Chapter 1

From Mandates System
To Trusteeship System
SOUTH WEST AFRICA & ITS NEIGHBOURS
Chapter I
FROM MANDATES SYSTEM TO TRUSTEESHIP SYSTEM

In application of the principles of 'sacred trust', as enumerated in the preceding 'Introduction', South West Africa was first subjected to the Mandates System before the United Nations, having come into existence in 1945, tried to draw it into the fold of the Trusteeship System. Even a short account of South West Africa under Mandates System, in so far it is relevant for our study, should be preceded by a brief description of the Territory itself and other useful and relevant information.

A. GENERAL INFORMATION ABOUT SOUTH WEST AFRICA

South West Africa is the name given to a country lying between River Orange, which forms its southern boundary, and Kunene and Okavango rivers which form its northern boundary.

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1 This country has been named and renamed by foreigners. Early in the 1760s white settlers of the Cape Colony referred to this territory as the "Transgariep", meaning the territory north of the Orange River. Charles John Anderson, a Swedish-born adventurer, was the first person to term the area north of the Orange River "South West Africa". Following the raising of the German flag at Luderitz Bay on 7 August 1884, the territory became known as "German South West Africa". When it was declared a League of Nations mandate under the Treaty of Versailles, it began to be referred to simply as "South West Africa". (Hidipo L. Hamutenya and Gottfried H. Seingob, "African Nationalism in Namibia" in Christian P. Potholm and Richard Dale, ed., Southern Africa in Perspective (New York, 1972), p. 85.
The Territory is located between the Portuguese Colony of Angola in the North, northern Rhodesia in the north-east, Walvis Bay and the Atlantic Ocean in the West and the Union of South Africa in the East and South. Its total area, including the 434 square miles of Walvis Bay enclave is estimated at 318,261 square miles (824,296 square kilometres) which is a little larger than Great Britain and France put together; it is about two-thirds of the area of the Republic of South Africa.

The country may be said to consist of a sandy desert coast belt extending 60 to 100 miles inland, a high interior plateau and a gently falling eastern strip of sandy country. The coastal desert of Namib constituting the natural shield to South West Africa has for centuries guarded the entrance to the hinterland against the prying intruders such as the Portuguese slave-hunters. Due to the waterless barrier of Namib desert none ever endeavoured to venture inland but proceeded on their trade route to the distant lands, leaving fabulous riches untouched beneath the surface of sand. For ages, therefore, the hinterland remained hidden beyond the towering sand dunes of the Namib desert. Only since the seventeenth century has information been gathered about the vast inland region and its peoples. The Namib might be

3 J.P. Van S. Bruwer, South West Africa: The Disputed Land (Cape Town, 1966), pp. 2-3 (cited by Potholm and Dale, op. cit., p. 36).
described as the real treasure house of South West Africa because it is one of the richest alluvial sources of diamonds in Africa. Here diamonds are extensively found loose in sand gravel on the ground. The two important harbours of the country, Walvis Bay and Luderitz, are both situated in the Namib.

In the whole of western belt rain seldom falls and, excepting for the coastal towns, the country here is uninhabited and, in fact, uninhabitable. In the extreme north the climate is almost semi-tropical and enjoys, relatively speaking, fair rainfall, about 24 to 30 inches a year. The inhabited portion of the Territory, lying mostly between the two deserts and consisting of grass steppe lands, has but a low rainfall. Long periods of drought are common, and agricultural and industrial development has been hampered by the limited water resources.

About the people it might be stated that Europeans numbering about 90,658, of whom more than a quarter are German-speaking people, constitute only about twelve per cent of the total population. About 67 per cent of these whites are Afrikaans-speaking descendants of the Dutch settlers in South Africa, while only 10 per cent are English-speaking.

More than 44 per cent of the African population is made up by the Ovambos, a large tribal group who by South
African laws are confined to the northern area of the country along the Angolan border - and, in fact, the tribe is divided by the border. After the Ovambo, the next largest tribal group are the Hereros, a Bantu-speaking people who, in the past - at least five centuries ago - immigrated to South West Africa from somewhere west of Lake Tanganyika. Other peoples are Damara, or Berg-Damara - 8.23 per cent of the population - whose more negroid features and darker skins make them slightly different in appearance from other tribes. Also to be found - forming about 1 per cent of the population - are a small group of Tswana, who predominate in neighbouring Botswana. Then there are Bushmen numbering about 2.18 per cent of the population. Finally, there are also two groups of coloureds, persons of mixed African and European origin. The most remarkable of these are the so-called 'Rehoboth Basters' who are Afrikaans-speaking descendants born as a result of miscegenation between Boer farmers and Nama women. South West Africa is the most sparsely populated country south of Sahara. Its population was estimated in 1970 to be 746,328.

The greater part of the country, by reason of its arid

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character, is incapable of supporting a large population. Scope for large scale manufacture of anything to meet the internal market is extremely limited, while external markets are too remote to be remunerative. Few areas can sustain any concentrated population.

Land and climate of South West Africa may not be suitable for any large scale farming or industrialization but they are suitable for the karakul sheep. Nearly half of the world's supply of karakul comes from South West Africa. South West Africa is also the second largest supplier of gem diamonds which lie beneath the barren soil. In addition to diamonds, South West Africa has a great variety of mineral deposits including copper, lead, zinc, tin, vanadium and petroleum. A pilchard and lobster industry has also developed there.

The mines of South West Africa are all white-owned, run from South Africa if not from Europe or America, and are among the most profitable enterprises of their kind in the world. Consolidated Diamond Mines of South West Africa Ltd., is controlled by De Beers and produces 99.6 per cent of South West Africa's diamonds. The American Newmont Mining Corporation and American Metal Climax are among the biggest shareholders in the giant Tsumeb Corporation and, along with the

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South West Africa Company Ltd., General Mining Corporation, the Canadian Rio Tinto, West German, and even Japanese interests, exploit the mineral resources of the Territory.

