Chapter II

Efforts To Secure Trusteeship Status For South West Africa
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During the first part of the first session of the General Assembly held in February 1946, member States were invited, vide its Resolution 9(I) of 9 February 1946, to submit trusteeship agreements in respect of former mandate territories for its approval preferably 'not later than during the second part of the first session of General Assembly'. At the same session the representative of the Union Government, G. Heaton Nicholls, formally reserved his Government's position on the future status of South West Africa, until she could conclude consultations with the African inhabitants regarding the incorporation of their Territory into the Union. In compliance with Resolution 9(I) of the General Assembly the Secretary-General of the United Nations, Trygve Lie, addressed a communication to the States concerned requesting them to undertake practical steps for the implementation of Article 79 of the Charter which provided for the conclusion of agreement on terms of trusteeship for each territory to be placed under the Trusteeship System. In reply to the Secretary-General's said communication the Union Government addressed two communications to him,

2 Ibid., 12th plen. mtg., p. 185.
one dated 12 August 1946, and the other dated 9 October 1946, requesting him, in the latter communication, to place the following item on the agenda of the General Assembly:

Statement by the Government of the Union of South Africa on the outcome of their consultations with the peoples of South West Africa as to the future status of the Mandated Territory, and implementation to be given to the wishes thus expressed.

Thus it was at the initiative of the Government of the Union of South Africa that the question of South West Africa came before the United Nations. The General Assembly referred this item, for detailed consideration and report, to the Fourth Committee. The Fourth Committee then called upon the representative of the Union of South Africa to make his proposed statement concerning the territory of South West Africa. Accordingly, Field Marshal Smuts, Prime Minister of the Union of South Africa, made a lengthy statement during the fourteenth meeting of the Fourth Committee held on 4 November 1946. Besides, a written memorandum was also submitted by the Union Government through her Minister, H.T. Andrews, and was circulated among the members of the Fourth Committee as a United Nations' document. Subsequently, at the 19th meeting of the Fourth Committee, Smuts clarified the position

4 Ibid., pp. 196-97.
of his Government with regard to the question of South West Africa.

Through the said Memorandum and the speeches of Smuts delivered at the fourteenth and nineteenth meetings of the Fourth Committee, the Union Government communicated her inability and unwillingness to place South West Africa under trusteeship of the United Nations. Several reasons were advanced as to why the United Nations' Resolution 9(I) of 9 February 1946 could not be complied with by the Union Government. Firstly, it was argued on behalf of that Government that the Mandates System as originally conceived by the Versailles statesmen was intended for application to certain territories which had formerly belonged to Russia, Austria-Hungary and Turkey and not to erstwhile German possessions in Africa and the Pacific and that the Mandates System was considered to be inapplicable to territories such as German South West Africa which were so sparsely populated and whose inhabitants were so little touched by the influence of civilization that their evolution into independent units and the application of the idea of political self-determination to them was considered unrealizable and impracticable. Yet the Allied commitment to the principle of self-determination

7 Ibid., para 8, p. 202.
8 Ibid., para 9, p. 203.
had to be honoured. Therefore, a new category of mandates, called 'C' mandates, was specially created. This 'C' category of mandates was quite different from 'A' and 'B' categories in that principles fundamental in the original conception of the mandates system were excluded from operation. In support of this plea it was stated on behalf of the Union Government that Article 22 of the Covenant of the League of Nations ascribed provisional independence to 'A' class mandate territories and clearly recognized the inapplicability of even eventual political self-determination and separate statehood in the case of 'C' category of territories including South West Africa. The Memorandum of the Union Government stressed upon the fact that in 'B' and 'C' class mandates Article 22 of the Covenant recommended administration under the laws of the Mandatories as integral portions of their respective Territories, which indicated that the framers of the Covenant were conscious of the fact that the 'C' class mandates were dependent on their mandatory Powers due to the backwardness of their inhabitants, the lack of material wealth and the geographical location of the territories.

The Memorandum drew attention to the fact that the

9 Ibid., para 10, p. 203.
10 Ibid., para 11, p. 203.
11 Ibid., paras 12 and 13, p. 203. (emphasis supplied)
principle of "open door" provided for in the case of 'A' and 'B' class mandates, was deliberately omitted from 'C' class mandates to facilitate the closest integration of the administration of the mandated Territory with that of the Mandatory.

The thrust of the argument was that since originally there was uncertainty about the suitability of the mandatory form of government for South West Africa, it would be improper to pursue that course by converting it into a trust territory first and then leading it to independence; such a goal, according to the Union Government, was not in the minds of the Versailles statesmen.

Secondly, it was submitted on behalf of the Union Government that not only did the Mandates System not envisage independence for 'C' class mandates but the Trusteeship System also saw no possibility in this direction. This idea was put by Smuts before the Fourth Committee in these words:

The fundamental concept of the Trust, just as of the Mandate, is the advance of the inhabitants and their progress along social, economic and political lines; and in this advance, due regard will be paid to the wishes of the inhabitants of the Territory. No particular mode is prescribed by which their advance in political status can be achieved. They may progress towards complete political independence, as has already happened with four of the League Mandates; Iraq, Syria, Lebanon and Transjordan. They may receive self-governing institutions of one degree of advance or another by which

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12 Ibid., para 14, pp. 203-4.
they receive an ever increasing say in their own affairs. This has been the case in South West Africa where a local Legislative Assembly and an Administrative Council have been established with wide authority. Where circumstances do not admit of their being or becoming a viable independent State by themselves, they may yet achieve their full political status by integration with another fully self-governing sovereign territory....

The thrust of Smuts' argument was that each mandate territory had to be treated on merit, and, therefore, treated differently, since different stages of human and economic development of each mandate territory had to be taken into consideration and that it was for this reason that all the mandate territories had not been put into one category but had been classified into three different categories: 'A', 'B' and 'C', South West Africa having been placed in the last mentioned category. Even among 'C' class mandates the case of South West Africa, Smuts argued, was vastly different from that of other 'C' class mandates like Western Samoa, New Guinea and the Japanese Pacific Islands because of its physical contiguity to the Union and its ethnological kinship with the rest of Southern Africa.

Thirdly, it was also contended on behalf of the Union Government that she was not legally obliged, either under

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14 Ibid., p. 237.
the League Covenant or under the United Nations' Charter, to place the territory of South West Africa under trusteeship. There was nothing in the relevant clauses of the Charter nor was it in the minds of those who drafted those clauses to support the contention that the Union Government could be compelled to enter into a trusteeship agreement even against her own views or those of the people concerned.

Smuts also pointed out that the Charter of the United Nations by the use of the term 'may' instead of 'shall' in Article 77 excluded any obligation to place mandated territories under trusteeship and made the application of the system to such territories a matter of voluntary agreement.

Finally, Smuts refused to accept the invitation of the General Assembly to place South West Africa under trusteeship also on the ground that 'during the first part of the session in London the Union Government did not join with other mandatory Powers in giving an undertaking to place certain of their mandates under trusteeship'.

### A. SOUTH AFRICAN PLAxA FOR INCORPORATION OF SOUTH WEST AFRICA

Besides declining to conclude a trusteeship agreement,

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17 Ibid.
Smuts also made a formal plea, on behalf of his Government, that the mandate territory of South West Africa be integrated with the territory of the mandatory Power so as to form one State. The plea for incorporation was based on several grounds.

The strongest ground that Smuts could give for incorporating the territory of South West Africa was that it was the wish of the people of South West Africa - both Europeans and the natives. He said that as far as the wishes of the European population were concerned, the Union Government was aware of them through the normal democratic channels, i.e. the Press, public utterances by representative leaders, and resolutions accepted unanimously by the South West African Legislative Assembly. Smuts added that since the wishes of the natives were not known, they were obtained through "an equally democratic but different form, having regard to their differing tribal customs." The Union Government, he said, had not conducted a referendum of individuals to obtain the wishes of the natives. The wishes of the natives were learnt through tribal units, since the tribe was their recognized political unit. The purpose of consultation was first explained to the tribal leaders who, in turn, explained it to their followers. The result of the consultation thus held was as follows:


for annexation 2,08,850
Against annexation 33,520
Could not be consulted 56,790

Smuts said that these figures spoke for themselves. Thus his argument was that if the entire European population and the majority of the natives desired the Territory to be incorporated into the Union, the United Nations should not thwart their wishes by standing in their way.

