and as to the voting procedure which the General Assembly should follow.

The Court was requested by the General Assembly if the following rule on voting procedure decided by it in October 1954[30] was a correct interpretation of the 1950 Opinion:

"Decisions of the General Assembly on questions relating to reports and petitions concerning the territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations."

The I.C.J. was requested to give an Advisory Opinion on this question in the light of the pronouncement by the Court in 1950 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 far as possible to the procedure followed in this respect by the Council of the League of Nations."[31]

The Court delivered its Opinion in 1955,[32] and held that the General Assembly had the power to take decisions regarding mandates by a two-thirds majority of Members present and voting despite the unanimity rule in the League: "... (T) he Court finds that the statement in the Opinion of July 11th, 1950, that 'The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System', must be interpreted as relating to substantive matters, and as not including or relating to the system of voting followed by the Council of the League of Nations."[33]

The contention that there was incompatibility between the voting procedure contemplated by the General Assembly and the unanimity rule was impliedly rejected. The Court did however say: "In view of the finding of the Court that the statement in the Opinion of 1950 that 'The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System' does not include or relate to the system of voting, it is unnecessary to deal with the issues raised by these contentions or to examine the extent and scope of the operation of the rule of unanimity under the Covenant of the League of Nations."[34]

Ingenious as this interpretation based on a distinction between "procedure" and "substance" may be, it can lead to only one conclusion: The unanimity rule of the League Council did not apply in the General Assembly.

When the Court proceeded to consider its statement of 1950 that the supervision of the General Assembly "should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations" the Court observed: "The constitution of an organ usually prescribes the method of voting by which the organ arrives at its decisions. The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity

rule was one of the distinguishing features of the Council of the League of Nations. These two systems are characteristic of two different organs, and one system cannot be substituted for the other without constitutional amendment."[35]

This is not a sufficiently persuasive argument and in reality begs the question. If the General Assembly in so characteristically different from the Council of the League on voting procedure, it should follow that the General Assembly is disqualified from exercising the supervisory powers of the Council. It was not surprising therefore that the Court felt obliged to admit that "... the question of conformity of the voting system of the General Assembly with that of the Council of the League of Nations presents insurmountable difficulties of a juridical nature."[36]

The difference between the voting procedure of the two organs cannot per se justify the use of a procedure different from that which South Africa is presumed to have agreed to under the League Covenant.

Thus the argument based on the different voting procedures is not only inconsistent with the Court's own holding implied from its argument based on "procedure" and "substance," (i.e. that there was no incompatibility between the voting procedure of the General Assembly and the unanimity rule) but it also wrongly presumes that the unanimity rule applied even when the League Council exercised

its supervisory powers.[37]

There is therefore a double-contradiction. For this reason it would be appropriate at this juncture to examine why the presumption that the unanimity rule applied when the Council of the League exercised its supervisory powers is incorrect.

To begin with there are certain dicta in the above-mentioned 1962 and 1966 Judgments of the I.C.J. on South-West Africa which indicate that within the framework of the League at least the unanimity rule was applicable to the Mandates.[38]

The 1966 Judgment affirmed that in view of the unanimity rule "the Council had no means of imposing its views on the mandatory" and that "in relation to the 'conduct' provisions[39]... it was never the intention that the Council should be able to impose its views on the various mandatories." "As regards the possibility that a mandatory might be acting contrary not only to the views of the rest of the Council but to the Mandate itself, the risk of this was evidently taken with open eyes...."[40]

As Judge De Castro has pointed out, these dicta imply that the unanimity rule is not merely a rule of voting procedure but it "touches the very essence of Mandates"[41] so that its implications should be examined in full.

The suggestion that the League was powerless over infractions of

mandates is inadmissible. It is contrary to a fundamental principle of the Mandate System for it negates the "securities for the performance of the trust" envisaged by Article 22 of the Covenant. It has been constantly emphasised above that supervision by the League was essential to the operation of the Mandate System and it was this factor which distinguished this System from the previous attempts at international administration. This argument is further inconsistent with the principle nemo judex in sua causa.[42]

Judge De castro has also expressed his disagreement with the conclusion that the League was powerless in its supervision of Mandates. He distinguishes between the capacity of Mandatory and Member of the League: "The relation between a mandatory and the Council *is not the same as that between a Member of the League and the* ouncil."[43] *The suggestion is that the unanimity rule was inope-*
tive as between the League and Mandatory qua the administering thority, whereas the rule applied normally in all dealings tween the League and each Member of the League in that and no her capacity. He contends that this is because "the relationship tween the mandator (League of Nations) and the Mandatory (South rica)... is not a relation of equality inter aequales, but one of ordination in the field of Mandates." He adds: "The Mandatory not play two different and inconsistent parts. It cannot enjoy advantages connected with the administration of the territory the robe of mandatory, and then after having doffed that, put on robe of Member of the League of Nations, make use of its right

of veto, and evade its obligations as mandatory."[44]

The Rule in Article 4 and 5 of the League Covenant arose out of the historical circumstances peculiar to the time of the drafting of the Covenant. It was designed to protect the sovereignty of all states and to avoid any situations in which bigger states would be able to impose their decisions on the smaller and weaker states.[45] Thus in all questions not involving the sovereignty of states the unanimity rule was not necessary.

Judge De Castro quotes, the words of two draftsmen of the Covenant, Lord Cecil of Chelwood and Mr. Scialoja to support the above conclusion. The former is quoted as saying that "it must have been by some accident that the rule in the Covenant providing that unanimity should not comprise the parties to the dispute had only been enacted in certain cases. Obviously if it were the right rule it should be applied to all cases of dispute."

The latter is quoted as saying that "there was no doubt that... it had been simply by an oversight that it had not been said that the votes of the interested parties should not figure in calculating unanimity."[46]

In his separate Opinion in the "Voting Procedure Case" Judge Lauterpacht, with regard to the voting practice in the League, said: "... the tendency was either in the direction of an express amendment of these provisions of the Covenant which, on the face

of it, left room for the frustration of an otherwise unanimous decision by a vote of an interested party or in the direction of regarding such amendment as unnecessary and of acting on the view that the principle nemo judex in re sua was already an integral part of the Covenant."[47]

Thus in 1921, the Assembly of the League recommended that pending the ratification of an express amendment of the Covenant to that effect, the votes of parties to the dispute should be excluded in the voting on the question whether a member of the League had gone to war in breach of the Covenant of the League.[48]

In 1922 India claimed representation on the Governing Body of the International Labour Organisation on the ground that it was among eight states of chief industrial importance which were to be represented on the Governing Body. The Council endorsed and acted on a legal opinion submitted by the Secretariat to the effect that "the Council would act in this affair as arbitrator, and that India could not be both judge and party to the case."[49]

In 1925, in the Hungarian Optants dispute between Hungary and Roumania which came before the Council under Article 11 paragraph 2 of the Covenant, it accepted a recommendation by a vote which excluded the representatives of parties. This was done after the President of the Council had explained that in inviting the body to pronounce on the recommendation, he had "deliberately excepted two members of the Council who are (were) parties to the dispute."[50]

Even the 1966 Judgment acknowledged that the unanimity rule underwent a de facto amendment in the voting procedure of the League: "In practice the unanimity rule was frequently not insisted upon, or its impact was mitigated by a process of give and take, and by various procedural devices to which both the Council and the mandatories lent themselves" which included "the occasional deliberate absence of the mandatory from a meeting, (which) enabled decisions to be taken that the mandatory might have felt obliged to vote against if it had been present."[51]

It can be seen therefore that there is sufficient authority to overrule South Africa's argument based on the unanimity rule on the ground that no party can be a judge in its own cause. However what is even more perturbing about the South African argument is that it leads to the absurd conclusion that there could be no possibility of any compulsory judicial settlement of disputes relating to the interpretation or application of the South-West Africa mandate on the ground that the machinery of supervision of mandates envisaged consent and approval of each mandatory in accordance with the unanimity rule. It may be further argued that the sole body which had jurisdiction to criticise breaches of Mandates and make remedial proposals to the Mandatory, namely, the Council of the League, was incapable of bringing an action before the Permanent Court against a mandatory in breach. Thus it would be argued that neither the Council nor any Member of the League could seise the

Court of any dispute concerning Mandates. This argument totally misconceives the fundamental role of the Court as a "security" for the performance of the sacred trust created by Article 22 of the Covenant. A pamphlet of the League in 1921 shows that even in the formative years of the League it was well-established that the inability of the Council to sue a Mandatory before the P.C.I.J. was a technicality which was not of legal significance to the role of the Court as a "security" for the trust. The pamphlet declared: "... (I)t is understood, as is expressly stated in the report on the Statute (of the P.C.I.J.) approved by the Assembly, that groups of states may appear as a party. Consequently, there is nothing to prevent the individual states represented at a given moment on the Council from instituting an action collectively, but not as the Council of the League."[52]

The Advisory Opinion of the P.C.I.J. in the "Mosul Case" is another authority for the above view that the unanimity rule was not to apply in the League in favour of a Member State which was a party to a dispute or matter being debated by the League. The P.C.I.J. affirmed that "... the rule of unanimity is applicable subject to the limitation that the votes cast by representatives of the interested parties do not affect the required unanimity.... The well-known rule that no-one can be judge in his own suit holds good.