The economy of South West Africa presents an extreme example of dualism. On the one hand, there is a modern, commercialized sector of activity which is based on production as we know it in industrial societies. In this sector modern technique of production and organization are used in all kinds of activity, in agriculture as well as in industry and commerce, and the standard of living of the Europeans is relatively high. On the other hand, there is a sector of activity in which the per capital income is quite low. This is subsistence sector in which there is almost no scope for the acquisition of modern techniques of production. Thus the two sectors of South West Africa belong to quite different stages of economic development.

The profits from the export of diamonds, karakul pelts, lobsters etc. are in the millions of dollars but the Africans may only labour in the mines and fields for a few rands a year. Much of the profit from diamonds and minerals goes out of the Territory, causing a startling discrepancy between gross domestic products and its national income.

Africans provide a cheap labour pool for the white-owned mines, farms and industries. Without cheap native

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8 Gibson, op. cit., p. 110.
labour the exploitation of minerals in South West Africa would not be as profitable as it is. They are brought in from the reserves to do the work, under a system which guarantees that they will remain transients in the white areas where they are needed. In the karakul industry the role of the Africans is that of the shepherd.

Since the German era, South West Africa has been divided into two principal zones, and this division has been central to the contract labour system. The first zone, known as the Police Zone, comprises the entire southern two-thirds of South West Africa except for the remote, tiny, and widely scattered enclaves carved out on the edge of the Police Zone as the "Damara homeland", "Herero homeland", "Nama homeland", "Tswana homeland", and "Rehoboth homeland". The Police Zone is an exclusive "homeland" for white settlers. It contains virtually all the important natural resources of the country and, therefore, all the industrial centres. The second Zone consists of the remaining northern third, referred to as the "Northern Bantu Areas". In these Bantu Areas almost half of the total native population lives at a subsistence level. Even to reach that level, African men from the "Bantu homelands" must seek employment in the Police Zone, the area to which, by law, they have otherwise no entry.

9 A Principle in Torment, op. cit., p. 16.
Consistent with its policies within its own undisputed boundaries, the South African Government has gradually introduced into South West Africa 'all the racist refinements of the apartheid system'.

The Territory has a Legislative Assembly of eighteen members. Only the white people are entitled to become its members or to take part in its elections. The South African Government from Pretoria itself directly controls defence, security, foreign affairs, immigration, and customs, while the territorial assembly governs all other domains. Executive powers are exercised by an Executive Committee composed of the Administrator, who is president of the Legislative Assembly, and four members elected by the Assembly. Coloureds elect members to an advisory Coloured Council, while the Africans are left to their tribal councils headed by Government-supported chiefs and to the mercies of the Ministry of Bantu Affairs in Pretoria.

B. SOUTH AFRICA ACQUIRES CONTROL OVER SOUTH-WEST AFRICA

For 30 years, from 1884 until the First World War, South West Africa was under German administration. It was invaded by South African forces shortly after the beginning of the First World War and, by the middle of 1915, it was

10 Gibson, op. cit., p. 113.
completely occupied by it. After the War was over in 1919, the leaders of the victorious Powers met in a Conference in Paris in January 1919 to draft a peace treaty and to decide about the fate of the colonies recovered from the vanquished Powers. As a result of the deliberations of these leaders the colonies recovered from the enemy were placed under the Mandate System of the League of Nations. Thus South West Africa became a mandate territory under Article 22 of the Covenant of the League of Nations. Article 22, however, did not name the mandatory Powers in respect of several mandate territories nor did it say as to how the mandated territories were to be distributed among them. All these points were decided upon by the Supreme Council of the Allied Powers because the German colonies in Africa and the Pacific were surrendered to them and not to the League of Nations vide Article 119 of the Treaty of Versailles. On 7 May 1919 the Supreme Council allotted to the Union of South Africa the mandate in respect of South West Africa.

11 The members of the Supreme Council of the Allied Powers were: Great Britain, France, Italy, Japan and the United States in the initial period.

12 This Article reads: "Germany renounces in favour of the Principal Allied & Associated Powers all her rights & titles over her overseas possessions".

The League of Nations not only played no part in the designation of the mandatory Powers but it also had no part in the drafting of, or in the negotiations over, a series of legal instruments which specified the degree of authority, supervision or administration to be exercised by each of the mandatory Powers. Such instruments, called the "mandate agreements", were drawn up in respect of each of the territories by direct negotiations between the Principal Allied and Associated Powers on the one hand and the mandatory powers on the other. They came into force after they had been confirmed by the Council of the League of Nations. The mandate in respect of South West Africa was confirmed by the Council of the League of Nations on 17 December 1920 along with those of New Guinea, Nauru, Samoa and the Islands north of equator. Thus South West Africa became a mandate territory with effect from the 17 December 1920 with the Union of South Africa as the mandatory power.

To begin with, South West Africa came under the de facto control of the Union of South Africa as a result of its military occupation following the defeat of Germany in World War I. This military occupation of South West Africa by the forces of the Union of South Africa was actually an occupation on behalf of the Allied Powers because the troops

14 Ibid., p. 20.
of the Union of South Africa were part of the Allied Command. The *de jure* authority of the Union Government to administer South West Africa is, however, derived from the decision of the Council of the Allied Powers to appoint South Africa as the mandatory power for South West Africa and also from the specific mandate agreement negotiated by that Council and later confirmed by the League of Nations on 17 December 1920.

C. THE QUESTION OF INCORPORATION IN SOME SPECIAL CASES

Although the Principal Allied and Associated Powers were committed in advance to the principle of 'no annexation' as part of their pre-Armistice Agreement, yet when the question of disposal of ex-enemy colonies came up for discussion at the Paris Peace Conference, the Allies seem to have had second thoughts about it so much so that it would not be wrong to look upon the negotiations at Paris as the battle between the proponents of outright annexation and those opposed to it. Many of the Allies, while putting forward claims to various territories that were to be detached from Germany and Turkey, wanted exceptions to be made to the principle of 'no-annexation' in some cases. Thus, in the view of the leaders of Newzealand, Australia and Japan, some other form

of control was satisfactory for the Middle Eastern and African lands but they wanted that the Pacific Islands should be annexed; for France, the exceptions to the "no-annexation" principle should be the Cameroons and Togoland; and likewise the Union of South Africa desired that German South West Africa should be excepted.