Another ground for incorporation of South West Africa advanced by Smuts was that the Union that would result from the merger of South West Africa with South Africa would be quite a natural one because of the similarity between the two territories in many respects. For example, he said that the natives who inhabited the territory of South West Africa and those who inhabited the Union Territory derived from the same stock. In other words, they were of the same ethnological stem and their languages were of the Bantu family of languages already spoken by the natives of the Union. In the second place, the native people of the Union Territory and that of the mandate territory had reached similar stages of civilization. In the third place, the native peoples of both the territories lived under the same systems of government. Smuts added that most of the Europeans and Natives who

20 Ibid., pp. 241-42.
21 Ibid., p. 242.
inhabited the Territory were so closely allied to those of the Union that 'strangers to South Africa could not tell them apart.'

The Union Government delegate also pleaded for incorporation on the ground of the territory of South West Africa being contiguous to that of the Union. He said that there were no strategic boundaries between the two territories along their thousands of miles of common frontier to distinguish one from the other. He said that South West Africa was a geographic, ethnic, strategic and economic part of the Union of South Africa. Since this element of contiguity was not present in respect of other mandate territories, Smuts' arguments implied that the plea for incorporation on the ground of the territory being contiguous to the territory of the mandatory Power could not be advanced by other mandatories because of their long distance from the metropolitan Powers. Emphasizing the inseparable character of the territory of South West Africa, Smuts said that South West Africa had been separated from South Africa due to aggression by the German forces and, therefore, its ultimate union with South Africa was as inevitable as was the Union of Wales and Scotland with England, of Texas and Louisiana with the American Union, of the Territories of Eastern Siberia with

the Great Russian Union and the Union of all India.

It was also pleaded on behalf of the Union Government that incorporation of the territory of South West Africa was necessary on grounds of safety and security of South Africa itself because, in the past, it was from that territory that aggression on South Africa had been launched by Germany. By implication this meant that the safety of the Union Territory would be greatly endangered without the territory of South West Africa being an integral part of it. Smuts also said that the desire for incorporation had received added emphasis from the activities of the German Nazi Party in South West Africa which almost resulted in the Territory becoming for a second time 'a springboard for German aggression against the Union.'

Yet another reason advanced on behalf of the Union Government was that incorporation would be advantageous to the people and territory of South West Africa also and that the development of the Territory would be gravely handicapped if it were administered entirely apart from the adjoining Union of South Africa. Smuts explained that the majority of the inhabitants had opted for incorporation into South Africa because they felt that such an association would permit them

24 Ibid., p. 243.
to enjoy the material benefits which would flow from an increasing expenditure from the Union revenues - an expenditure which was not practicable while the country continued as a political entity separate from the Union. Smuts said that doubts regarding the future status of South West Africa militated against the effective development of the territory, as private capital and individual initiative were not attracted to the Territory because of the uncertainty regarding its future.

Thus we see that in the early days of the dispute the plea of the Union Government for incorporation was based on a variety of considerations like 'the factual position', 'the geographical position', 'identity of interests', 'the strategic position', 'ethnological relationship between the natives of South West Africa and the Union', the 'suitability of the Union's administration for South West Africa', 'the existing measures of integration between the two countries' and the so-called 'expressed wish of both the native and European population'. It was not contended on behalf of the Union Government at this stage, as was done later, that the Union's mandatory obligations had ceased with the demise of the League of Nations.

The request for permission to incorporate the territory

27 Ibid., p. 243.
28 Ibid., p. 238.
of South West Africa indicated that the Union Government realized that she had no authority to bring about the integration of the Territory unilaterally. By asking the United Nations to approve of her plan for the incorporation of South West Africa the Union Government also indirectly recognized the competence of the United Nations in the matter. It is of particular interest to note that the Union Government did not approach the Principal Allied and Associated Powers for securing the approval of the incorporation of South West Africa although it were they that had granted her the mandate for South West Africa in 1920.

In this connection it may also be stated that Smuts' request seemed to be only for de jure integration of South West Africa with the Union Territory and not for de facto integration, although he did not use these terms in his speech. This impression is formed from the following sentence in his speech:

...Hence integration of South West Africa within the Union would be mainly a formal recognition of a unity which already exists.... 29

The Fourth Committee had general discussion on the request of South African Government for permission to incorporate South West Africa from its 14th to 20th meetings in 1946. The request of the Union Government for the incorporation of South West Africa was subjected to severe criticism.

29 Ibid., p. 244.
The main crux of the South African case for incorporation was that the people of the territory of South West Africa themselves 'wished' their territory to be incorporated into the Union of South Africa. In the discussions that followed Smuts' statement, many delegates tried to rebut this argument. For example, the delegates of many countries like Yugoslavia, Mexico, India, China, Czechoslovakia, U.S.S.R., refused to believe in the fairness of the elections that were held in South West Africa for determining whether the inhabitants wanted integration of their Territory with that of South Africa or wanted to remain a separate political entity. The Indian delegate, Maharaj Singh, refused to believe that the natives had fully understood the nature and extent of the consultation which they had undergone or that the advantages of trusteeship had been clearly explained to them. He also pointed out that a substantial number of the natives could not be consulted according to the figures given by the South African delegate himself. Subsequently, the Indian delegate added that he was not convinced that the wishes of the South West African natives had been freely expressed, since there were very few highly educated Africans who would be able to appreciate the difference between incorporation and trusteeship. Speaking in a similar vein the Chinese delegate,

31 Ibid., 20th mtg., p. 110.
Liu Chieh, also doubted whether the people of South West Africa had sufficient political advancement to be able to understand the purpose and consequence of their decision and also whether they had expressed their 'wish' freely. The Czech delegate, K. Lisicky, too, refused to place much faith in the statistics of referendum, supplied by South African Government. The Soviet delegate, N.V. Novikov, described the referendum conducted by the Union Government in South West Africa to determine its future as 'fictitious demonstration of the will of the people of South West Africa.' The Cuban delegate, Guy Perez Cisneros, said that in view of the fact that the population of South West Africa did not have a truly democratic organization, it would be impossible to ascertain their wishes. He refused to take into consideration an opinion expressed in an abnormal way. The Yugoslav delegate, K. Dimitrije Vlahov, said that since the chiefs and the tribal councils as a rule were appointed by the Government and in consequence depended on it, the consultation through the chiefs could not be treated as consultation of the people.

32 Ibid., 16th mtg., p. 78.
33 Ibid., 17th mtg., p. 87.
34 Ibid., 18th mtg., p. 89.
35 Ibid., 19th mtg., p. 98.
36 Ibid., p. 99.
The Mexican delegate, Luis Padilla Nervo, felt that annexation was juridically and constitutionally impossible even if the people had expressed their wish to that effect. This was so because the people of the mandate territory were minors who could not enter into international undertakings, as he put it. He further said the people of South West Africa would be legally able to join the Union only after they had achieved self-government and independence. Jan Galewicz, the delegate of Poland, also held the same view. The delegate of Syria, Cosh K. Zurayk, said that South Africa could ask South West Africa to join the Union if it became independent but independence would have to be granted first.

Several delegates to the Fourth Committee stressed upon the point that incorporation was contrary to, and in direct violation of, the letter and spirit of the Charter. The Soviet delegate, Novikov, was of the view that the proposal for annexation violated Article 76 of the Charter and was also in contradiction to the purposes of the international Trusteeship System. Lisicky, the representative of Czechoslovakia, questioned whether the organization could

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37 Ibid., 20th mtg., p. 108.
38 Ibid., 19th mtg., p. 105.
39 Ibid., 20th mtg., p. 113.
40 Ibid., 18th mtg., p. 89.
consider a proposal which, instead of dealing with a progressive evolution towards independence, was on the contrary designed to put an end to their political aspirations by outright annexation of their Territory. Galewicz, the Polish delegate, said that, according to the Covenant of the League of Nations and the United Nations' Charter, there was only one way of terminating a mandate, namely, to grant to a non-self-governing population independence which would give to that Territory the opportunity of becoming a member of the United Nations. M. Lannung, the delegate of Denmark, held the view that the spirit of the Charter would not be constructively implemented by the only two alternatives proposed by the Union of South Africa: incorporation, or a continuation of the existing situation without United Nations' supervision.