"From a practical standpoint, to require that the representatives of the Parties should accept the Council's decision would be tantamount

to giving them the right of veto enabling them to prevent any decision being reached...."[53]

Judge Lauterpacht also endorsed this approach of the P.C.I.J.: ".... the requirement of unanimity, however expressly stated, is implicitly qualified by the ... principle (that no one can judge his own cause); and ... nothing short of its express exclusion is sufficient to justify a state in insisting that it should by acting as judge in its own case, possess the right to render inoperative a solemn international obligation to which it has subscribed."[54]

The same Judge observes later: "In so far as the principle nemo judex in re sua is not only a general principle of law, expressly sanctioned by the Court (I.C.J.), but also a principle of good faith, it is particularly appropriate in relation to an instrument of a fiduciary character such as a mandate or a trust in which equitable considerations acting upon the conscience are of compelling application."[55]

Although Judge Lauterpacht held that the General Assembly could arrive at decisions relating to mandates by a two-thirds majority he was at the same time of the opinion that such decisions of the General Assembly were not binding. This in his view created a "rough equivalence" of supervision between the Council and the General Assembly: "... (W)hile the supervision of the General Assembly exceeds that of the Council of the League of Nations in as

much as it is exercised by a majority vote of two-thirds and thus deprived of the safeguards of unanimity, it is at the same time less exacting inasmuch as it is exercised by means of decisions of a character less binding than those of the Council of the League...."[56]

This is a surprising proposition. Firstly, it postulates the validity of the unanimity rule in the League Council's supervisory functions when, according to his own analysis, these were intended to be carried on without the unanimity rule. The factor which in his opinion counter-balances the fact that a decision of the General Assembly is "deprived of the safeguards of unanimity" is that the resolution is "less binding" than one that could be made by the League Council. However, if the resolutions of the Council itself were not meant to enjoy "the safeguards of unanimity" there is nothing to counter-balance!

Secondly, if a resolution or recommendation of the General Assembly exercising its supervisory powers is to be "less-binding" than a comparable resolution of the Council of the League then the degree of supervision of the General Assembly, contrary to the 1950 Advisory Opinion, must necessarily be less stringent than that of the Council. This argument is untenable if the General Assembly is to have at least the same degree of effectiveness as the Council in the supervision of Mandates.

Although the Charter does not anywhere give the General Assembly any express powers to bind members there is nothing inconsistent with the Charter in the view that as the successor of the Council in the supervision of mandates, the General Assembly should, as submitted above,[57] be deemed to have inherited in full the supervisory powers of the Council in addition to certain other powers. If the General Assembly is to be the new supervisory body it must be viewed as having inherited at least all the supervisory powers of the League Council quite apart from the argument concerning the additional powers. There is no logical basis for the argument that although the General Assembly inherited the powers of the League Council the inheritance was a matter of degree in that the General Assembly resolutions, in the exercise of that organ's supervisory powers, were intended to be "less-binding" than those of the League Council.

In the Advisory Opinion on the "Admissibility of Hearings of Petitioners by the Committee on South-West Africa" the I.C.J. said: "There is nothing in the Charter of the United Nations, the Covenant of the League, or the Resolution of the Assembly of the League of April 18th, 1946..... that can be construed as in any way restricting the authority of the General Assembly to less than that which was conferred upon the Council...."[58] The Court poi-

nted out that the 1950 Advisory Opinion had held that the General

ssembly, as the successor to the Council should not exercise a

larger authority than the latter. On the other hand, it is submitted that the General Assembly's authority should not be restricted to something less than the authority of the Council of the League. The I.C.J. in its 1956 Opinion said: "It followed (from the 1950 Opinion) that the General Assembly in carrying out its supervisory functions had the same authority as the Council. The scope of that authority could not be narrowed by the fact that the Assembly had replaced the Council as the supervisory organ."[59]

In the alternative it may be argued that the Covenant itself contained a provision[60] which excluded the unanimity rule in disputes involving breach of mandate. Article 15 paragraph 1 provided that if any dispute between the Members of the League was not submitted to arbitration or judicial settlement the matter was to be submitted to the Council which was to endeavour to settle the dispute. Paragraph 4 of the same Article provided: "If the dispute is not thus settled, the Council, either unanimously or by a majority vote, shall make and publish a report containing a statement of the facts of the disputes and the recommendations which are deemed just and proper in regard thereto." It seems highly probable that, during the life of the League any breach of mandate by a Mandatory would have arisen in the form of a "dispute" within Article 15. The vote of the defaulting Mandatory State would have been excluded at the time of the debate on the breach

under Article 15 paragraph 4 because the latter paragraph implements the principle that a party cannot judge its own cause.

Wright has observed: "The Council acts by unanimous vote as required by Article 5 of the Covenant in mandate questions, though there is a tendency to give wider application to the rule of Article 15, which excludes the vote of interested parties from the required unanimity in recommending on political disputes."[61]

Article 16 is also pertinent to the question of breach of mandate. Paragraph 4 of that article provided: "Any member of the League which has violated any covenant of the League[62] may be declared to be no longer a member of the League by all the other Members of the League represented thereon."[63] If expulsion of a Mandatory from the League was by a vote of "all the other Members" of the Council the vote of the Mandatory obviously could not count, otherwise the entire paragraph would be meaningless.

These provisions appear to support the contention that whenever a Member of the League was in a subordinate capacity in dealings with the League (as, for example, in its capacity as Mandatory) it was not intended to be given any veto powers over the League.

As has been seen, there was provision for the compulsory expulsion of the delinquent League Member. In relation to Mandates an additional power existed - that of termination of the Mandate; and this

also without any right of veto by the Mandatory. The basis of such a right is discussed in the next section.

Stoyanovsky suggests that a mandatory which was expelled from the League would automatically lose its mandate.[64]

Conclusion

It is submitted by way of summary that the unanimity rule was not intended to be applied in matters concerning the League's supervisory powers; and that the voting procedure of the General Assembly is not therefore inconsistent with the procedure actually adopted by the League Council acting in its supervisory role.

If the Court in 1955 had recognised the inapplicability of the unanimity rule in the above manner it would not have been faced with the theoretical difficulties discussed above and at the same time this would not have affected the final result reached by the Court in 1955 - that the General Assembly could supervise Mandates without implementing the unanimity rule.

t has been submitted in the previous section concerning the nature f the supervision of the General Assembly that voting procedure ust necessarily affect the degree of supervision. On the premise hat the rule nemo judex in sua causa applied to the League ouncil's supervisory powers, the General Assembly would be

applying a lesser degree of supervision than that of the Council if it were to proceed on the basis of unanimity. Judge Lauterpacht in the 1955 case also affirmed, but in a different context, that the voting procedure went hand in hand with the "degree of supervision": "But I am not of the view that the Opinion of the Court ought to base the answer to the question put to it on the ground that the degree of supervision has no relation to the question of voting. The procedure of voting determines the degree of supervision."

The conclusion reached in the previous section on the nature of the supervision of the General Assembly was that because of the fundamental disparity in the voting procedures and the nature and constitutions of the supervisory organs of the United Nations and of the League, the nature and degree of supervision of the former is necessarily different from and sometimes more onerous than that of the latter; but that this is immaterial in view of the succession of the United Nations to the League's supervisory powers and the signature of the mandatory to the Charter which has the effect of imposing on the Mandatory an obligation to accept United Nations' supervision by concluding a trusteeship agreement and to accept the nature and procedure of such supervision as defined by the Charter.