The plea for annexation in each case was put forward on grounds of security. In pursuance of the desire to annex New Guinea, the Australian Prime Minister, W.M. Hughes, put forward the security plea in these words:

If there were at the very door of Australia a potential or actual enemy Australia could not feel safe. The islands were as necessary to Australia as water to a city. If they were in the hands of a superior power there would be no peace for Australia....

The New Zealand Prime Minister, Massey, also spoke in the same vein. His request for annexation of Samoa on grounds of security was couched in these words:

Samoa was of vital importance to New Zealand. It was situated on the main water route to the South Pacific from the Panama Canal. If, by any chance, Samoa were in hostile hands, New Zealand would be strangled...

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16 Murray, op. cit., p. 10.
18 Ibid., p. 751.
Similarly, General Botha, the South African Prime Minister, while supporting the mandatory principle in respect of other colonies, also pleaded for the annexation of South West Africa on grounds of security. He pointed out that the Germans had used the territory of South West Africa as a military station. Therefore, he feared that 'unless the territory were incorporated in South Africa, the small German population would continue to foment trouble in order to get back to Germany and these troubles might extend to the Union'.

This was, no doubt, the first occasion when the Union Government officially expressed the desire to incorporate the territory of South West Africa. However, just about a month before the Paris Peace Conference met in 1919, General Smuts in a booklet had already expressed the view that the mandatory principle should not be extended to Africa and the Pacific but should be reserved for Europe and the Middle East only. The reason given by Smuts for confining the mandates system to Europe and the Middle East only was that he took mandates to mean self-determination. "The German colonies in the Pacific and Africa", he wrote, "are inhabited by barbarians, who not only cannot possibly govern themselves, but to whom it would be impracticable to apply any ideas of

19 Ibid., p. 744.
political self-determination in the European sense".

The thrust of Smuts' argument was that German colonies in the Pacific and Africa should be annexed, since neither the Mandate System which was based on the principle of 'no annexation' could be applied to them nor could political self-determination be thought of for them in the European sense.

The plea of the Union Government for the annexation of South West Africa attracted international support from at least two big powers, Britain and the United States, besides the implied support of those Allied Powers which had themselves laid claim to some of the colonies like Pacific islands, Samoa and New Guinea recovered from the vanquished powers. The British Prime Minister, Lloyd George, while supporting the mandatory principle for all territories under the control of the United Kingdom, requested President Wilson to look into the case of the dominions (that is, Australia, New Zealand and South Africa which wanted to annex New Guinea, Samoa and South West Africa respectively). Lloyd George, in other words, desired that President Wilson should reconsider his attitude regarding annexation or no-annexation at least in respect of some special cases.

President Wilson's attitude was somewhat different.

21 Ibid., p. 15.
On the whole he favoured the application of mandatory principle to all the ex-enemy colonies without any exception otherwise "the world would say that the great powers first portioned out the helpless parts of the world and then formed a League of Nations", as he put it. However, he seemed to have no objection if, sometimes in the future, a mandate territory was annexed to, or integrated with, the territory of the mandatory under certain circumstances. Speaking specifically about South West Africa, President Wilson said, "It was up to the Union of South Africa to make it so attractive that South West Africa would come into the Union of their own free will. Should that not be the case, the fault would lie with the mandatory". He further declared, "If successful administration by a mandatory should lead to Union with the mandatory, he would be the last to object".

President Wilson, however, did not want annexation to take place against the wishes of the people. He wanted that the integration with the territory of the mandatory should be desired by the people of the mandated territory. He made this clear when he said: "...when the time came, their own interests, as they saw them might qualify them to express a wish as to their ultimate relations - perhaps lead them to

23 Ibid., pp. 765-66.
24 Ibid., pp. 741-42.
25 Ibid., p. 742.
D. PRACTICAL STEPS FOR INDIRECT ANNEXATION OF SOUTH WEST AFRICA DURING THE DAYS OF THE LEAGUE

The Union Government did not confine herself to the mere expression of her desire at the Paris Peace Conference to annex South West Africa. During the functioning of the Mandates System under the aegis of the League of Nations she went even to the extent of taking certain practical steps to bring about piecemeal annexation or integration of South West Africa in an indirect way. The occasion for doing so arose time and again because the exercise of South Africa's authority in and with regard to South West Africa naturally raised the question of sovereignty. The mandate authorized her to have full administrative and legislative power over the Territory as an integral part of the Union. She tended to interpret this as an authorization to incorporate the territory. In 1920 Smuts even told a German deputation that the mandate which the Union of South Africa had accepted over South West Africa was nothing else but annexation. Hence, in 1922, by Act of Parliament No. 22 the immovable property associated with the railways and harbours of South West Africa

26 Ibid., p. 741.
was transferred "in full dominion" to the Union and vested in the Governor-General. The Permanent Mandates Commission objected to this action of the Union Government which, under relentless pressure from the organs of the League, amended the 1922 Act by Act No. 9 of 1930.

A similar issue of sovereignty was raised by the 1926 Agreement between South Africa and Portugal about South West Africa's frontier with Angola; the preamble to this Agreement contained the words 'possess sovereignty' which the Permanent Mandates Commission denied. The Union Government in 1930 accepted the Council's resolution on this, which followed the argument of the Mandates Commission that the Mandatory power could exercise the rights of sovereignty without actually possessing sovereignty. Similarly, the unauthorized transfer of the narrow strip of Caprivi Zipfel, which originally belonged to the Mandated areas of South West Africa, to Bechuanaland was also opposed by the Permanent Mandates Commission, which succeeded ultimately in having the territory restored after protracted discussions. Then, in 1924, the Union Government proposed to naturalize by an Act of Parliament all the German inhabitants of the Territory. The Permanent Mandates Commission felt that it would assimilate

28 Ibid., p. 12.
29 LmOJ, no. 7, 11th year, 1930, p. 839.
30 PMC Minutes, 6th sess., 1925, p. 172; ibid., 13th sess., 1930, pp. 132, 204.
the Germans with the inhabitants of the Union, destroying a vital distinction and that such collective and almost compulsory naturalization contradicted the principles of the Mandate. Eventually the Union's proposal was allowed with some reservations.