The Chinese delegate, Liu Chieh, stated that since the Mandates System had been instituted after World War I to replace the policy of territorial aggrandizement, it would be a backward step for the United Nations to endorse lightly a proposal for the annexation of a mandate territory. He doubted whether annexation could be justified even if social and economic improvement of a non-self governing territory had taken place under its administering Power.

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41 Ibid., 17th mtg., pp. 86-87.
42 Ibid., 19th mtg., p. 105.
43 Ibid., 20th mtg., p. 109.
44 Ibid., 16th mtg., pp. 79, 78.
It was also emphasized by some delegates that the Union Government was bound to place South West Africa under the United Nations' trusteeship. For example, the Soviet delegate, Novikov, said that neither the Charter nor the resolution of 9 February 1946 exempted any territory from being placed under trusteeship; nor did those documents permit a delay in the presentation of draft trusteeship agreements. He felt that if Article 77 was interpreted in such a way as to mean that it exempted states from the obligation to place mandate territories under the Trusteeship System and that it was purely a matter of voluntary agreement, it would render Chapters XII and XIII of the Charter quite superfluous.

The Indian delegate, Maharaj Singh, was opposed to the annexation of South West Africa by the Union of South Africa on the ground that the Union Government practised a policy of segregation and discrimination against all non-Europeans.

Vlahov of Yugoslavia also refused to accept that South West Africa was essential for the security of South Africa. He said that the danger from the Nazi activities had passed because the Hitler regime which had launched the attack on South Africa from the territory of South West Africa had

46 Ibid., 15th mtg., p. 70.
disappeared and the United Nations had decided to take all measures necessary to forestall and eliminate threats to peace.

The British delegate, A.G. Bottomley, however, came out with a statement supporting the request for incorporation. His government was satisfied with the steps taken to determine the people's wishes and he saw no reason to doubt the fairness or the accuracy of the results of the popular consultation. He said that European and native inhabitants had expressed themselves in favour of incorporation. He saw no reason why the United Nations should gainsay the freely expressed wish of those people.

In the second place, Bottomley did not agree with the view that there was obligation in the Charter to bring the mandate territories under the Trusteeship System. His interpretation of Article 77, paragraph 2, was that a mandatory Power was free to place or not a mandate territory under trusteeship.

As we would see later in these pages, the United Kingdom remained unwavering throughout in its outright support to the Union of South Africa even when other colonial Powers had changed their views. This support of the United Kingdom

47 Ibid., 19th mtg., p. 99.
48 Ibid., p. 100.
49 Ibid.
was one of the factors that enabled the Union of South Africa to defy the United Nations with impunity.

The effect of the severe criticism of the plea of the Union Government for annexation was that during the debate in the Fourth Committee in 1946 the representative of the Union Government, Smuts, while still reiterating that no trusteeship agreement would be submitted in conflict with what he described as "the clearly expressed wishes of the inhabitants", declared that his government "would continue to administer the territory as heretofore as an integral part of the Union, and to do so in the spirit of the principles laid down in the mandate."

B. THE FIRST RESOLUTION ON SOUTH WEST AFRICA AND ITS PART COMPLIANCE

There was great tussle among the member States of the United Nations over the nature of the first resolution that should be adopted because the first resolution was to show the direction and prepare the ground work for future United Nations' action in regard to the problem of South West Africa.

(a) The Draft Resolution Recommended by Sub-Committee II

The Sub-Committee II, appointed by the Fourth Committee to examine, among other matters, the request of the Union

Ibid., p. 102.
Government for the incorporation of South West Africa, had recommended a draft resolution sponsored by Denmark and the United States which, inter alia, in its operative part, stated that the General Assembly:

\begin{quote}
Considers that the data before this General Assembly do not justify action by the General Assembly approving the incorporation into the Union of South Africa of the mandated territory of South West Africa. 51
\end{quote}

This was a mild resolution inasmuch as it did not reject outright the request for incorporation. The principle of incorporation ought to have been rejected firmly. Incorporation, if conceded in one case, would create a bad precedent for the future. The draft resolution, as it stood, seemed to reject incorporation of the Territory for the time being only because of the insufficiency of data available. This means that, if more data was made available by the Union Government in justification of her plea for incorporating South West Africa, such a request might then be favourably considered.

The Sub-Committee II had earlier rejected two resolutions, one sponsored jointly by India and Cuba, and the other by the Soviet Union. The India-Cuba draft resolution, in its operative part, was as follows:

\begin{quote}
\end{quote}

The General Assembly

"Rejects any solution involving the incorporation of the Territory of South West Africa in the Union of South Africa; and

"Recommends that the mandatory territory of South West Africa be placed under the International Trusteeship System and that the Government of the Union of South Africa be requested to submit for the consideration of the General Assembly a trusteeship agreement for the aforesaid Territory". 52

The Soviet draft resolution, inter alia, had stated:

"The General Assembly

"Rejects the proposal of the Union of South Africa regarding the incorporation of the Territory of South West Africa; and

"Recommends the Government of the Union of South Africa to submit for consideration by the General Assembly in accordance with Articles 77 and 79 of the Charter a trusteeship draft agreement for the Territory of South West Africa". 53

These resolutions were somewhat stronger because they rejected outright any solution which provided for the incorporation of the Territory.

(b) The Draft Resolution Recommended by the Fourth Committee

The Denmark-U.S. draft resolution, which was recommended by the Sub-Committee II after rejecting the Indo-Cuban and Soviet draft resolutions, did not find favour with the

52 Ibid., p. 289.
53 Ibid., p. 287.
Fourth Committee. It approved another draft resolution by 17 votes to 15 with 4 abstentions. It was sponsored by India and was on the lines of the one earlier rejected by the Sub-Committee II. As this draft resolution was adopted with a narrow majority, it was clear to the members that, if this pattern of voting remained unaltered in the General Assembly, the draft resolution was sure to fall through for want of the required two-thirds majority.

(c) The Resolution as Finally Adopted

Therefore, the Danish, the United States and Indian delegates, after mutual consultations, produced a new draft resolution which was adopted by the General Assembly by 37 votes to nil with 9 abstentions and 8 absentees. Thus the very first resolution that was adopted by the General Assembly on the question of South West Africa was not the one recommended by the Fourth Committee but a new one, partly based on the resolution recommended by the Fourth Committee and partly based on the Danish-U.S. resolution recommended by the Sub-Committee II but not approved by the Fourth Committee.

The resolution adopted by the General Assembly on 14 December 1946 was as follows:

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

Noting with satisfaction that the Union of South Africa, by presenting this matter to the United Nations recognizes the interest and concern of the United Nations in the matter of the future status of the territories now held under mandate;

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

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

Desiring that agreement between the United Nations and the Union of South Africa may hereafter be reached regarding the future status of the mandated territory of South West Africa;

Assured by the delegation of the Union of South Africa that, pending such agreement, the Union government will continue to administer the territory as heretofore in the spirit of the principles laid down in the mandate;

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

The General Assembly, therefore,

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

recommends that the mandated territory of South West Africa be placed under the international trusteeship system and
invites the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the aforesaid Territory." 55

This resolution may be considered as of more than mere passing importance; it was a significant resolution as it was the first concrete expression of the newly awakened conscience of mankind. The Resolution, moreover, outlined and foreshadowed the likely course of action to be adopted by the United Nations. It not merely refused to accept the proposal for incorporation of South West Africa but at the same time recommended Trusteeship System for it. The future of the Territory was thus clearly chalked out. If trusteeship was to be the next stage in the political evolution of South West Africa, independence would have to be the ultimate goal as has been the case with other trust territories. The resolution thus reflected the great advance which had been made by the end of the war in the recognition of the right to ultimate self-determination of all dependent territories.