The conclusion arrived at in the current section is that by disregarding the unanimity rule the General Assembly would not be

exceeding the degree of supervision of the League - on the premise that the rule was not applicable when the latter supervised mandates. Alternatively, if the rule did apply in the League, the Mandatory must be deemed to have agreed to the new supervision of the United Nations (as submitted in the last section) even if it exceeds the degree of supervision of the League.

The Termination of the Mandate for South-West Africa by the General Assembly.

It was submitted above that despite the dissolution of the League the Mandate Agreements continued to be "existing international instruments" within Article 80 paragraph 1 of the Charter. However the termination by the General Assembly of the Mandate for South-West Africa[65] raises the question whether the Mandate is today an "existing" instrument within Article 80.

It might be argued that as a result of this termination by the United Nations the Mandate ceases to exist and that consequently all international obligations pertaining to the Mandate (including Article 1) ipso facto cease to exist.

Falk writing in 1967 on the resolution terminating the Mandate says that the "enforceability of this resolution appears highly unlikely

for the time being, and its legal bearing on the Mandate is uncertain.... This action by the Assembly may encourage Balthasar Vorster, thought to be an advocate of annexation, to annex South-West Africa. Annexation, although obviously a violation of the Mandate, would probably make it increasingly difficult to proceed separately against South-West Africa and might require any enforcement action to be directed against South Africa itself."[66]

Annexation would be politically inexpedient, and in the current international political climate when South Africa's defiance of the United Nations has produced demands for its expulsion from the Organisation, any such move towards formal annexation would be counter-productive for South Africa.

The termination nevertheless constitutes a potentially dangerous move for it now provides a stronger legal foundation to the argument, rejected by the I.C.J. in 1950, that the Mandate had lapsed resulting in the situation in which all its attendant rights and obligations had also lapsed.[67] The argument was rejected by the I.C.J. on the ground that the Mandate survived the dissolution of the League since its raison d'être and original object remained unfulfilled. Although even today the objects of the Mandate remain unfulfilled, the Court would have to take judicial notice of the fact that the authority of the Mandatory to administer has been terminated so that its corresponding obligations must also be

deemed to have "lapsed".

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. The Court had declared in 1950: "The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified."[68]

In Justice Hidayatullah's opinion, this is the "decisive argument" against South Africa and he criticises the Dissenting Opinions in the 1962 Case and the Judgment of 1966 for consistently ignoring this.[69]

In fact, in 1971, the I.C.J. 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 for State liability for acts affecting other States."[70]

The termination of the Mandate was unfortunate because it not only has achieved no practical change but also because it must be held

responsible for creating the legal impasse under Article 80 of the Charter whereby the Mandate is no longer an "existing international instrument" within Article 80 paragraph 1. The question however admits another avenue of approach:

The argument (above) was that Article 80 paragraph 1 precludes South Africa from arguing that the provisions of Article 1 of the United Nations Charter are inapplicable to South-West Africa in so far as Article 76 refers to that Article. It was submitted that South Africa cannot deny the applicability of Article 1 via Article 76 to South-West Africa to the extent that the aims of Article 1 coincide with those of the Mandate. This was to rebut the argument that Article 1 is not applicable to the territory via Article 76 because that article refers to the "trusteeship system" under which South-West Africa has not yet been placed.

These arguments relating to Article 80 paragraph 1 vis-a-vis Article 76 were however made with a view to demonstrate that South Africa has an obligation to conclude a Trusteeship Agreement. But the basis of this obligation does not exist solely in the Mandate - whether or not that instrument is treated as an "existing international instrument". The basis of the obligation has been explained elsewhere and will not be repeated here. Suffice it to say that it can exist <u>independently of</u> the Mandate. The survival of the Mandate was only one among several reasons for this obligation. Thus the

question of the current validity of the Mandate is really a red herring. It is relevant only in a technical sense to the applicability of Article 1 of the Charter to the territory via Article 76; but then, Article 1 has been shown to apply to South-West Africa by other arguments which are independent of Article 76.[71] In any case even the argument relating to the non-applicability of Article 1 via Article 76 is a circular one. In essence, it embodies the proposition that "the consequences of an illegal act can excuse the (illegal) act itself". It was explained above why such an argument is inadmissible.

The Legality of the Termination of the Mandate by the General Assembly

Although the termination of the Mandate Agreement may have been of little use from a practical point of view, it was intra vires the United Nations. If each Mandate was a treaty (and therefore reflected a consensus ad idem of the Parties),[72] the rules governing its operation modification and termination were the ordinary principles governing the law of treaties. Under the Vienna Convention on the Law of Treaties a treaty justifies termination upon breach (a) if the breach amounts to a repudiation of the treaty; or (b) if the breach involves the violation of a provision essential to the accomplishment of the object or purpose of the treaty.[73]

To determine whether the termination of the Mandate was justified

under international law it is necessary to examine Resolution 2145 of the General Assembly terminating the Mandate.

In the preamble the General Assembly declares itself to be "convinced that the administration of the Mandated territory by South Africa has been conducted in a manner contrary" to the Mandate and the Charter and notes that South Africa has been repeatedly requested for more than twenty years to perform its obligations, but to no avail. The General Assembly then "Declares 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."[74]

The Resolution can thus be seen to find firstly that South Africa has "disavowed" the Mandate (i.e. that it has repudiated it) and secondly that it has failed to ensure the moral and material well-being of the people of South-West Africa (i.e. it has committed a breach which goes to the root of the basic purpose of the treaty). For these reasons the General Assembly acting on behalf of the United Nations, can be said to have justifiably repudiated the treaty by terminating the mandate of South Africa. In this instance termination may be regarded as an act of repudiation.

The Security Council of the United Nations has affirmed its support for the action of the General Assembly and has also adopted

resolutions taking formal note of the breaches of South Africa. In doing so it "was acting in the exercise of what it deemed to be its primary responsibility, the maintenance of peace and security, which, under the Charter, embraces situations which might lead to a breach of the peace."[75]

Through these resolutions the Security Council declared that it was "mindful of the grave consequences of South Africa's continued occupation of Namibia";[76] and that "the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the United Nations Charter."[77] The Security Council has also decided that the continued occupation of the territory of Namibia by the South African authorities "constitutes an aggressive encroachment on the authority of the United Nations...."[78] In 1970 the Security Council declared further "that the defiant attitude of the Government of South Africa towards the Council's decisions undermined the authority of the United Nations."[79] It also called upon all states to refrain from having any dealings with the government of South *Africa to the extent that such dealings are inconsistent with the* declaration that the presence of South Africa in Namibia is illegal.[80]

In the opinion of the I.C.J. the above resolutions "were adopted in conformity *with the purposes and principles of the Charter* and in

accordance with its Articles 24 and 25. The decisions are consequently binding upon all States Members of the United Nations, which are thus under obligation to accept and carry them out."[81]

The Security Council, by declaring the South African presence in Namibia to be illegal, has approved of the action of the General Assembly which terminated South Africa's Mandate.

It can be seen therefore that the termination of the Mandate, is valid not only according to the general international law on the termination of treaties but also the Charter of the United Nations.

No less significant a personality than General Smuts, in his above-mentioned pamphlet which later became the basis for Article 22 of the Covenant, considered that termination of a Mandate would follow if the trust was persistently violated by the Mandatory.

"In case of any flagrant and prolonged abuse of this trust the population concerned should be able to appeal for redress to the League, who should in a proper case assert its authority to the full, even to the extent of removing the Mandate and entrusting it to some other state if necessary."[82]

Smuts' statement pre-supposes the existence of a power on the part of the League to terminate any Mandate in the event of serious breaches by the Mandatory. This power is therefore discussed next since it has an important bearing on the power of the General

Assembly to terminate the Mandate in view of the theory of the transmission of supervisory powers from the League to the United Nations.

It was submitted earlier that the General Assembly inherited in full the supervisory powers of the League Council and also acquired such additional supervisory powers which are contained in the Charter or which must necessarily be implied from its provisions. The Charter is silent on the power of termination and there are no provisions in the Charter from which such a power may be implied. In the absence of such a power, the General Assembly must fall back on the theory of devolution of supervisory powers in order to justify its claim to such a power; i.e. it must be shown that the League Council had power to terminate so that upon its dissolution the General Assembly inherited the power.