However, the first direct step for the annexation of South West Africa was taken by the Union Government when the Legislative Assembly of South West Africa, constituted in 1926 by the South West African Constitution Act, 1925 and comprising only of white members, adopted a resolution which read as follows:

The time has arrived to amend the Treaty of Peace and South West Africa Mandate Act, and the South West Africa Constitution Act 1925 so as to provide:

(a) that this Territory be administered as a fifth province of the Union subject to the provisions of the Mandate;

(b) that accordingly this Territory be represented in the House of Assembly and the Senate (of the Union of South Africa);

(c) that this Assembly be called a Provincial Council and that the powers given to this Assembly be altered so as to bring them into conformity with those possessed by a Provincial Council of the Union, in terms of the South Africa Act, 1909;

(d) that the Parliament of the Union of South Africa have full power to make laws for the peace, order and good government of this Territory;


(e) that the Governor-General's powers of legis­lation as laid down in the Treaty of Peace
and South West Africa Mandate Act 1919, be
altered so as to bring them into conformity
with the general powers exercised by him
over any Province of the Union, in terms of
the South Africa Act 1909.

The members of the Commission persistently expressed
their concern at this resolution and Rappard said that the
demand for incorporation could hardly meet with the Commis­
sion's approval, seeing that it tended to modify the inter­
national status of the Territory. The Permanent Mandates
Commission was in this way continuously watchful of the
attempts on the part of the Union Government to give an
annexationist turn to their administration, criticized the
same and sought to have the actions reversed.

The Union Government took many such steps as achieved
a measure of political integration of South West Africa with
the Union of South Africa designed to rule out any future
separation between the two. However, the policy of the
Union Government during the days of the League was to bring
about piecemeal integration of the Territory of South West
Africa. The result of this policy would have been that one
day the League of Nations would have been faced with a fait
accompli, had it not been watchful. However, a specific and
formal request for permission to annex the Territory was
never presented to the League of Nations on behalf of the

33 Ibid.
Union Government.

In connection with the desire and efforts of the Union Government to annex South West Africa, the speech of her delegate, Leif Bgeland, at the winding up session of the League of Nations, is of particular significance. On 18 April 1946, when the Assembly of the League of Nations was discussing a resolution on its own dissolution, the delegates of the Mandatory Powers stated the views of their respective Governments regarding the administration of their mandate territories after the demise of the League. On this occasion Leif Bgeland stated the views of the Union Government in these words:

...In the meantime, the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandate Commission could not be held.

The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory.... 34

This speech contains four important points which were

as follows:

(a) The Union Government would continue to administer the territory of South West Africa in accordance with the obligations of the mandate;

(b) Complete compliance with the letter of the mandate would not be possible due to the winding up of the supervisory organs of the League;

(c) The dissolution of the League would not diminish the obligations of the Union Government; and

(d) The Union Government would continue to discharge her obligations, until other arrangements are agreed upon regarding the future status of South West Africa.

This speech is conspicuous by the absence of any assurance whatsoever that the Union Government would not proceed with direct or indirect incorporation of the territory of South West Africa under Trusteeship System that was to be set up under the United Nations which had already come into being prior to the delivery of the above quoted speech of Leif Egeland. This omission in Lief Egeland's speech, by one interpretation, might even be by chance but, keeping in view the declared stand of the Union Government leaders in the past on the question of South West Africa and the attempts already made by that Government to assume sovereignty over it, the possibility appears to be that this silence on the part of the Union Government was due to the fact that the commitment for placing the Territory under trusteeship
conflicted with her desire to annex South West Africa at some future date. Further, Leif Egeland's speech has some vague expressions also like "other arrangements" which are open to different interpretations. Such expressions seem to have been deliberately used to keep the options for the future open and to avoid any commitment with regard to South West Africa.

Leif Egeland's speech might be seen in the background of reservations made by the Union Government earlier at the San Francisco Conference held in 1945. The Union Government delegate at that time also had not committed his country to the application of trusteeship principle if it was applied to all the territories of the world without any exception, that is, with total disregard for the special problems, circumstances and position of each territory. He particularly stated that his government could not subscribe to the application of 'open door' principle to the 'C' class mandates since it might prove detrimental to the native population. This reservation made in 1945 almost echoes the reservations made in the booklet "League of Nations: A Practical Suggestion" published as far back as 1918. Incidentally, in both cases the reservations were made by the same man - Field Marshall Smuts. It goes to prove that the intentions of the Union

Government in respect of South West Africa had remained unaltered over the years.

E. THE TERMS OF THE MANDATE

The specific responsibilities and duties of the Government of the Union of South Africa in respect of her administration over South West Africa emanate from Article 36 of the Covenant and the Mandate for German South West Africa. Under the terms of the latter, the Union of South Africa was granted full power of administration and legislation over the territory... as an integral portion of the Union of South Africa with permission to 'apply the laws of the Union of South Africa to the Territory subject to such local modifications as circumstances may require'. In general terms she was charged with the responsibility of promoting to the utmost 'the material and moral well-being and the social progress of the inhabitants of the territory subject to the present mandate'. This, being the underlying idea of the Mandate System as such, was applicable to all the mandate territories of whatever category.

Besides this general directive, the Union of South Africa was assigned certain positive duties. She was called

36 See Appendix 'A'.
37 See Appendix 'B'.

upon to ensure in the Territory freedom of conscience and
the free exercise of all forms of worship subject to the
provisions of any local law for the maintenance of public
order and public morals. She was also to permit missionar­
ies, nationals of any state, members of the League of Nations,
to enter into, travel and reside in the territory for the
purpose of prosecuting their calling. There were no other
positive obligations of the Union of South Africa in relation
to the people of the Territory at least as far as the texts
of the Covenant and the Mandate for South West Africa were
concerned.