By implication the resolution also registered the view that there was no question of any independent rights being possessed by countries which had administered mandate territories and that any powers that they possessed were more or less in

55 General Assembly resolution 65(1).

the nature of a delicate assignment as well as necessary authority entrusted to them for the proper performance of their duties as trustees for the territories administered by them.

At the same time it has to be observed that this first General Assembly resolution on South West Africa was slightly milder in its wording than the one recommended by the Fourth Committee. Instead of rejecting the incorporation as a solution of the problem of South West Africa, it records its inability to accede to the incorporation of the territory of South West Africa into the Union of South Africa. However, the change in the wordings of the resolution helped in securing more affirmative votes and reducing the negative votes to nil.

A thing of particular interest is that even South Africa did not cast a negative vote on this resolution; it merely abstained along with 8 others - Australia, Brazil, France, Greece, Netherlands, New Zealand, Turkey and United Kingdom. Later, as we would see, when the South African attitude hardened, it started voting against all such resolutions.

Two other votes on this resolution are of interest to us - those of the United Kingdom and the United States. As we have already seen above in this chapter, the delegate of United Kingdom, during the general debate in the Fourth
Committee, had refused to doubt about the fairness of the consultations held by the Union Government with the people of South West Africa and had stressed upon the non-obligatory character of the Trusteeship System. Yet he too did not cast a negative vote; he simply abstained. The vote of the United States was, on the other hand, positively in favour of the resolution. The attitudes of these powers have all along been important as the South African Government's capacity to defy the United Nations stemmed mainly from the degree of support received from West European Powers, particularly Britain and the United States.

(d) **Part Compliance by the Union Government**

The efforts of the Fourth Committee to prevent the annexation of South West Africa largely succeeded because in a communication dated 1 August 1947 addressed to the Secretary-General of the United Nations, the Union Government conveyed the assurance that she would not proceed with the incorporation of South West Africa, that she would maintain the status quo and that she would administer the Territory in the spirit of the existing Mandate. A statement to this effect was made by the Union Government delegate, H.G.


Lawrence, in the Fourth Committee also during its 31st meeting. Besides these assurances the Union Government also informed the Secretary-General that she would transmit to the United Nations, for its information, an annual report on her administration of South West Africa and that the report for the calendar year 1946 had already been transmitted to the Secretary-General. In these respects the Union Government may be said to have complied with the General Assembly Resolution 65(I) of 14 December 1946.

However, the compliance of the Union Government was in part only since it categorically refused to place South West Africa under trusteeship as was enjoined upon her, vide resolution 65(I). For refusing to place South West Africa under Trusteeship System of the United Nations, the Union Government repeated the reasons given earlier by her, viz., she had no legal obligation to do so, and, she could not ignore the wishes of the great majority of the inhabitants of South West Africa who, according to that Government, favoured incorporation. At the same time the Union Government also refused to forward petitions to the United Nations and the reason given by the Union Government delegate for such a decision was that the right to petition presupposed

59 Ibid., 4th cttee., 31st mtg., pp. 3-5.
60 Ibid., p. 4.
61 Ibid.
a jurisdiction which would exist only where there was a right of control or supervision and, according to the Union Government, no such jurisdiction was vested in the United Nations with regard to South West Africa.

C. RESOLUTIONS ADOPTED DURING 1948 AND 1949

The Fourth Committee did not adopt any new approach to the question of South West Africa up to 1949. All the resolutions adopted by the General Assembly in 1947, 1948 and 1949 in the main reiterated the appeal already made to the Union Government, vide Resolution 65(I), to place the territory of South West Africa under trusteeship through an agreement with the United Nations.

Resolution 141 (II) of 1947 adopted by the General Assembly was slightly different from the one recommended by the Fourth Committee. In the Fourth Committee the Indian and Danish delegates had submitted almost identical draft resolutions.

The operative parts of both these draft resolutions

62 Ibid., 33rd mtg., p. 16.
63 General Assembly Resolutions 141 (II) of 1 November 1947, 227 (iii) of 26 November 1948, and 337 (iv) of 6 December 1949.
were as follows:

**Indian draft resolution**

The General Assembly, therefore,

**Takes note** of the decision of the Government of the Union of South Africa not to proceed with the incorporation of South West Africa;

**Firmly maintains** its recommendation that South West Africa be placed under the trusteeship system;

**Urges** the Government of the Union of South Africa to propose for the consideration of the third session of the General Assembly a trusteeship agreement for the Territory of South West Africa;

**Authorizes** the Trusteeship Council in the meantime to examine the report on South West Africa recently submitted by the Government of the Union of South Africa and to submit its observations thereon to the General Assembly.

... 65...

**Danish draft resolution**

The General Assembly, therefore,

**Takes note** of the decision of the Union of South Africa not to proceed with the incorporation of South West Africa;

**Firmly maintains** its recommendation that South West Africa be placed under the trusteeship system;

**Urges** the Government of the Union of South Africa to propose at an early date for the consideration of the General Assembly a trusteeship agreement for the Territory of South West Africa;

**Request** the Secretary-General to report to the General Assembly at its third session regarding such action as may have been taken in pursuance of this recommendation; and

**Authorizes** the Trusteeship Council in the meantime to examine the report on South West Africa now submitted by the Union Government and to submit its observations thereon to the General Assembly.

65 The Indian draft resolution did not contain any para corresponding to the one in the Danish draft resolution.
As is clear from the perusal of the above, both the draft resolutions had, *inter alia*, urged the Union Government to propose for the consideration of the General Assembly a trusteeship agreement for the territory of South West Africa but, while the Indian draft resolution wanted, *inter alia*, the proposed trusteeship agreement to be submitted 'at the third session', the Danish resolution, *inter alia*, wanted it to be done 'at an early date'. That was the main difference between the two draft resolutions. The Fourth Committee had recommended for adoption by the General Assembly the Indian draft resolution by 27 votes to 20 with 4 abstentions. A resolution adopted with such a narrow majority in the Fourth Committee could not secure passage in the General Assembly due to the two-thirds voting requirement there. Hence the Indian and Danish delegates reached a compromise with the result that neither the clause 'at an early date' nor the clause 'at its third session' was retained in Resolution 141 (II) adopted by the General Assembly; instead, the resolution, *inter alia*, provided that the Union Government should propose a trusteeship agreement "in time to enable the General Assembly to consider the agreement at its third session."

There was no change in the substance of the Resolution.

Resolution 227 (III) adopted by the General Assembly in 1948 was exactly the same as recommended by the Fourth

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Committee. Resolution 337 (IV) adopted by the General Assembly in 1949 was also substantially the same as recommended by the Fourth Committee. These resolutions, in addition to urging the Union Government to propose a trusteeship agreement, *inter alia*, also expressed regrets that the Union Government had not complied with the previous General Assembly resolutions in this regard.

In spite of these resolutions the Union Government refused to make any change in her stand. In fact, as we would shortly see, there was progressive hardening in the attitude of the Union Government towards the whole question of South West Africa.

D. Union Government's 'Closer Association Plan'

The request for permission to incorporate South West Africa having been declined by the General Assembly, the Nationalist Government of South Africa headed by D. Malan proceeded with the plans for the incorporation of South West Africa in an indirect and piecemeal fashion so as not to invite the charge of outright annexation of the Territory. With this purpose in view she brought about the enactment of the South West African Affairs Amendment Act No. 23 of 1949.  

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This Act provided, inter alia, for the representation of the territory of South West Africa in the Union Parliament; six members of European origin were to represent the Territory in the House of Assembly, and four, also of European origin, were to represent it in the Senate. The Act also provided, inter alia, that a reference to a province of the Union, a provincial council, a provincial division of the Supreme Court or a provincial revenue fund should be constructed as a reference to the Territory, the Legislative Assembly of the Territory, the high Court of South West Africa and the Territory revenue fund respectively. This was, in nutshell, the so-called 'closer association plan.'