The General Assembly under the theory of devolution could not have inherited a power which the League did not have for nemo dare potest id quod ipse non habet, or (the corollary), nemo accipire potest id quod ipse donator nunquam habuit. Even the I.C.J. agreed with this principle in 1950 when it held that the degree of supervision of the General Assembly should not exceed that exercised by the League. This principle has been repeatedly endorsed by the I.C.J. since 1950; for example in the Advisory Opinions of 1955 and 1956.

In addition to Smuts, Quincy Wright is of the view that since the

Mandate was given "on behalf of the League of Nations", the latter had an inherent power to terminate it.[83] Wright has cited several authorities which support this conclusion.[84] Bentwich is also of the view that the League possessed the right to terminate Mandates.[85]

Lauterpacht and Woolf also regarded the power of the League as extending to the revocation of Mandates in case of breach by the Mandatory and to the appointment of a new Mandatory.[86]

Lugard, writing on the legal position of persons under Mandate, says: "... (T)he person 'protected under mandate' shares with the owner of an estate 'un titre précaire' subject to the conditions of revocation, rendition, or resignation of the Mandate."[87]

Although the Covenant also did not contain any express provision empowering the League to terminate Mandates it is possible to identify Article 13 paragraph 4 (of the Covenant) as one article under which the power to revoke Mandates could have been exercised by the League.

This provides that: "The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered.... In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto." This provision, in connection with

the compromissory clause in each of the Mandates[88] required a decision by the P.C.I.J. before the League could "propose what steps should be taken to give effect to" the decision under Article 13 paragraph 4.[89]

In view of the foregoing, it is submitted that the power of the League to terminate mandates was well-established. The I.C.J. declared in 1950, and has subsequently reaffirmed its views on numerous occasions, that the General Assembly inherited the supervisory powers of the League Council and that the I.C.J. acquired the jurisdiction of the P.C.I.J. in relation to Mandates. However, at the date of termination of the South-West Africa Mandate there was no formal decision of the I.C.J. that the Mandatory had violated the Mandate. This was of minor significance, since the decision was made by the I.C.J. in the 1971 Advisory Opinion, thus curing any such procedural irregularity that might have existed in 1966 when the resolution terminating the Mandate was passed.

Finally, it is submitted that South Africa itself recognised not only its accountability to the United Nations but also the power of the latter to terminate the Mandate. The recognition was shown as far back as in 1946 when South Africa sought permission of the United Nations to formally incorporate the territory into the Union. This could only be done <u>if the Mandate was first terminated</u> - and

it is obvious that this is what was required of the United Nations. The fact that permission was sought from the United Nations and not the Allied Powers who had assigned the mandate indicates a recognition by South Africa of United Nations authority over the Mandate.[90]

Indeed, when permission to incorporate was refused, Smuts withdrew his plan for incorporation and the Government affirmed its intention to render reports to the United Nations - ostensibly for purposes of "information" only, although it was clear that this offer was motivated by a desire not to precipitate a rupture in relations between the Mandatory and the new Organisation by refusing to render reports and thereby challenging its authority over Mandates.[91]

It was not until 1949, when Smuts' government had been replaced by that of the Nationalist Party under Malan, that the South African Government, in retaliation to the United Nations' refusal to grant permission for the incorporation of South-West Africa, declared that it regarded the Mandate as having lapsed with the dissolution of the League and served notice that it would no longer submit reports to the United Nations.[92]

It is interesting to compare the 1946 attitude of the South African Government with its attitude in 1951. In 1950, pursuant to the efforts of the ad hoc Committee on South-West Africa set up by the

General Assembly to negotiate with the mandatory to give effect to the 1950 Opinion of the *I.C.J.*, South Africa appeared to make a conciliatory gesture by agreeing to conclude an international agreement for the supervision of its administration of South-West Africa, but not only was the type of supervision it was prepared to accept negligible[93] but the agreement was proposed to be between the Mandatory and the three remaining Allied and Associated Powers - the U.K., France and the U.S.A. in whom, it was argued, sovereignty over South-West Africa was vested after the dissolution of the League. This was a novel argument which had never before been put forward by the Mandatory. In all its prior reference to the Mandate it had never maintained that this was a mandate of the Powers.

Thus when the attitudes of South Africa in 1946 and 1951 are compared within the context of the termination of the Mandate, the inconsistency is obvious. If authority to terminate the Mandate was vested in the Powers, the Mandatory should have approached those Powers in 1946 for permission to incorporate South-West Africa. South Africa, by approaching the United Nations first, indicated its recognition of the Organisation as the competent body and it is now estopped from denying this.[94]

The Termination of the Mandate and the Status of the Territory

It should be noted that the termination of the Mandate does not involve a change in the status of the territory. The termination merely deprives the Mandatory of its authority to administer the territory.

In answering the third question put to it for the Advisory Opinion of 1950 the I.C.J. observed that "competence to determine and modify the international status of South-West Africa rests with the Union of South Africa acting with the consent of the United Nations."[95] This, it has been argued, shows a kind of dual division of authority between South Africa and the United Nations, which necessarily excludes the possibility of either the Mandatory or the United Nations acting unilaterally.

Judge Fitzmaurice has gone as far as to suggest that the joint authority of the United Nations and the Mandatory can only be exercised at the initiative of the Mandatory. "It therefore follows from what the Court said about modifying the status of the territory, that competence... would rest *'with the Union of South Africa acting with the consent of the United Nations' - which view invests South Africa with the initiative, and negatives the existence of any independent right of termination* (of the Mandate) resident in the United Nations acting alone".[96]

The foregoing genre of argument is fallacious for two reasons. Firstly, it fails to distinguish between the modification of the status of a mandated territory and the termination of the authority of the mandatory.

The argument is based on the premise that the termination of the authority of the Mandatory (by a voluntary or compulsory process) ipso facto results in a change in the status of the territory concerned. What new status this territory becomes invested with is left undefined. For example, if prior to the dissolution of the League, South Africa as mandatory, had renounced its authority in South-West Africa the territory could not have lost its status as a "C" Mandate territory, which status resulted not from the presence of the authority of the Mandatory in the territory but, independently of that authority, from Article 22 paragraph 6 of the Covenant. A change in this status would have required an amendment of Article 22 paragraph 6.

has never been challenged, except perhaps, under dubious circumances, by the Mandatory itself, that the South-West Africa Mandate rvived the dissolution of the League.[97] This must necessarily mean that the status of South-West Africa as a "C" Mandate survived, (b) that the authority of the Mandatory to continue to administer the territory survived. What happened in 1966 was that the ority of the Mandatory came to an end; but it is too big a leap

from this position to hold that the lapse of the Mandatory's authority also resulted in a lapse of the status of the territory.

Even the French judge, Judge Gros, who dissented with the majority Opinion of the I.C.J. of 1971, could not avoid this pitfall. Having made substantially the same point as Judge Fitzmaurice on the question of termination of the Mandatory's authority he observed: "It must be recognised that neither the Court nor any judge who took part in the 1950 proceedings was ready to admit the existence of a power of revocation appertaining to the United Nations in case of violation of the Mandatory's obligations."[98]

Against the above statement it may be replied that the 1950 proceedings were advisory in character, and as such, the Court's discretion to explore issues was restricted to the three fairly specific questions asked by the General Assembly. Further, no termination of the Mandatory's authority had taken place in 1950 and none of the questions requested the Court to inquire into the possibility.[99]

However the argument which confuses the question of status of the territory with the authority of the Mandatory would naturally interpret the Court's answer to the question of status as also applying to the authority of the Mandatory.

It should follow that if the interpretation of Judges Fitzmaurice and Gros of the above-quoted pronouncement of the Court is the correct one, then the holding of the Court on the question of the modifiction of the Status of the territory is also open to the same criticism.

It is therefore appropriate to examine whether the interpretation given to the Court's statement of 1950 is in fact correct.