Besides these positive obligations, the Union of
South Africa had also certain other obligations which were
negative in character. It was the duty of the Mandatory
to see

(a) that the slave trade was prohibited;
(b) that no forced labour was permitted except
for essential public works and services;
(c) that the traffic in arms and ammunition was
controlled in accordance with the principles laid down in
the Convention relating to the control of the arms traffic
signed on 10 September 1919;
(d) that the supply of intoxicating spirits and
beverages to the natives was prohibited;
(e) that the military training of the natives was
prohibited except for internal police and local defence of
the Territory; and

(f) and that no military or naval bases or fortifications were erected in the Territory.

The Union Government was, in addition, required to report to the League of Nations on the extent of her compliance with the terms of the mandate.

F. LEAGUE OF NATIONS' SUPERVISION OF THE MANDATES

The granting of the mandate had naturally to be accompanied by the simultaneous creation of the required supervisory machinery to ensure that the terms of the mandate were being honoured, and not flouted, by the mandatory power. Three organs of the League of Nations were directly connected with the supervision of the administration of mandates by the mandatory powers. They were: the Assembly, the Council and the Permanent Mandates Commission. A prior but brief examination of the methods of supervision available to, and resorted to by, these organs would be useful in order to appreciate correctly several problems relating to the supervision of the administration of Territory that arose after the United Nations got seized with the problem of South West Africa.

(a) League Supervisory Organs

The Assembly of the League of Nations was the main forum where all questions, including those relating to the
Mandates System, used to be discussed on the basis of a report of the Secretary-General. The Assembly could discuss and make suggestions but could not take decisions. The principal discussion on mandates questions used to take place in the Sixth Committee of the Assembly.

League supervision over the administration of mandate territories was carried out principally by the Council, advised and assisted by the Permanent Mandates Commission. Upon the Council rested the main responsibility for taking necessary action to get the system into working order, such as conducting negotiations with the Allied Powers and the proposed mandatories, confirming the mandates, defining degree of authority, control or administration to be exercised by each mandatory. The Council also received annual reports from each mandatory. Three of the permanent powers of the Council were the mandatory powers. Under Article 4, para 5 of the Covenant, a mandatory power, not a member of the Council, was invited to sit with the Council when a report on its mandate territory was discussed and to take part in the discussions and in the voting like other members. The right of veto could be used by any member of the Council.

The Permanent Mandates Commission consisted originally of nine members but its strength rose to 10 when, in 1924, Professor Rappard was made its extraordinary member. A

38 Constitution of the Permanent Mandates Commission, para (a).
majority of the members had to be nationals of non-Mandatory Powers. This meant that out of 10 members only four could be nationals of mandatory powers. The four places which were the maximum that could be occupied by nationals of mandatory powers were filled, from the beginning, by British, Belgian, French and Japanese nationals, with the result that no nationals of three other mandatory powers (Australia, New Zealand and South Africa) ever sat on the Commission as regular members. All the members of the Commission were appointed by the Council and chosen for their personal qualities and competence. Members of the Commission were not to hold any office which made them directly dependent upon their governments.

The Covenant, in Article 22, provided that the Permanent Mandates Commission was "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". It was, therefore, an advisory body - a body whose duty it was to examine and report. It was designed to assist the Council in carrying out its task. Its work was preliminary in character. Constitutionally, it had no power to take decisions binding on the mandatory powers or to address direct recommendations to them. Its conclusions were not final until they had been approved by the Council. The

39 Ibid.
Permanent Mandates Commission not only performed the negative role of verifying that the Mandatories did not overstep the powers conferred upon them but also ascertained whether those powers had been put to good use by them and whether the administration had been in accordance with the interests of the native population.

(b) The Method of Supervision

The chief source of information at its disposal consisted in the annual reports of the mandatory powers which were always examined by the Permanent Mandates Commission in the presence of the duly authorized representative of the mandatory power concerned. This representative also supplied supplementary information and explanations sought by the Commission. The annual reports were supplied on the basis of a questionnaire supplied by the Permanent Mandates Commission. Another source of information to the Permanent Mandates Commission was written petitions from the inhabitants of a mandated area. They had to be routed through the Mandatory Power which was entitled to attach thereto its own comments. Any petition from any other source than the

40 Rule 1 of the Rules of Procedure regarding petitions (31 January 1923) reads: "All petitions to the League of Nations by communities or sections of the populations of mandated areas should be sent to the Secretariat of the League of Nations through the mandatory government concerned; the latter should attach to these petitions such comments as it might think desirable".
mandatory government concerned used to be returned to the signatories with the request that they should re-submit it through the mandatory. Petitions were one of the main and most interesting innovations of the mandates system. The Permanent Mandates Commission made use of other documents also such as the records of parliamentary debates concerning mandated territories, or information emanating from private sources, such as scientific studies of articles published in reviews or in the daily press. Regarding on-the-spot inspection of the mandated areas, the Commission and also the Council were not favourably disposed towards it. There was no provision in the rules of procedure on petitions for the hearing of petitions in person by the Mandates Commission; and in practice the requests for oral hearing of petitioners were rejected by the Commission, the League Council, and the Mandatory Powers.

41 Rule 2 of the Rules of Procedure regarding petitions reads:

"Any petition from the inhabitants (of mandated areas) received by the Secretariat of the League of Nations through any channel other than the mandatory Government concerned should be returned to the signatories with the request that they should resubmit the petition in accordance with the procedure prescribed above."


The Permanent Court of International Justice was recognized by the mandate agreements themselves as the final interpreter of their terms. Cases of interpretation and application of mandated provisions were referred to it by the parties concerned.

G. THE ERA OF TRUSTEESHIP SYSTEM

Close on the heels of the Mandates System followed the Trusteeship System. The Charter of the United Nations devotes two chapters to the Trusteeship System - chapter XII and chapter XIII. The former deals with the basic objectives of the Trusteeship System and defines its scope and operations, while the latter deals with the organization and functions of the Trusteeship Council which exercises certain powers and functions with respect to trust territories.