The announcement about the 'closer association plan' brought forth sharp reaction from the members of the Fourth Committee. They denounced it as vehemently as they could. The Philippines delegate, Jose D. Ingles, said that the Act, to all intents and purposes, had made South West Africa, de facto as well as de jure, a province of the Union and its Legislative Assembly one of the provincial councils of the Union. He added that the making of South West Africa a province of South Africa unilaterally terminated the mandate, which was illegal. He reminded the delegates that the representative of South Africa, speaking before the Assembly of the League of Nations on 9 April 1946, had said that his government would regard the dissolution of the League as in no way diminishing her obligations under the Mandate, which
she would continue to discharge with the full and proper appreciation of her responsibilities until such time as other arrangements were agreed upon concerning the future status of the Territory. Further, the Philippines delegate felt that the enactment of the South West African Affairs Amendment Act violated the provisions of Articles 80, para 1, of the Charter also. The Chinese delegate, Shih-shun Liu, also said that what was claimed to be only 'closer association' really amounted to incorporation. In support of his contention he even quoted from a speech of the South African Prime Minister wherein he had stated that, under the new law, the Union of South Africa no longer recognized the existence of the Mandate.

Three delegates of the Union Government separately explained the real purpose behind the South West African Affairs Amendment Act and sought to remove the misgivings of other delegates on the subject. E.H. Louw, one of the Union Government delegates to the United Nations, clarified in the Fourth Committee that the proposed 'closer association' plan would not mean incorporation of South West Africa. Another

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68 Ibid., 4th cttee., 123th mtg., pp. 205, 206 and 207.
69 Ibid., 129th mtg., pp. 208, 209.
70 Ibid., 3rd sess., 1948, 4th cttee., 76th mtg., p. 293.
Union Government delegate, G.P. Jooste, also speaking in the Fourth Committee, assured the members that the Act would make South West Africa not a part of, but a partner with, the Union. A third Union Government delegate to the United Nations, J.R. Jordaan, in a letter dated the 11 July 1949 addressed to the Secretary-General of the United Nations, clarified that no greater powers were devolved upon the Union Government by the said Act in respect of South West Africa than were accorded to her under the terms of the original mandate but that, on the other hand, certain powers previously exercised by the Union Government were then to be transferred to the legislature of South West Africa which, therefore, would be able to enjoy a considerably greater measure of self-government than was enjoyed by a province of the Union.

These explanations failed to carry conviction with most of the members of the Fourth Committee. The French delegate, Roger Garreau, however, supported the Union Government by saying that the explanation given by the representative of South Africa went to show that the measures recently taken by his Government did not constitute annexation of the territory of South West Africa.

71 IbiQ., 4th sess., 1949, 4th c'ttee., 130th mtg., p. 214.
72 UN Doc. A/929, n. 67, p. 3.
While no formal resolution specifically rejecting the so-called 'closer association plan' was adopted by the General Assembly since none was recommended by the Fourth Committee, the assurance given on behalf of the Union Government in 1948 that the proposed closer association plan was not aimed at incorporation of the Territory had been taken note of by the General Assembly in its Resolution 227 (III) of 1948 in these words:

Takes note of the assurance given by the representative of the Union of South Africa that the proposed new arrangement for closer association of South West Africa with the Union does not mean incorporation and will not mean absorption of the Territory by the Administering Authority.

E. CONFLICTING INTERPRETATIONS OF THE CHARTER PROVISIONS

The debate held in the Fourth Committee since 1946 following the request of the Union Government for permission to incorporate South West Africa brought to the surface sharp differences among members on the question whether the placing of a mandate territory under trusteeship was obligatory or permissive. The difference of opinion, in fact, centred round the interpretation of the provisions of the Charter relating to the Trusteeship System.

Let us first examine the views of those who held that the nature of the Trusteeship System was voluntary. The
delegate for Netherlands, W.J.A. Kernkamp, emphasized that Article 77 of the Charter did not say that the mandate territory "must be placed" under the Trusteeship System. Hence, according to him, the Union of South Africa could neither be compelled to place South West Africa under trusteeship nor blamed if it did not comply with the invitation to do so, though one could express only regrets if it did not do so. Similarly, the French delegate, Rene Mayer, also pointing to the use of the words 'may be placed' and not 'must be placed' in Article 77 of the Charter, argued, in addition, that the use of the words "subsequent agreement" in Article 77, para 2 of the Charter, indicated that the placing of a territory under trusteeship was to be the result of the voluntary act of the mandatory. According to him, the voluntary character of the Trusteeship System was further proved from Article 80, paragraph 1 of the Charter which 'provided explicitly that there could be a delay before trusteeship agreements were concluded.' The British delegate, A.G. Bottomlay, stated in 1946 that Article 77, para 2, clearly provided that a mandatory Power was free to place a mandate territory under the Trusteeship System or not to do so. Again, in 1947,
it was argued on behalf of Britain that the words 'may be placed' in Article 77 of the United Nations' Charter proved the optional nature of the Trusteeship System. In 1948 another British delegate, Gordon Walker, added that the General Assembly could at the most request South Africa to put the territory of South West Africa under trusteeship but that the South African government had an equal right to refuse to comply with such a request. He added that, if the Charter provided for 'agreement', it was implied that there could be disagreement also.

The Greek delegate, C. Tranos, said that a trusteeship agreement was a contract and a contract required the voluntary consent of two parties; consequently the contract could not be imposed on the Union Government. The Belgian delegate, K.F. Ryckmans, said that the words that it will be a "matter for subsequent agreement" as to which territories would be placed under the Trusteeship System, occurring in Article 77, para 2 of the Charter, implied that certain territories might not be placed under the Trusteeship System, and, therefore, the Union Government was under no legal obligation to place South West Africa under trusteeship.

78 Ibid., 3rd sess., 1948, 77th mtg., p. 299.
79 Ibid., 79th mtg., pp. 320-21.
80 Ibid., p. 325.
Foster Dulles, the United States delegate, was also of the view that there was no legal obligation for a state to submit trusteeship agreement.

Most of the delegates who held the view that there was no legal obligation to place mandate territories under trusteeship, however, felt that the Union Government had only moral obligation to do so because, as the French delegate, Rene Mayer, put it, the authors of the Charter did not want to leave the mandate territories outside the Trusteeship System.

The United States delegate, John Foster Dulles, was of the view that the General Assembly should wield its moral power to prevail on the Union Government to submit trusteeship agreement in respect of South West Africa.

The Danish delegate, Hermann Lannung, felt that there was a strong moral obligation for the Government of the Union of South Africa to act in the same way as the other mandatory Powers.

Those delegates who believed in the compulsory nature of the Trusteeship System drew strength from the words "the trusteeship system shall apply..." occurring in Article 77

81 Ibid., 2nd sess., 1947, 31st mtg., p. 5.
82 Ibid., 32nd mtg., p. 12.
83 Ibid., 31st mtg., pp. 5-6.
84 Ibid., 38th mtg., p. 47.
of the Charter, which, according to them, drove home their point that placing a mandate territory under trusteeship was not a matter of choice or discretion of the mandatory Power. For example, the delegate of Guatemala, Jose Luis Mendoza, subscribed to this view. The Soviet delegate, Borie E. Stein, said that the permissive provision "may be placed" in Article 77, in fact, applied to the category mentioned in sub-paragraph (c) and not to sub-paragraphs (a) and (b) of the said category which were of obligatory nature.

In this connection the Philippines delegate, Carlos P. Romulo, said as follows:

In Article 77 of Chapter XII of the Charter, the Chapter which set up the international trusteeship system, three categories of territories were distinguished. Only the third category comprised territories to be placed under the system "voluntarily". The logical inference as regards the other two categories, and especially "territories now held under mandate", was that it was obligatory to place them under the trusteeship system.

Jesus M. Yepes, the representative of Colombia, said that Article 80, paragraph 2, did not permit any postponement

85 Appendix 'C'.
87 Ibid., 32nd mtg., p. 9.
88 Ibid., 31st mtg., p. 7.
of negotiations for trusteeship agreements.

The Indian delegate, Kaharaj Singh, was of the view that it was clearly the intention of the Charter that the mandate territories, if not granted independence, should be put under the Trusteeship System and that the General Assembly was perfectly within its rights in bringing pressure to bear in order to secure the implementation of the trusteeship provisions of the Charter, since South Africa had no legal title to South West Africa.