It is submitted that the above pronouncement of the Court does not, as a matter of logic, necessarily bear the meaning attributed to it by Judge Fitzmaurice. Firstly, it should be noted that the Court was only referring to the question of status - indeed, it cannot be understood to be referring to the termination of authority. Alternatively, even if the Court is so understood, its pronouncement should be viewed as an opinion as to the legal consequences of a termination of the STATUS of the territory; i.e. if the status of a mandated territory is abolished then the authority of the Mandatory must also come to an end. This is not inconsistent with the original objects of the Mandate System, namely, that when a mandated territory was ready for self-determination it would be granted independence (i.e. a change of status) necessitating the ending of the Mandatory's authority.

In this sense, it might be conceded that a change of status could also create the end of the Mandatory's authority. However, the two Judges did not draw this inference from the Court's statement of 1950. They reversed the only conclusion which might conceivably be drawn from the statement. Instead of holding that a change of status requires an end to the Mandatory's authority they proceeded on the premise that the termination of the Mandatory's authority necessarily results in a change in status of the mandated territory, and in so doing they invoked the above statement of the Court. This conclusion does not follow from the statement. Thus while it might be true that a change in status of a mandated territory could result in an end to the mandatory's authority the converse is never true.

It can be seen therefore that Judge Fitzmaurice's interpretation of the 1950 Opinion is incorrect - the most that can be read into the statement of the Court is that the United Nations cannot unilaterally *modify the status of South-West Africa - this being* without prejudice to the question whether the United Nations can (unilaterally) terminate the authority of the Mandatory in that territory. The merits of the Court's holding that the United Nations cannot unilaterally terminate the status of the territory is of course an entirely different question. Indeed, some would argue that the statement that the United Nations cannot unilaterally terminate the status of the territory can only apply under normal circums-

tances when the Mandatory is ready to duly perform its international obligations; that in the event of persistent and fundamental breaches by the Mandatory the supervisory role of the General Assembly vests in it sufficient authority not only to terminate the powers of the Mandatory qua mandatory but also to change the status of the mandated territory, for example by declaring it to be a trust territory or even by declaring it independent.

CHAPTER XI

MANDATES AND THE CONTEMPORARY LAW OF NATIONS

This Chapter is intended to serve as the concluding Chapter of this study as well as a reminder of the need for international judicial tribunals to adjudicate in disputes concerning Mandates in the light of the changing law of nations. Examples of such changes pertinent to Mandates will be outlined and the prospects for future international adjudication on this question will be assessed.

The administration of mandated territories today must not be viewed merely in terms of the relevant instruments and circumstances existing in the 1920's; rather, the task must be appraised within the total context of the realities of contemporary international law.

To quote Judge Nervo: "The world of today is far removed and different from the one of the First World War. New interests, new needs and new laws, customs, norms, and standards of international behaviour are being created by the relentless forces of public opinion, in search of recognition by the legislative and judicial bodies all over the world; and are today proclaimed or enacted by peaceful and normal procedures, or put into force by the sheer strength of peoples and states.

"The statesmen, the jurists, legislators and the courts of justice, they all have to recognise the realities of today, for the sake of freedom, justice and peace....

"The (International) Court... is not limited by the strict enumeration of Article 38(of its Statute), whose prescriptions it is free to interpret in accordance with the constant evolution of the concepts of justice, principles of law and teachings of publicists."[01]

Any judicial body, be it in the municipal or the international sphere, must be sensitive to changes within the society in which it operates. This change may be formal, in the form of new legislation or informal as evidenced by the strength of public opinion in support of it. In the international sphere, public opinion may on a given issue be so strong as to crystalise into what is known as "customary" international law. Public opinion is admittedly difficult - although not impossible - to gauge. In the field of self-determination international public opinion is overwhelmingly in favour of it and against all forms of colonialism. This world wide sentiment is comparatively a recent development which took place in the post World-War II era, and it was virtually non-existent in the era before and immediately after the First World-War. More recently, this new development has been buttressed

by formal changes in international law; for example, by the incorporation of the principle of self-determination and respect for human rights in the Charter of the United Nations, the Constitution of the International Labour Organisation, the Universal Declaration of Human Rights, the declaration on the Elimination of All Forms of Racial Discrimination, and the numerous resolutions of the United Nations' General Assembly and the Security Council, including the Declaration on the Granting of Independence to Colonial Countries and Peoples.[02]

According to Judge Tanaka, the principle of the protection of human rights has received recognition as a legal norm under three main sources of international law, namely (1) international conventions; (2) international custom and (3) the general principles of law: "Now, the principles of equality before the law or equal protection by the law presents itself as a kind of human rights norm. Therefore, what has been said on human rights in general can be applied to the principle of equality....

"We consider that the principle of equality, although it is not expressly mentioned in the mandate instrument constitutes, by its nature, an integral part of the mandates system and therefore is embodied in the Mandate. From the natural law character of this principle its inclusion in the Mandate (for

South-West Africa) must be justified."[103]

If the principle of equality has gradually evolved to the status of "a kind of human rights norm" and if it is to have so pervasive an effect, it makes all forms of discrimination illegal no matter where practised; and as Falk has pointed out, Judge Tanaka's argument renders the practice of apartheid illegal anywhere, including South Africa.

The generation of customary international law which has often been given formal expression in important international instruments has created a state of transformation from a sovereignty-centred international system (operating through conventions) to a community-centred international system (operating through international organisations).[104] This has resulted in states incurring international obligations without them always being formally undertaken on a strictly consensual basis, for example, through international treaties. It is in the light of this current law regarding self-determination, equality and human rights generally that Mandates must be viewed, and Judge Tanaka's approach is an excellent example of the interpretation of the Mandate for South-West Africa in the light of current law.

In the sphere of international adjudication by the I.C.J.,

there is evidence of a healthy development in the outlook of the Court on such matters, for as Rosenne has observed: "The Charter of the United Nations and the urgency of current international problems and aspirations have turned the course of the organised international society into new directions.... The intellectual atmosphere in which the application today of international law is called has changed, and with it the character of the Court, as the Organ for applying international law, is changing too.[05]

It was not in vain that Judge Jessup, before expressing his dissent with the 1966 Judgment of the I.C.J. on South-West Africa, quoted the famous words of Charles Evans Hughes, former Chief Justice of the United States and a former judge of the P.C.I.J.: "A dissent in a Court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed."[06]

Five years later, in 1971, the Court gave an opinion on South-West Africa which did much to restore the confidence of States in the Court, confidence which was severely shaken by the inability of the 1966 Judgment to interpret the Mandate in a progressive spirit. In 1971 not only did the Court dismiss

the standard arguments South Africa has put forward since the 1950's, but it categorically held that South Africa had breached its Mandate, and that States were under an international obligation not to assist South Africa in its activities in South-West Africa.

The Court further held that "... 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 definition 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."[07]

If South Africa continues to ignore this pronouncement of the principal judicial organ of the United Nations it does so at its own peril; for as Judge Lauterpacht has warned: "But in doing so it acts at its peril when a point is reached when the cummulative effect of the persistent disregard of the

articulate opinion of the (United Nations) Organisation is such as to foster the conviction that the state in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus (a)... State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organisation, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness... and that it has exposed itself to consequences legitimately following as a legal sanction."[08]

In view of the foregoing it can be confidently stated that, quite apart from the technical arguments concerning the treaty-making powers of the League or of the United Nations, or the status of the territory of South-West Africa, or the current validity of the Mandate Agreement as an international treaty and the extent of the powers of the United Nations over what remains of the Mandate System, there would be no difficulty in obtaining international judicial support (from the I.C.J.) for the view that South Africa is under an international obligation to grant immediate powers of self-determination to the territory of South-West Africa and that in persistently ignoring the articulated opinion of the United Nations it has

"overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness" and that its acts constitute a very serious breach of international law which pose a threat to international peace and security and which therefore bring the matter within the purview of Chapter VII of the Charter of the United Nations.

In conclusion one must address oneself to the question as to what extent would enforcement action in respect of South-West Africa - even if given express judicial approval by the I.C.J. - be feasible or effective.

As has already been pointed out, because of the level of de facto integration of South-West Africa into the territory of South Africa it would be impossible to proceed against South-West Africa separately, and such action would have to be directed *against South Africa itself.*

The level of integration is showed by the fact that South Africa today reaps huge economic benefits from the diamond-rich territory of South-West Africa, and has made extensive investments to exploit the natural resources of the territory, which include minerals and other resources, although the land is not productive agriculturally. Rich deposits of diamonds, uranium, copper, lead and zinc have been discovered.[09] In

1964 mineral exports alone accounted for almost R100,000,000. In addition, there were valuable exports of fish, cattle, Karakul, hides and skins worth millions more.[10] Today, more than ten years later, these figures may have increased several times over.