(a) Basic Objectives of the Trusteeship System

The basic objectives of the Trusteeship System, as defined in Article 76, Chapter XI, are:

(a) to further international peace and security;

(b) to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned, and as may be provided by the terms of each trusteeship agreement;
(c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

(d) to ensure equal treatment in social, economic, and commercial matters for all members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to provisions of Article 80.

(b) Types of Trust Territories

The Charter envisages two types of trust territories - strategic and non-strategic.

Article 82 of the Charter provides that 'there may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements...' A strategic trust territory differs from other trust territories in that all the functions of the United Nations with regard to it are exercised by the Security Council. Functions relating to the non-strategic trust territories are performed by the General Assembly.

Only the Japanese Mandated Islands, administered by the United States, have been designated as strategic trust territories so far.
(c) **Territories to which the System is Applicable**

Under Article 77(1) of the United Nations Charter the Trusteeship System covers the following three categories of territories:

(a) territories now held under mandate;
(b) territories which may be detached from enemy states as a result of the Second World War; and
(c) territories voluntarily placed under the system by states responsible for their administration.

(d) **Establishment of a Trust Territory**

A territory can be placed under Trusteeship System by means of a special agreement arrived at between the states directly concerned including the mandatory power in the case of territories held under mandate by a member State of the United Nations on the one hand, and the United Nations, on the other. In the case of strategic trust territories, the terms of agreement are approved by the Security Council, while the terms of the non-strategic trust territories are approved by the General Assembly. The trusteeship agreement in each case includes the terms under which the trust territory is to be administered. It also designates the authority which exercises the administration of the trust territory.

44 *U.N. Charter*, Article 75 (Appendix 'C').
45 *Ibid.*, Articles 83 and 85 (Appendix 'C').
46 *Ibid.*, Article 81 (Appendix 'C').
(e) **The Administering Authority of a Trust Territory**

Under Article 81 of the Charter, the administering authority of a trust territory 'may be one or more states or the Organization itself' and must be designated in the trust agreement. The definition of the administering authority given in the said Article allows for three different kinds of administration: administration by a single state, joint administration by more than one state and administration by the Organization itself. A non-member is also not precluded from becoming an administering Power if the need arises.

(f) **Obligations of the Administering Authority**

The obligations of the administering authority of a trust territory are derived mainly from two sources: (a) Chapters XI, XII and XIII of the Charter, and (b) the terms of trusteeship agreement. All the obligations of an administering authority can be grouped, by and large, under three heads: (a) obligations towards the people of the trust territory, (b) obligations towards the United Nations, and (c) obligations towards other states of the world.

The Administering Authorities are under an obligation to recognize and act upon the principle that the interests

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47 See Appendix 'C'.
of the inhabitants of the trust territory are paramount. Keeping this always in their mind, they have to ensure the well-being of the inhabitants, to bring about their political, economic, social and educational advancement, give them just treatment, protect them from abuses and respect their cultures. They have also to bring about their progressive development towards self-government as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned. Further, the administering authorities are under an obligation to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion and to encourage recognition of the interdependence of the peoples of the world. They have to take constructive measures of development and to encourage research and to promote the spirit of cooperation with one another.

The administering authorities are under an obligation to cooperate with the United Nations in order to enable the machinery of supervision to function satisfactorily. The manner in which their cooperation should be forthcoming has been prescribed in the Charter and the Rules of Procedure. They are required to send annual reports on the trust territories upon the basis of a questionnaire prepared for this

48 U.N. Charter, Articles 73 and 76 (See Appendix C).
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purpose by the Trusteeship Council. They must forward petitions from the inhabitants of trust territories with or without their comments. They should also facilitate the work of visiting missions that may be sent by the United Nations to the trust territories for making on-the-spot investigation or to obtain first-hand account of the conditions prevailing there. The administering authorities will be entitled to designate a representative who can participate without vote in the examination and discussion of the annual reports and petitions.

The administering authorities must ensure equal treatment in social, economic and commercial matters for all members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice.

The administering authorities are under an obligation to ensure that the trust territory shall play its part in the maintenance of international peace and security. They are,

49 Ibid., Article 88 (Appendix 'C').


51 U.N. Charter, Article 87(c); and Rules of Procedure of the Trusteeship Council, op. cit., Rule 94.


53 U.N. Charter, Article 76(d) (Appendix 'C').
therefore, authorized to make use of the volunteer forces, facilities and necessary assistance from the trust territory. They must maintain law and order within the trust territory and provide for local defence.

(g) Supervision of Trust Territories

One of the most distinguishing characteristics of the Trusteeship System is that the 'trustee' is accountable to the world community for its administration of the trust territory. The world community has to find out whether or not the 'trustee' is discharging its solemn responsibilities both in letter and spirit of the trusteeship agreement. In particular, it is entitled to know how far the 'trustee' has contributed to the moral and material welfare of its ward and how much nearer it has been able to bring the goal of self-government or independence in the territory under its charge.

In relation to the trusteeship functions of the United Nations, the General Assembly occupies the pivotal place. When we talk of international accountability of the trustee, we mean that it is to this body, the General Assembly, that the trustee is primarily and essentially accountable in respect of non-strategic trust territories. The responsibility of the General Assembly, under the Trusteeship System, flows

Ibid., Article 84 (Appendix 'C').
from Articles 85 and 87 of the Charter which are as follows:

**Article 85**

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

**Article 87**

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

- a) consider reports submitted by the administering authority;
- b) accept petitions and examine them in consultation with the administering authority;
- c) provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and
- d) take these and other actions in conformity with the terms of trusteeship agreements.

These Articles give sufficiently wide powers of control and supervision to the General Assembly in respect of trusteeship matters. However, the General Assembly itself does not perform the actual and day-to-day supervisory functions listed in Article 87 above. The actual supervisory duties are performed by another organ of the United Nations - the Trusteeship Council which acts as the agent and assistant of the
General Assembly in carrying out the functions of supervision. All preliminary work relating to the trust territories, including the examination of petitions, annual reports and periodic visits to the trust territories, is done by the Trusteeship Council. Having done its work, the Trusteeship Council sends its report to the General Assembly which thereupon formulates its recommendations in the form of resolutions.