As far as the views of the Union Government on this question are concerned, Smuts' opposition to the view that the trusteeship provisions of the Charter were of compulsive nature have already been noted above in this Chapter. The Union Government delegate to the Fourth Committee in 1947, H.G. Lawrence, was not prepared to accept even the moral obligation to sign a trusteeship agreement. He categorically stated that 'no inference could be drawn from the action of other States because of the material differences between their mandated territories and South West Africa.' He pointed out that his country had reserved its position both before and after signing the Charter pending consultations with the inhabitants of South West Africa. Moreover, as he

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89 Ibid., 33rd mtg., p. 14.
90 Ibid., 40th mtg., p. 62.
91 Ibid., 38th mtg., p. 48.
put it, moral code consisted of indeterminate rules and there was no international tribunal to exercise jurisdiction over moral principles.

Thus the debate revealed that there was considerable difference of opinion among Member-States regarding the meaning of Article 77 of the United Nations' Charter. These doubts and differences of opinion of legal nature could not be resolved without an authoritative judicial pronouncement.

F. ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE

In the course of the debates in the Fourth Committee in 1946, 1947, 1948 and 1949 it had become clear that there were differences of opinion on various other legal questions also, for example, the international status of South West Africa, the juridical position of the Union of South Africa vis-à-vis South West Africa and the United Nations, the duty of the Union Government to submit annual reports, the right and degree of supervision of the United Nations over the Union's administration of South West Africa, the right of petition to the United Nations and other matters. To be more precise, the questions which required authoritative answers and on which the members had expressed doubts were the following:

92 Ibid., p. 49.
a) What was the status of the territory of South West Africa after the demise of the League of Nations?

b) What was the status of the mandatory Power itself? Did it cease to be a mandatory with the folding up of the League or, if it continued to retain its former status, what were its obligations?

c) Was the Union government legally bound to place South West Africa under trusteeship? Could it be compelled to do so?

d) If the mandatory continued to retain its former status and if its former obligations survived in spite of the demise of the League of Nations, the question then arose was as to whom it was responsible and accountable to. Could the United Nations assume the supervisory functions formerly exercised by the League of Nations? Was the Union Government under an obligation to submit to the United Nations supervision?

The move to make a reference to the International Court of Justice for advisory opinion was opposed by the Soviet Union and its allies. The Soviet delegate, J.N. Zarubin, said that he saw no need for seeking the legal opinion of the International Court of Justice for removing various doubts relating to the question of South West Africa, since, in his opinion, at its three previous sessions, the General Assembly had not raised any legal objections in
connection with the South West Africa question. The Polish
delegate, Tadeusz Zebrowski, said that since the obligations
of South Africa were perfectly clear, there was no need to
ask the opinion of the International Court of Justice.

The Fourth Committee, however, adopted a draft resolu-
tion by 30 votes to 7 with 9 abstentions recommending to the
General Assembly that advisory opinion of the International
Court of Justice be obtained to clarify the legal position.
The relevant operative part of the draft resolution was
as follows:

(The General Assembly)

1. Decides to submit the following questions
to the International Court of Justice with
a request for an advisory opinion which
shall be transmitted to the General Assembly
before its fifth regular session, if
possible:

"What is the international status of the
Territory of South West Africa and what
are the international obligations of the
Union of South Africa arising therefrom,
in particular:

93 Ibid., 4th sess., 1949, 4th cttee., 135th mtg.,
pp. 242-43.
94 Ibid., p. 249.
95 Ibid., Annexes, Agenda Item no. 34 (UN Doc. A/1180),
p. 110. The seven states voting against this draft
resolution were: Byelorussian Soviet Socialist Repub-
lic, Cuba, Czechoslovakia, Liberia, Poland, Ukrainian
Soviet Socialist Republic, Union of Soviet Socialist
Republic. The states which abstained on this resolu-
tion were: Australia, Belgium, Canada, Greece, New
"(a) Does the Union of South Africa continue to have international obligations under the Mandate for South West Africa and, if so, what are those obligations?

"(b) Has the Union of South Africa the competence to modify the international status of the Territory of South West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?

2. Requests the Secretary-General to transmit the present resolution to the International Court of Justice, in accordance with Article 65 of the Statute of the Court, accompanied by all documents likely to throw light upon the question".

The resolution then lists the documents which the Secretary-General is asked to send to the International Court of Justice along with the application for an advisory opinion.

The General Assembly at its 269th plenary meeting adopted the above resolution with an amendment by 40 votes to 7 and 4 abstentions. The amendment moved by 17 nations, added one more question between paragraphs (a) and (b) which was as follows:

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

The International Court of Justice delivered its

General Assembly Resolution 338 (IV) of 6 December 1949.
Advisory opinion on 11 July 1950.

(1) The general question asked of the Court was

What is the international status of the territory of South West Africa and what are the international obligations of the Union of South Africa arising therefrom?

The Court's unanimous reply was:

That South West Africa is a territory under the international mandate assumed by the Union of South Africa on 17 December 1920. 98

Discussing its reply the Court observed:

It is now contended on behalf of the Union Government that this Mandate has lapsed, because the League has ceased to exist. This contention is based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself. The League was not, as alleged by that Government, a "mandator" in the sense in which this term is used in the national law of certain States. It had only assumed an international function of supervision and control.

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. 99

The other part of the question, viz., what are the international obligations of the Union of South Africa

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98 Ibid., p. 143.
99 Ibid., pp. 132, 133.
arising therefrom, was answered by the Court along with the second question.

(ii) The second question asked of the Court was:

Does the Union of South Africa continue to have international obligations under the mandate for South West Africa, and, if so, what are those obligations?

The answer of the Court, by 12 votes to 2, was:

That the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice, to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the mandate and Article 37 of the Statute of the Court. 100

Discussing this point the Court observed:

These obligations represent the very essence of the sacred trust of civilization. Their raison d'être and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist.... 101

And further:

When the authors of the Covenant created this system, they considered that the

100 Ibid., p. 133.
101 Ibid., p. 133.
effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System. 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. 102

The Court stated further:

...the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it. 103

And still further:

...having regard to the fact that the dispatch and examination of petitions form a part of that supervision, the Court is of the opinion that petitions are to be transmitted by that Government to the General Assembly of the United Nations, which is legally qualified to deal with them. 104

And further it held:

102 Ibid., p. 136.
103 Ibid., p. 137.
104 Ibid., p. 138.
...The degree of supervision to be exercised by the General Assembly should not therefore 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... 105

(iii) The third question asked of the International Court of Justice was:

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

The Court's unanimous reply was:

That the provisions of chapter XII are applicable to the Territory of South West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System. 106

The Court observed in this connection:

South West Africa being a territory held under Mandate (Article 77a) may be placed under the Trusteeship System in accordance with the provisions of Chapter XII. 107

By 8 votes to 6 the Court further held:

That the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System. 108

105 Ibid.
106 Ibid., p. 144.
107 Ibid., p. 139.
108 Ibid., p. 144.
The Court observed in this connection:

Articles 75 and 77 show, in the opinion of the Court, that this question must be answered in the negative. The language used in both articles is permissive ("as may be placed thereunder"). Both refer to subsequent agreements by which the territories in question may be placed under the Trusteeship System. An "agreement" implies consent of the parties concerned, including the mandatory Power in the case of territories held under Mandate (Article 79). The parties must be free to accept or reject the terms of a contemplated agreement. No party can impose its terms on the other party. 109

(iv) And the fourth and final question asked of the Court was:

Has the Union of South Africa the competence to modify the international status of the Territory of South West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?

The Court held unanimously:

That the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations. 110

A close examination of the advisory opinion of the

109 Ibid., p. 139.
110 Ibid., p. 144.
Court would reveal that there were many points which went in favour of the United Nations.