South-West Africa is not integrated with South Africa at the economic level only. The territory's defence is also integrated into the overall defence system of the Republic; the territory is of immense strategic value to South Africa and serves as a good buffer zone against the independent African States to the north of the Republic and to the north, north-east and east of South-West Africa. (See map).

As indicated above, South-West Africa is administered as if it were a fifth province of the Republic so that not only is the policy of apartheid enforced there in all matters of state, work and law but as inside the Republic itself, distribution of revenue received by the territory is along segregationist lines. For example in the 1964-65 period, out of R4,768,412 spent on school construction inside the territory of South-West Africa, R3,315,966 were for European schools and R799,534 for African Schools and R673,912 was for other races.[11]

The above facts and figures are recited to show the level of

integration of the territory into that of South Africa so that any enforcement by the United Nations would require the territory to be forcibly detached from South Africa. It will not be simply a question of proceeding against the territory by itself.

Recently the United Nations has taken some action to safeguard the economic resources of the territory. It has been reported that the United Nations Council for Namibia has "decreed that any natural resources exported from Namibia without Council authority should be seized and held in trust for the people of the disputed territory.

"Under the decree all planes, or ships or containers found to be carrying these exports could also be seized."[12]

How this "decree" is to be executed remains to be seen - no details for its implementation were available at the time of writing. However the United Nations has not, to date, been successful in remedying any of the numerous breaches committed by South Africa. The implementation of the "decree" will therefore prove difficult, if not impossible. It has already been observed that "the big Western countries most involved in mining and other business in Namibia (are) likely to ignore the Council's call for a boycott of exports."[13]

The interest of Western powers, particularly the United Kingdom and the United States, inside the territory of South-West Africa have added a further dynamic to the question of enforcement. The United Nations Special Committee for South-West Africa has confirmed the presence of Western interests in South-West Africa. In a Report in 1966 the Committee stated that the Tsumeb Corporation, the Consolidated Diamond Mines (a subsidiary of de Beers Consolidated Mines) and the Marine Diamond Corporation, in all of which the two Western Powers are financially interested, were working the diamond deposits in the territory. Other corporations were working on meat canning, fish production and other export commodities.[14]

It can be seen, therefore, that in so far as South Africa has economic interests in South-West Africa and in so far as certain Western Powers have economic interests in South-West Africa and in South Africa itself with whom the U.K., the U.S., France and Japan have close economic and in some cases military co-operation, the problem of effective control by the United Nations of South Africa's administration or the enforcement of the Mandate provisions through non-violent or violent means is rendered difficult because this would necessarily depend on the co-operation of the Powers concerned. Not only has this co-operation not been forthcoming, but the

possibilities of a veto over any action by the United Nations under Chapter VII affecting Western economic interests either in South-West Africa or South Africa itself remains a virtual certainty. In the current moves to expel South Africa from the United Nations, the U.K., U.S.A. and France exercised a triple-veto to prevent the Security Council from addressing a resolution to the General Assembly recommending expulsion.

Peaceful judicial settlement has failed to produce any change; and if the United Nations ability to take forcible enforcement action continues to be fetterred by the veto powers of certain members of the Security Council, the matter will be pushed into the realm of change through internal revolutionary uprising and a dislodging of South Africa's governmental authority in South-West Africa manu militari.

APPENDIX I

ARTICLE 22 OF COVENANT OF THE LEAGUE OF NATIONS

APPENDIX I.

Article 22 of the Covenant of the League of Nations.

1. To those colonies and territories which as consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation 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 recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

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 liqour traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the native 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. There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, 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 AGREEMENT REGARDING GERMAN SOUTH WEST AFRICA OF 17 DECEMBER, 1920

The Council of the League of Nations:

Whereas by Artilce 119 of the Treaty of Peace with Germany signed at Versailles on June 28th, 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 afore-mentioned, 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 afore-mentioned 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:

Article I.

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South West Africa.

Article II

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa, to the territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.

Article III.

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 September 10th, 1919, or in any convention amending the same.

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

Article IV.

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

Article V.

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.

Article VI.

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.

Article VII.

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 on the 17th day of December, 1920.

NOTES

Chapter I: Notes to pp.10-15.

1. Wright, Mandates Under The League of Nations 7-8 (hereafter cited as Mandates); see also Nussbaum, A Concise History Of The Law Of Nations 20 (hereafter cited as Concise History).
2. Wright, Mandates 8-9.
3. Nussbaum, Concise History 79-114.
4. Wright, Mandates 11.
5. Ibid.
6. Snow, The Question Of Aborigenes In The Law And Practice Of Nations 70.
7. Wright, Mandates 18.
8. Ibid.
9. Wright, Mandates 20, footnote 42.
10. Ibid., pp. 13-14.
11. Ibid., p. 20.
12. Bentwich, The Mandates System 8 (hereafter cited as Mandates System).
13. Beer, African Questions At The Peace Conference 424-425.
14. Wright, Mandates 22.

Notes to pp.15-20.

15. Bentwich, Mandates System 2.

16. Carroll, *South West Africa And The United Nations* 27-29 (hereafter cited as South West Africa).

17. Bentwich, Mandates System 1-10.

18. Carroll, South West Africa 27.

19. Ibid.

20. Bentwich, Mandates System 1-4; see also Wright, Mandates 315-320.

21. Ibid., p.4.

22. Ibid., p.5. The nature, scope and effectiveness of such supervision is examined later; see particularly Chs. III and IV Infra.

23. Temperley, History of the Peace Conference II, 236, New Statesman March, 26, 1921. See also Bentwich, Mandates System 9-16.

24. Bentwich, Mandates System 5.

25. Ibid., pp.17-18.

26. Bentwich, Mandates System 10; see also Corbett, What is the League of Nations?, V Brit. Yb. Int'l L. 132, n. 4 (1924) (hereafter cited as League of Nations).

27. Bentwich, Mandates System 101.

28. Article 22 paragraph 1 of the Covenant of the League of Nations. See Appendix I.

29. Article 22 paragraph 2 of the Covenant.

30. Article 22 paragraph 3 of the Covenant.

Notes to pp.21-30.

31. Gazette des Tribunaux Libano - Syriens, 1010 December 1927.

32. New Guinea, Samoa and Nauru also fell in this category.

33. Article 22 paragraph 7 of the Covenant.

34. Article 22 paragraph 9 of the Covenant.

35. Article 22 paragraph 8 of the Covenant.

36. Corbett raises this ambiguity in Article 22 paragraph 8 in a different context - note 65, in Chapter II, infra.

37. The treaty-making power of the League is discussed in the appropriate context below. At this stage it suffices to note that the silence of Article 22 on the question cannot conclusively prove an absence of such a power.

38. Appendix II.

39. League of Nations, Memorandum of the Secretary General - L/N 20/48/161, Annex. 3, June 1920.

40. Hymans Report on The Obligations of the League of Nations under Article 22 of the Covenant (Mandates) August 5, 1920 p.8.

41. Per Judge Bustamante, I.C.J. Reports, 1962, p.359.

42. Ibid.

43. See I.C.J. Reports, 1962, p.391.

44. Emphasis supplied; cf. the terminology of Art. 22 paragraph 8 of the Covenant.

45. I.C.J. Reports, 1962, p.392; emphasis supplied.

46. Article 8 of the draft Convention.

47. I.C.J. Reports, 1962, p.394.

Notes to pp.30-35.

48. Appendix II, infra.

49. Emphasis supplied. Source: I.C.J. Reports, 1962, p.395.

50. note 44 supra.

51. [1959] I.L.C.Y.B. II, 94. See also Report by Brierly as Special Rapporteur to the International Law Commission, [1950] I.L.C.Y.B. II, 227.

52. See Generally the dissenting Opinion of Judge Jessup in I.C.J. Reports, 1966, 325 at p.390-392.

53. See generally Hall, The British Commonwealth Of Nations 180.

54. O'Connell, Independence and Succession to Treaties XXXVIII Brit. Yb. Int'l L. 103 (1962). See generally idem pp.89-95.