(h) **The Place of the Fourth Committee**

However, the General Assembly can not find sufficient time either to give the reports of the Trusteeship Council a detailed consideration or to make up its mind finally about the follow-up action because of its heavy agenda. A large international conference, such as the General Assembly is, can at the most formulate general principles, give broad directions and record decisions but it must, of necessity, leave the job of detailed scrutiny of the matter to one of its subsidiary bodies. Accordingly, the General Assembly, in deciding upon a suitable follow-up action is aided and advised by the Trusteeship Committee which is one of its subsidiary bodies set up at the commencement of each regular session under Article 22 of the Charter. This Trusteeship Committee...
Committee is also called the Fourth Committee because in the serial order it is the fourth standing committee of the General Assembly. The difference between the work of the Trusteeship Council and the Trusteeship Committee should be clearly understood. Whereas the Trusteeship Council, which is one of the Principal Organs of the United Nations, performs the supervisory functions, listed in Article 87, on behalf of the General Assembly, the Trusteeship Committee, which is a subsidiary body of the General Assembly, performs only the advisory functions. The General Assembly bases most of its actions concerning trusteeship and non-self governing territories on its recommendations, though it is free not only to take action on its own but also to discard its recommendations. Thus all matters regarding trust territories are discussed at two places - the Trusteeship Council and the Trusteeship Committee before appropriate resolutions on them emerge out of the General Assembly. However, if a territory has not yet acquired the status of a trust territory, its affairs are discussed only in one body, that is, the Trusteeship Committee (the Fourth Committee) before the General Assembly proceeds with the required action.

The Fourth Committee, like other Main Committees of the General Assembly, consists of all the members of the United Nations. Each country which is a member of the United Nations is a member of the General Assembly and each member
which is a member of the General Assembly is also simultaneously a member of each of the Main Committees including the Fourth Committee. Therefore, each of these standing committees is in itself a sort of 'little assembly'. Since the Trusteeship Committee (the Fourth Committee) operates only as a subsidiary organ of the General Assembly, all its recommendations are subject to approval by the General Assembly meeting in a plenary session before they become official General Assembly recommendations.

Again, the Fourth Committee, like other Main Committees elects its own Chairman, Vice-Chairman and a Rapporteur. The 'rapporteur' formulates the report of his committee and submits it to the General Assembly. The report includes the recommendations of the committee including the resolutions, if any, recommended by it.

Though one-fourth of the members of a committee constitutes the quorum, decisions in every main committee are made by a simple majority of the members present and voting, whereas in the General Assembly, for a decision to be taken on "important questions", a two-thirds majority is essential.


59 Ibid., Rule 127, p. 28.

60 Ibid., Rule 85, p. 18. (This Rule 85 is the same as Article 18(2) of the Charter). For questions which do not fall into the category of "important questions", only a majority of the members present and voting is required vide Rule 87 of the Rules of Procedure and Article 18(3) of the Charter.
The phrase 'majority of the members present and voting' means members casting an affirmative or negative vote. Members who abstain from voting are considered as not voting.

The implication of this difference between the voting requirements of the General Assembly and a Main Committee is that if a resolution in a Main Committee is adopted with less than two-thirds votes, it will be defeated in the General Assembly because it must secure at least two-thirds votes there in order to be finally adopted. For example, if there are one hundred and thirty-six members in the General Assembly, a resolution to be adopted in a Main Committee would need a minimum of sixty-nine votes but the same resolution would need ninety-one votes to be adopted in the General Assembly. Thus, if a resolution is adopted in a Main Committee with affirmative votes anywhere between sixty-nine and ninety-one, it would be defeated in the General Assembly. Knowing this position the members of the committees are compelled to try to work out a compromise by avoiding extreme positions so that the resolutions recommended by them receive at least two-thirds votes in the General Assembly.

R. CERTAIN WEAKNESSES IN THE COVENANT, THE WINDING UP RESOLUTION AND THE CHARTER

Certain weaknesses in the Covenant, the Winding Up

61 Ibid., Rules 88 and 128, pp. 19, 28.
Resolution and the Charter need also be mentioned at this stage, since they have direct bearing on the problem of South West Africa as it arose after the establishment of the United Nations.

Article 22 of the Covenant of the League of Nations which established the mandates system classified the mandates into three categories - 'A', 'B' and 'C'. In the case of 'A' category of mandates it was clearly stated in para 4 of the said Article that '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'. While the League of Nations Covenant was thus explicit about the goal of independence for 'A' class mandates, the wording of Article 22 was at best ambiguous concerning the political goals for the other two types of territories. The reading of Article 22 as a whole might give one the impression that the three categories of mandates were on a chronological continuum and that since the independence of the 'A' mandates was "provisionally recognized", it would be merely a matter of time until the 'B' and 'C' territories would also achieve that goal but this is only a matter of interpretation. The fact remains that nowhere in the Article itself was independence laid down explicitly as the goal for 'B' and 'C' types.

62 Murray, op. cit., p. 212.
of mandates, and Article 23 which included obligations of colonial powers generally, contained no allusions to it. This omission of independence or self-government as the goal for South West Africa was continued even in the mandate agreement for the Territory. On the contrary, both in the Covenant and in the Mandate for German South West Africa, it was provided that the Territory should be administered as integral portion of the territory of the Union of South Africa. This expression, at least on the face of it, seemed to rule out the possibility of South West Africa existing as an independent sovereign state any time in the future. The Union Government later repeatedly took shelter behind this phrase while justifying her request for the incorporation of South West Africa or while resisting the United Nations' attempt to convert the Territory into a trust territory.

Another document which created complications for the United Nations might be mentioned. Before dissolving itself, the Assembly of the League of Nations adopted a resolution on the question of mandates on 18 April 1946. This resolution emphasized the following four points:

63 Appendix 'A'.
64 Appendix 'B'.
65 IMOJ, Special Supplement No. 194, op. cit., pp. 278-79.
(i) In para 3 the Resolution recognized that, on the termination of the League's existence, its functions with respect to the mandated territories would come to an end.