(a) Firstly, the Court stated that if the mandate lapsed, as the Union Government had contended, the latter's authority would equally have lapsed. The Union Government had already pleaded even before the Court that, with the demise of the League of Nations, the mandate had lapsed. If it were so, the Union Government had no right to be in South West Africa. This meant that the presence of the Union Government in South West Africa was illegal and, therefore, the United Nations would be within its competence, if it took necessary steps to remove her from the Territory.

(b) Secondly, the Court clearly declared that the Union Government was under an obligation to forward petitions and submit annual reports to the United Nations on her administration of the Territory.

(c) Thirdly, the supervisory authority was to be the United Nations as the successor of the League of Nations and the Union Government was under an obligation to recognize it as such.

(d) Fourthly, the provisions of Chapter XII were applicable to the territory of South West Africa in the sense that they showed the way to bring the Territory under Trusteeship System.

However, there were many points in the 1950 Advisory
Opinion of the International Court of Justice which went against the United Nations. These points were as follows:

(a) The Court's declaration that the supervision by the United Nations should not exceed that which was permitted to the League of Nations and should conform as far as possible to the procedure followed by the Council of the League of Nations made it very difficult, if not impossible, for the United Nations to perform the supervisory duties in accordance with the provisions of its own Charter. Many supervisory duties permissible to the United Nations under the provisions of its Charter could not be performed by it because they were legally not permissible to the League itself under the provisions of the Covenant. Hence, if the United Nations still performed those duties, it could be accused of having exceeded the supervision exercised by the League of Nations. For example, the Trusteeship Council, in spite of having an authority under the Charter to send visiting missions to the trust territories, could not do so just because the League of Nations was not empowered to do so. Similarly, it could not grant oral hearing also because the League of Nations was not empowered to do so.

(b) The one remark of the Court that was likely to cause greatest embarrassment to the United Nations was that

111 U.N. Charter, Article 87(c) (Appendix 'C').
the Union Government was under no legal obligation to place South West Africa under trusteeship. Already the Union Government was herself saying that she had no legal obligation to place South West Africa under trusteeship. Her traditional friends had supported her on this point as we have already seen. The ruling of the Court strengthened their case and weakened that of the countries which were all along contending that South Africa had a legal obligation to place South West Africa under trusteeship.

(c) The Court’s ruling that the parties must be free to accept or reject the terms of a contemplated agreement and that no party could impose its terms on the other party also weakened the efforts of the United Nations to get the territory of South West Africa placed under trusteeship by an agreement with the Union Government. In fact, the Court’s ruling helped the Union Government, as we would see later in these pages, to put forward unreasonable demands and also to reject various solutions to the problem of South West Africa proposed by various committees established by the General Assembly for the purpose of implementing the 1950 Advisory Opinion of the International Court of Justice.

(d) The Court’s statement that the competence to determine and modify the international status rests with the Union of South Africa acting with the consent of the United Nations, no doubt, meant that the Union Government could not bring about unilateral modification in the status of South
West Africa, but, by implication, it also meant that the United Nations too could not bring about any unilateral modification in it.

Thus we see that the Advisory Opinion of the International Court of Justice could not be considered as wholly in favour of the United Nations. The above analysis shows that, while the Advisory Opinion clarified certain legal aspects of the problem, it also made the solution of the problem more difficult by certain of its declarations.

In view of the fact that the Advisory Opinion of 1950 was neither wholly favourable nor wholly unfavourable, it was difficult for the Fourth Committee to decide whether to accept it or reject it. Technically speaking, advisory opinions are binding neither upon the states nor upon the organs of the United Nations that had sought them. The Court and experts in International Law have been explicit in stating that they have no binding force. The organ of the United Nations that had sought a particular advisory opinion would not be deemed to be acting illegally if it opposed the opinion given or if it adopted contrary conclusions on a question of law to which the Court had given an answer. Advisory opinions, as one writer chose to say,

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are "merely opinions and merely advisory". Nevertheless, the advisory opinions have certainly a moral value and, therefore, their influence is great. Their persuasive character and substantive authority is also great because they are judicial pronouncements of the highest international tribunal. Therefore, the Assembly and the Council would not be in a very good position before the world if they paid no attention to an advisory opinion after obtaining it. Far worse than the rejection of the advisory opinion in toto after having obtained it at its own initiative would be the situation in which the Assembly decided to accept only those parts of an opinion which were favourable and reject those which were not. Hence, as far as the 1950 Advisory Opinion of the Court on South West Africa was concerned, there was no option for the General Assembly but to accept it in its entirety, in other words, to eat the chaff also with the wheat, vide Resolution 449(V)A of 13 December 1950.

115 Antonio Sanchez de Bustamante, The World Court (New York, 1925), p. 264.
116 Fitzmaurice, op. cit., p. 55.
117 Bustamante, op. cit., p. 264.
before examining the action taken by the General Assembly after the 1950 Advisory Opinion certain other matters relevant to the present enquiry might be considered, since they demonstrate the progressive hardening of the attitude of the Union Government. We have seen that initially the Union Government was somewhat cooperative, evident as it is from her part compliance with the first General Assembly Resolution on South West Africa - Resolution 65(I) of 1946. The hardening of the Union Government's attitude began with the consideration by the Trusteeship Council of the first Annual Report on South West Africa sent by her. The Report was forwarded to the Trusteeship Council for consideration and report, vide Resolution 141(II) of 1947. This was done in spite of the fact that South West Africa was not a trust territory. Since it was not a trust territory, some delegates had opposed the consideration of the report by the Trusteeship Council. For example, J.A. Tsarapkin, the Soviet delegate had opposed it in these words:

...the report on South West Africa should not be examined by the Trusteeship Council inasmuch as the resolution of the last session of the General Assembly 1 November 1947 provided that the Government of the

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Union of South Africa should submit for consideration to the third session of the General Assembly a draft of a Trusteeship Agreement on the Territory of South West Africa... a report on the Territory of South West Africa could be considered only after this Territory is included in the Trusteeship System and a Trusteeship Agreement is approved by the General Assembly.... The examination by the present session of the Trusteeship Council of the report on South West Africa cannot be based on or justified by any Article of the Charter because the only Article in the Charter which authorizes the Trusteeship Council to examine reports is Article 87, paragraph a, which concerns only reports on Trust Territories presented by Administering Authorities concerned, and there is no other basis for the examination of the report by Trusteeship Council....

In spite of some opposition, the Trusteeship Council gave the annual report its fullest consideration and then submitted its report to the General Assembly.

The report of the Trusteeship Council was a severe indictment of the South African Government's policies in South West Africa in every field. In particular, the report of the Trusteeship Council mentioned that the natives of South West Africa had no franchise, no eligibility to office, no representation in the governing bodies and no share in the administration of the Territory. In every field, be it education, economic development, political

education and cultural development of the natives, the Trusteeship Council was not satisfied with the performance of the Union Government. The Trusteeship Council also reported that the natives were subjected to discriminatory treatment by the Union Government inasmuch as they did not have adequate amenities like schools, hospitals, etc. in proportion to their numerical strength and that many areas were completely without these facilities. The Trusteeship Council also observed that the Union Government spent just ten per cent of the budget on the natives which comprised ninety per cent of the whole population of South West Africa and that ninety per cent of the budget was devoted to the European population which comprised of not more than ten per cent of the total population.

When the report of the Trusteeship Council was considered by the Fourth Committee, the Union Government delegate, E.H. Louw, intervened in the debate and made two important points concerning the submission of annual reports. In the first place, he said that his government had forwarded the annual report on voluntary basis and, therefore, it should not be regarded as creating a precedent or construed as a commitment for the future or implying any measure of accountability to the United Nations on the part of the Union

121 Ibid., p. 43.
Government. In the second place, he said that the Trustee-
ship Council should not consider the annual reports on South
West Africa because that Territory was not a trust territory
and there was no trusteeship agreement in respect of it.

The observations of the Trusteeship Council on the
annual report on South West Africa were taken note of in
Resolution 227 (III) adopted on 26 November 1948 by the
General Assembly on the recommendation of the Fourth Com-
mittee and the Secretary-General was asked to transmit
those observations to the Union Government.