55. Noel-Baker, Judicial Status Of British Dominions In International Law 107.

56. Hall's International Law, ed., Higgins, 8th ed., 35. See also Wheaton's Elements Of International Law, ed., Keith, 6th ed., I, 130-131.

Chapter II: Notes to pp.36-42.

57. Wright, Mandates Under The League Of Nations 498; Van Rees, Les Mandats Internationaux I, 12 cited by Wright, idem 498.

58. Stoyanovsky, La Théorie General Des Mandats Internationaux 19; see also Wright, Mandates 528-529, and Chapter III infra.

59. Carroll, South West Africa And The United Nations 29.

60. Wright, Mandates 499.

61. Wright, Mandates 530; and I.C.J. Reports, 1966, p.24; and the Dissenting Opinion of Judge Nervo, I.C.J. Reports, 1966, p.453.

62. Lauterpacht, Private Law Sources And Analogies Of International Law 196 (hereafter cited as Private Law Sources).

63. Wright, Mandates 379 at 381.

64. Per de Villiers J.A., Rex v. Christian, 1924 S.A.L.R. (A.D.) 119-120.

65. Corbett, What is the League of Nations?, V Brit. Yb. Int'l L. 132 (1924).

66. Schucking and Wehberg, Die Satzung des Völkerbunds, 430-431 - cited by Corbett, ibid., p.132, n.1.

67. Rolin, Le Système des Mandats 3-4 R.D.I.L. 351 (1920).

68. Corbett, League of Nations, p.132, n.4; see also Bentwich, The Mandates System 10.

69. Corbett, League of Nations, 133.

70. Ibid.

Notes to pp.42-49.

71. Bentwich, Mandates System 17; see also Wright, Mandates 334.

72. Bentwich, Mandates System 7-8.

73. Corbett, League of Nations, 133-134.

74. See Wright, Mandates 383-384 for the general characteristics of this institution.

75. Ibid., p.385.

76. Emphasis supplied.

77. A similar view is expressed in Oppenheim, ed., McNair, 4th ed., I, 205.

78. Brierly, Trusts and Mandates X Brit. Yb. Int'l L. 217 (1929); see also Wright, Mandates 376-385.

79. Lepaulle, An Outsider's View-point of the Nature of Trusts, XIV Cornell L.Q. 52, (hereafter cited as Nature of Trusts). Judge McNair has held (1) that a trustee's control of property is limited, (2) that the trustee is under an obligation "based on confidence and conscience" to carry out the trust for the benefit of another person, and (3) that any attempt by the trustee to absorb the property into his own patrimony is illegal (I.C.J. Reports, 1950, p.149).

80. I.C.J. Reports, 1962, p.357.

81. Lepaulle, Nature of Trusts, 52. See also the Dissenting Opinion of Judge Tanaka in I.C.J. Reports, 1966, p.267.

82. Article 22 paragraph 1 of the Covenant.

83. Brierly, Trusts and Mandates, 219.

Notes to pp.50-58.

84. Cf. the opinion of Judge Bustamante, note 80 supra, that the inhabitants are "legal persons who will one day have the capacity to decide for themselves".

85. Bentwich, Mandates System 7-8; supra note 72; cf. Wright's view that "while ordinarily rights under international law vest only in states, it appears that the mandated peoples have a status, withdrawing them from the sovereignty of any state and giving them the opportunity to invoke the direct protection of the League, which makes it not inappropriate to speak of them as enjoying rights under international law correlative to the duties imposed by the mandates upon the mandatories for their benefit" (Whright, Mandates 457).

86. For the procedure adopted see Chapter I supra, the section on "The Nature of the Mandate Agreements".

87. See Bentwich, Mandates System 20, 96 for the role of this Commission in the supervision of mandates; see also Chapter IV infra.

88. Corbett, note 69 in this Chapter supra.

89. Separate Opinion, I.C.J. Reports, 1950, p.148; see also note 79 in this Chapter.

90. Rex v. Christian, 1924 S.A.L.R. (A.D.) 112.

91. Rex v. Christian, 1924 S.A.L.R. (A.D.) 121.

92. See also the Dissenting Opinion of Judge Tanaka in I.C.J. Reports, 1966, p.267.

93. Lauterpacht, Private Law Sources pp.viii, xxv, 84-86.

94. Dissenting Opinion, I.C.J. Reports, 1966, p.217.

Chapter III: Notes to pp.59-65.

95. Ch. I, supra.

96. South-West Africa (second phase) Judgment, I.C.J. Reports, 1966, pp.20-21.

97. Article 22, paragraph 6 of the Covenant, Article 2 of the Mandate for South-West Africa.

98. See Chapter I.

99. C.L.R. 580-581. This case is discussed below; see also Roberts-Wray, Commonwealth And Colonial Law 54-59.

01. [1910] 2 K.B. 576.

02. Per Vaughan Williams, and Kennedy L.J.J. Ibid., pp.591-592, 620-621.

03. Ibid., pp.603-604.

04. Per Kennedy, L.J. Ibid., p.620.

05. 58 C.L.R. 581; the decision in R v. Crewe Ex Parte Sekgome was also approved by the Privy Council in Sobhuza II v. Miller [1926] A.C. 518.

06. Frost v. Stevenson 58 C.L.R. 581.

07. League of Nations Official Journal, IV, 604. See also Bentwich, The Mandates System 103; and Wright, Mandates Under The League Of Nations 522-528.

08. Corbett, What is the League of Nations? V Brit. Yb. Int'l L. 135 (1924).

09. Evatt, J. in Stevenson Case, 58 C.L.R. 585.

10. 58 C.L.R. 528.

11. Per Latham, C.J., ibid., p.552.

Notes to pp.65-69.

12. New Guinea was mandated to His Britannic Majesty, the mandate to be exercised on his behalf by the Government of the Commonwealth of Australia.

13. 44 and 45 Vict. c.69.

14. Evatt, J., 58 C.L.R. 608.

15. Ibid., p.549.

16. Separate Opinion, I.C.J. Reports, 1950, p.150.

17. Article 2 of the Mandate for New Guinea (1921) and Article 2 of the Mandate for South-West Africa (1920). The wording of Article 2 in each Mandate is identical to the extent quoted above.

18. See Frost v. Stevenson 58 C.L.R. 550-555; and Wright, Mandates 319-321.

19. Wright, Mandates 451.

20. Frost v. Stevenson 58 C.L.R. 551; see also Wright, Mandates 324-327.

21. Bentwich, Mandates System 20.

22. A situation described by Wright as a "condominium of the Principal Powers" - Wright, Mandates 319.

23. Wright, ibid., pp. 332 and 335. See also Hales, Some Legal Aspects of the Mandate System: Sovereignty - Nationality - Termination and Transfer, 23 Trans. Grot. Soc. 86-95 (1937).

24. Frost v. Stevenson 58 C.L.R. 551; see also Wright, Mandates 327.

Notes to pp.69-75.

25. Gess, Permanent Sovereignty over Natural Resources, 13 Int'l and Comp. L.Q. 398, 443-444 (1964); however Lee disapproves of this theory: The Mandate For Mesopotamia And The Principle Of Trusteeship In English Law 19.

26. Note 16 in this Chapter supra.

27. 58 C.L.R. 552-553.

28. Dissenting Opinion - South-West Africa (Second Phase). Judgment I.C.J. Reports, 1966, p. 481; see also the comments of The Asian-African Legal Consultative Committee - South-West Africa Cases. Report of the Committee and Background Materials 126.

29. Bentwich, Mandates System 20.

30. Ibid., p. 96.

31. The Status of The Mandatory Power XII Brit. Yb. Int'l L. 151 (1931).

32. Bentwich, Mandates System 100; and Imishue, South-West Africa - An International Problem 13; see also Carroll, South-West Africa And The United Nations 31-33, and Wright, Mandates 209-210.

33. Re Ezra Goralshvi, 20 Am. J. Int'l L. 771 (1926).

34. 1924 S.A.L.R. (A.D.) 109.

35. Corbett, League of Nations 128, 130.

36. Ibid.

37. i.e. as an "A" mandate.

38. Corbett, League of Nations, 128.

39. Ibid., p.130.

Notes to pp.75-80.