(ii) Para 3 of it also recognized that Chapters XI, XII and XIII of the Charter of the United Nations embodied the "principles" corresponding to those declared in Article 22 of the Covenant of the League.

(iii) Para 4 of it took note of the "expressed intentions" of the members of the League to continue to administer the mandates in accordance with the obligations contained in the mandate agreement of each territory.

(iv) Para 4 also made it amply clear that 'until other arrangements have been agreed upon between the United Nations and the respective mandatory powers', the foregoing arrangements would continue.

More important than these declaratory statements in the Winding Up Resolution were the omissions.

This Resolution, on the one hand, recognized that the functions of the League of Nations with respect to the mandates would cease after its expiry and, on the other, it said that the new arrangements regarding the mandates would have to be worked out and negotiated between the United Nations and the mandatory powers. The resolution was, however, totally silent on the issue as to which body or bodies would perform the functions relating to the mandates that used to
be performed by various organs of the League during the interval between the winding up of the League and the making of the new arrangements. To whom shall the mandatory powers be answerable during this period? To whom shall they submit their annual reports and forward petitions? In other words, who shall supervise the administration of the mandated territories by the mandatory powers? The said Resolution of 18 April 1946 contained no answer to these questions. Thus the Resolution created a legal hiatus between the Covenant and the Charter. The Resolution put an end the supervisory functions of the League before the supervisory functions of the United Nations began to operate. The new supervisory organ under the United Nations, that is, the Trusteeship Council, came into existence on 26 March 1947. This means that, between 18 April 1946 when the old supervisory organ, viz., the Permanent Mandates Commission was wound up and 26 March 1947, there was no international institution to which the mandatories were accountable. This gap of almost one year provided the Union of South Africa with a convenient pretext to annex South West Africa.

This omission was not by chance or due to oversight, since a Chinese proposal for a temporary system of the United Nations inspection and temporary annual reports to bridge the

The gap between the Covenant and the Charter was not adopted. Even the Preparatory Commission and the Committees succeeding it whose duty it was to make arrangement for the transfer of functions, activities and assets of the League did not fill the interregnum. The Resolution, in other words, did not declare that the United Nations was heir to the League in all respects. It also did not make it obligatory for the mandatory powers to sign the new agreements with the United Nations nor did it prescribe any time limit for the same. It simply desired that the then existing arrangements would continue till the new arrangements were agreed upon. These omissions had far-reaching effects on the United Nations' handling of the South West Africa case in the future.

The Charter of the United Nations is also not without significant omissions in so far as the future of the former mandates is concerned - and these omissions also created complications for the future. Article 77 of the Charter says that "the trusteeship system shall apply to such territories...as may be placed thereunder by means of trusteeship agreements". Again, for the second time, the same Article, para 2, says that "it will be a matter for subsequent agreement as to which territories...will be brought under the trusteeship system and upon what terms". From this it can

be concluded that the act of placing any territory under trusteeship was intended to be a voluntary affair. Had the intention been to impose a positive obligation on the administering powers to place territories under trusteeship, the words 'such' and 'as may be' would have been omitted from Article 77. The proceedings of the San Francisco Conference also do not indicate that it was the intention of the drafters of the Charter to create a compulsory Trustee­ship System. In Committee II/4 of that conference the Egyptian delegate had proposed the deletion of the words 'such territories in the following categories as may be placed thereunder by means of trusteeship arrangements' from the provisions of the Working Paper with the result that the preamble to Article 77(1) would have read 'The Trustee­ship System shall apply to...' The Egyptian delegate went on to suggest the insertion of the word 'all' into paragraph (a) of Article 77 so that it would have read 'all territories now held under the mandate'. Had these proposals been adopted, they would have established a clear obligation on the part of the Mandatory Powers to place all Mandates under trusteeship. The Egyptian proposals were rejected by Committee II/4 and

68 Appendix 'C'.
70 Ibid., Doc. 323, II/4/12, pp. 677-683.
among the objections to them put forward by other delegates was that they would have the effect of creating a compulsory system and would thus go beyond the competence of the San Francisco Conference.

The legal weakness of the United Nations to force trusteeship upon an unwilling state is further heightened by Article 80(1) of the Charter which runs as follows:

Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81 placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

Here also the emphasis is on the point that the rights enjoyed by States, under existing international instruments, shall not be altered in any manner until agreements have been concluded between the States and the United Nations. This means that a territory can be placed under trusteeship only through bilateral efforts because where there is a mention of an agreement, it obviously implies two parties. Therefore, the United Nations by its unilateral efforts cannot bring about trusteeship agreement in respect of any territory, if

71 Ibid., Doc. 512, II/4/21, p. 469.
72 Appendix 'C', for the complete text of the Article.
the other party is not willing to do so.

The textual weakness of the Charter, as pointed out above, is offset, to some extent, by para 2 of Article 80 of the Charter which reads:

Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

This para, no doubt, does not permit any delay in the negotiation and conclusion of agreements but it does not explicitly make it compulsory for any unwilling State to place a former mandate territory under trusteeship. At the most, the above quoted paragraph requires negotiations to be held without delay for placing a territory under trusteeship. Since neither party can impose its terms upon the other, negotiations may go on endlessly without producing any result, in case a former mandatory power is unwilling to place the territory under its charge under trusteeship. By simply holding negotiations for placing a territory under trusteeship an unwilling mandatory Power can save itself from being accused of violating Article 80(2) of the Charter. It can blame the other party - in this case, the United Nations - for having delayed an agreement.

To sum up, the omission in Article 22 of the Covenant, as pointed out above, created uncertainty about the future
goal in respect of the mandated territory of South West Africa; the omission in the Winding Up Resolution left the administration of mandated territories unsupervised for a certain period whereas the Charter itself does not seem to have created, in indisputable language, legal obligation of the former mandatory Powers to place the mandated territories under trusteeship.

All these omissions in the Covenant, the Winding Up Resolution and the Charter, as pointed out above, were, in fact, their weaknesses. They created complications for the United Nations in so far as the question of South West Africa was concerned, as we shall have occasion to see in the chapters that follow.