40. Ibid., p. 134.

41. Ibid., p. 134.

42. Ibid.

43. Ibid.

44. Ibid., pp.134-135.

45. Ibid., p.135.

46. Lauterpacht, Private Law Sources And Analogies Of International Law 199-208.

47. Evatt, The British Dominions as Mandatories, I.A.N.Z.I.L. 27.

48. 1924 S.A.L.R. (A.D.) 101.

49. Bentwich, Mandates System 127.

50. Van Rees, P.M.C. Min. I., 19.

51. Wright, Mandates 336.

52. Wright says that the Powers having assigned the mandates "passed out of the picture" (Ibid., p. 502).

53. Discussed in the next chapter.

54. Bentwich, Mandates System 20.

55. 1924 S.A.L.R. (A.D.) pp.108-109.

56. Infra, Chapters IX and X.

Notes to pp.80-85.

57. Wright, Mandates 338. Cf. Spiegel who maintains that because of the principle of non-annexation and because the League's powers were limited under international law by Article 22 of the League Covenant the League could not have possessed sovereignty but held the mandates as trust property; Spiegel, "Das Völkerrechtlich Mandat Und Seine Anwendung auf Palästina" (Vienna 1925) pp.29-30, cited by Wright, p.335.

58. Rex v. Christian, supra pp.77-78.

59. Article 2 of the Mandate Agreement for South-West Africa.

60. Wright, Mandates 370-371.

61. S. African Law Reports (1926) C.P.D. 312.

62. Cf. Wright, Mandates 325-6.

63. See the concept of trust supra, Ch. II, and also the Hymans Reports referred to in Ch. I.

64. Frost v. Stevenson 58 C.L.R. 589.

65. 49 C.L.R. 278-9.

66. Verein Fur Schutzgebietsanleihen E.V. v. Conradie, N.O. 1937, S.A.L.R. (A.D.), 113, at 146-151.

67. Article 6 of the Mandate Agreement for South-West Africa.

68. Ibid., Article 7.

69. Wright, Mandates 445-446.

70. The "safegaurds" are enumerated in Article 22, paragraphs 1 and 5 of the Covenant of the League of Nations.

Notes to pp.85-92.

71. Wright, Mandates 326; but see the discussion by Wright on who has ultimate responsibility for injuries arising from acts of the mandatory government - idem, pp.506-510, and the discussion by the same author as to who has authority to change the fundamental law binding the inhabitants of the territories. His conclusion is that the Mandate is an "agreement" which neither party can unilaterally amend, and even if both parties agree to an amendment it must be in conformity with Article 22 and the rights of third States thereunder, idem, p.516, and pp.518-519; cf. the same author's discussion on the revocation of the Mandate by the League, idem, pp.520-522; see also Ch. X infra.

72. Hudson World Court Reports, I, 156.

73. Dissenting Opinion in South-West Africa (Second Phase) Judgment, I.C.J. Reports, 1966, pp.301-302.

74. Wright, 17 Am. J. Int'l L. 700 (1923). See also Wright, Mandates 518-519.

75. Ballinger, South-West Africa, The Case Against The Union 40-41 (hereafter cited as Case Against The Union); see also Sorensen, ed., Manual Of Public International Law 93-98.

76. Waldock, The Plea of Domestic Jurisdiction before International Legal Tribunals XXXI Brit. Yb. Int'l L. 96-115 (1954).

77. Ibid., p.142.

78. South Africa House of Assembly Debates, May 3, 1954 cols. 4485-87.

79. Rex v. Christian, supra, pp.77-78, 80.

Notes to pp.93-106.

80. Cheng, The Rationale of Compensation for Expropriation 44 Trans. Grot. Soc. 267 (1958).

81. Nationality Decrees Case, Hudson World Court Reports, I, 156 (hereafter cited as W.C.R. I).

82. Article 22 paragraph 9 of the Covenant.

83. "The Wimbledon" Case, W.C.R. I, 175.

84. Bentwich, Mandates System 16; see also Wright, Mandates 440-441, 519-521.

85. Wright, Mandates 528-529.

86. Ibid., p.530.

87. Ibid.

88. Ibid., p.531.

89. Wright, Mandates 533.

90. See Carroll, South-West Africa, Ch. I.

91. Ibid., p.15.

92. Statutes of the Union of South Africa, 1954, pp.559, 561.

93. Carroll, South-West Africa 81.

94. For a more detailed description see Carroll, ibid., pp.5-8; see also Imishue, South-West Africa - An International Problem 9-12 (hereafter cited as South-West Africa).

95. Carroll, South-West Africa 34.

96. Wright, Mandates 209-210; and Carroll, South-West Africa 31-33.

Notes to pp.107-109.

97. [1948-1949] U.N.Y.B. 570; and Imishue, South-West Africa 53.

98. Lejeune, The Case For South-West Africa 132; see also supra, Ch. I.

99. Imishue, South-West Africa 40-41, and Ch. VII infra.

01. Imishue, South-West Africa 48-49.

02. U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12, at 32 (A/4191) (1956). See also Ballinger, Case Against The Union 31-32.

03. General Assembly Resolution 1567 (XV) 1959.

04. For example, General Assembly Resolution 851 (IX) November 1954; Resolution 941 (X) December 1955; Resolution 1054 (XI) February 1957; Resolution 1360 (XIV) November 1959. In the latter year no less than seven resolutions were passed; see Ballinger, Case Against The Union 14-15.

05. But see Carroll, South-West Africa Chs. 5 and 6 generally; see also Ballinger, Case Against The Union 30 and Imishue, South-West Africa 40-51, 61, and Yearbook of the United Nations, 17th Sess. 440 (1962) for Report of the Special Committee on South-West Africa (established by the General Assembly in December 1961) on breaches of the Mandate by South Africa through the systematic enforcement of apartheid in the territory in all spheres of life.

06. "South-West" is a short form for "South-West Africa".

07. House of Assembly Debates April 23, 1956, Vol. 91. Cols. 4108-9, statement by J. Basson, M.P. in April 1956.

Chapter IV: Notes to pp.111-118.

08. Wright, Mandates Under The League Of Nations 128.

09. Resolutions of the 7th Assembly, League of Nations Monthly Summary, VI, 238.

10. Wright, Mandates 136.

11. Ibid., p.194.

12. Bentwich, The Mandates System 116.

13. Wright, Mandates 147-148.

14. Bentwich, Mandates System 109-116.

15. Ibid., p.113.

16. Ibid., p.117. See also Chapter III, note 95, supra.

17. Bentwich, Mandates System 119.

18. Wright, Mandates 401.

19. Bentwich, Mandates System 111; Wright, Mandates 196, 199.

20. Permanent Mandates Commission, Minutes III, 325.

21. Bentwich, Mandates System 111.

22. See Report of the 15th Session of the Permanent Mandates Commission 1929, p.15.

23. The Mandatory's powers in the "B" and "C" Mandates were wide enough to permit the Mandatory to establish its own Courts inside the mandated territory; see Article 22 paragraphs 5 and 6 of the League Covenant; see also Bentwich, Mandates System 120-130.

4. Wright, Mandates 405.

5. [1926] A.C. 321.

Notes to pp.119-126.

26. Bentwich, Mandates System 121-126; see also Wright, Mandates 410-411.

27. For the text of the Order in Council see Wright, Mandates 409-411.

28. Unreported, see Wright, Mandates 411-412, and Bentwich, Mandates System 123-125.

29. Article 22 of the Mandate for Palestine and Transjordan.

30. Bentwich, Mandates System 125.

31. Also unreported, see Wright, Mandates 411-412; see also 20 Am. J. Int'l L. 770 (1926), and Stoyanovsky, The Mandate For Palestine 336-361 cited in Wright, p.412.

32. Wright, Mandates, 412.

33. Permanent Mandates Commission, Minutes XI, 67,202.

34. Wright, Mandates 414.

35. Ibid., p.415.

36. Ibid., p.419-420.

37. Ibid., p.420.

38. 53 - 54 Vict. c.57.

39. Wright, Mandates 421.

40. Wright, Mandates 422.

41. Ibid., p. 422 - 423.

42. Statutes of the Union of South Africa 1919, p.492.

43. Supra, Chapter III; see also Wright, Mandates 424-425.

44. 1924 S.A.L.R. (A.D.) 120.