Enraged by the consideration of the annual report by
the Trusteeship Council, the Deputy Permanent Representative
of the Union Government, J.R. Jordaan, in a letter dated the
11 July 1949, informed the Secretary-General that his
government had decided not to send any more annual reports
on her administration of South West Africa. The disconti-
nuance of the annual reports inaugurated an era of confron-
tation between the United Nations and the Union Government
over the issue of South West Africa and it also marked the
beginning of the hardening of the attitude of South African
Government.

122 Ibid., 3rd sess., 1948, 4th ctte., 76th mtg.,
pp. 287-38.

123 Ibid., Annexes (Pt.I), Agenda Item No. 22 (UN Doc.

124 UN Doc. A/929, n. 67, pp. 7-3.
Giving the reasons for the decision not to submit any more annual reports on South West Africa, Jordaan stated in his letter that, although the Union Government did not consider herself legally obliged to send annual reports, she had, nevertheless, been discharging that function in a spirit of goodwill, cooperation and helpfulness. That action, on the part of South Africa, was voluntary. The reports were sent only for information purposes and on the distinct understanding that the United Nations had no supervisory jurisdiction in South West Africa. Jordaan further stated in his letter that, at the time of submitting the report in the past, it had been made clear that the forwarding of reports should not be regarded as creating a precedent or construed as a commitment for the future, as the South African Government did not consider herself accountable to the United Nations for her administration of South West Africa. According to the South African delegate, the annual report had been made the basis of unjustified criticism and censure of the Union Government's administration in South West Africa as well as in the Union itself. Moreover, the act of submitting a report had created in the minds of a number of members of the United Nations an

125 ibid., p. 7.
126 ibid.
127 ibid.
impression that the Trusteeship Council was competent to make recommendations on matters of internal administration of South West Africa and had caused other misconceptions regarding the status of the territory of South West Africa. Hence Jordaan said that the Union Government had regretfully come to the conclusion that no further reports should be forwarded. At the same time, the Union representative made it clear, that the decision to discontinue sending reports did not mean the desire to suppress factual and other information in respect of South West Africa which, as he wrote, could be had from other sources.

During the discussions in the Fourth Committee members severely criticized the decision of the South African Government to discontinue the submission of reports on South West Africa. The Chinese delegate, Shih-shun Liu, said that the arguments of the Union delegate regarding the refusal to send annual reports were neither logical nor valid. Referring to the remarks of South African delegate that the reports submitted by his government had been subjected to 'unjustified criticism', the Chinese delegate said that the criticism of South African Government, as in the case of other Administering Powers, was made in the normal way in the interest of

128 Ibid.
129 Ibid., pp. 7-8.
the population of the Territory. The Chinese delegate also refused to accept the South African representative's plea that, since the Union of South Africa had not concluded a Trusteeship Agreement for South West Africa, the United Nations was not competent to discuss and make observations on the annual reports on the territory of South West Africa. The Indian delegate, B. Shiva Rao, said that South African Government herself was to blame for the criticism as she had not cooperated with the Trusteeship Council by refusing to send a special representative. The Indian delegate further said that the debates in the Trusteeship Council were neither unduly critical of, nor unfriendly to, the Union Government. The real reason, in his opinion, was the coming into power of Malan as Prime Minister of South Africa who wanted to practise racial segregation in South West Africa and who, therefore, did not want to associate the United Nations with the administration of the Union Government since the latter were opposed to racial segregation. The Syrian delegate, Yasin Kughir, said that the criticism of the report should actually have encouraged the Union Government to transmit more detailed information in order to correct any misrepresentation of the information she had transmitted previously.

132 Ibid., 130th mtg., p. 215.
The French delegate, Roger Garreau, as President of the Trusteeship Council, testified that the discussions in the Trusteeship Council had been conducted with the greatest objectivity and that not only South Africa but, in fact, all the Administering Authorities had come in for a good deal of criticism, whether founded or unfounded. The Cuban delegate, Guy Perez Cisneros, felt that the refusal to send reports amounted to unilateral repudiation of the old mandate which still existed. Moreover, "it was the international community's duty to be informed how the territories it entrusted to the administration of some countries were governed". The reason given by the Union Government for discontinuing the annual reports did not seem to be a convincing one. The real reasons for the decision to discontinue the submission of annual reports seem to be as follows:

(i) The coming into power of the National Party in South Africa did make for a radical change in South African attitude and policy. The Nationalist Party was totally opposed to the submission of annual reports even when it was sitting in opposition. As early as 1947, Eric Louw, then sitting in the opposition, had made the following submission in the Union House of Assembly:

133 Ibid., p. 216.
134 Ibid.
What will be the consequence of the submission of annual reports to the United Nations.... The hearing which will be given to the Union by the United Nations Trusteeship Commission will differ markedly from that which prevailed in the days of the old League of Nations, because the old League of Nations, with about half a dozen exceptions consisted of white countries. It was a body which consisted of predominantly white countries. But the United Nations is a horse of a totally different colour. The United Nations is predominantly non-white. It consists of predominantly Coloured and Asiatic countries, and of countries whose inhabitants are of mixed blood....

Louw was now a member of the South African Cabinet and represented his country at the United Nations when the decision to discontinue the annual reports was taken.

(ii) Another reason for the discontinuance of annual reports seemed to be the apprehension by the Union Government that the continued submission of reports and their routine consideration by the Trusteeship Council year after year might make the territory of South West Africa, at least, de facto, if not de jure, a trust territory.

(iii) Finally, there also seems to be a possibility that the Union Government might have seen the apparent inconsistency in sending the annual report and not forwarding the petitions from the inhabitants at the same time.

By Resolution 337 (V) adopted in 1949 by the General

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Assembly on the recommendation of the Fourth Committee the Union Government was called upon to resume submission of annual reports. The Union Government, however, did not comply with it and the annual report submitted by her remained the first and the last annual report on South West Africa since the setting up of the United Nations.

II. THE QUESTION OF ORAL HEARINGS

During this period the Fourth Committee opened the door to the appearing of petitioners before it from the mandate territory. The first person to be given the privilege of appearing as petitioner was Rev. Michael Scott, a clergyman of the Anglican Church in South Africa. The Union Government delegate, G.P. Jooste, had bitterly opposed the granting of a hearing to anyone in principle and more so to Rev. Michael Scott on the following grounds.

a) The problem of South West Africa concerned only the Union Government and the Assembly and it was inconceivable that an individual should be consulted on such an international issue.

b) Neither Article 22 of the Covenant of the League of Nations nor the procedure adopted by the League of Nations...
contained any provision for the grant of a hearing to petitioners.

c) No step should be taken to prejudge the opinion of the International Court of Justice if it was to be sought on the legal status of South West Africa.

d) Oral hearings could not be granted on the basis of the precedents since whenever in the past a request had been granted for an oral hearing, it was done either to enable an individual to defend himself or to enable the people to express their views on a problem which the mandatory Power had referred to the Assembly for settlement or to discuss the report of an organ of which that individual was president. None of these circumstances existed in the case of Scott.

e) The request for an oral hearing should be routed through the South African Government.

f) Rev. Scott could not represent the whole population of South West Africa, since 40 per cent of the Heroros lived outside South West Africa and the remainder comprised less than one-tenth of the indigenous population of the Territory.

g) There was no evidence to indicate that the vast majority of the population had any desire to express its views to the Committee or to any other external authority.

h) Rev. Scott would hardly have anything to add to the large number of communications he had already sent direct to the members of the Committee.
i) Rev. Scott could not be expected to be aware of the real conditions in South West Africa, as he had lived there only for two months.

The United States delegate, Charles Fahy, during discussions in the Fourth Committee on the above issue, felt that permission for an oral hearing should be granted in general terms to a representative of substantial elements of the population and not to any specified individual. The delegate for United Kingdom, Terence A. Shone, said that the General Assembly was an organization of States and so, if a private individual was granted an oral hearing, there might result serious consequences to the functioning of the Organization itself.

In spite of the opposition by South Africa and others, the Fourth Committee at the 137th meeting, by 29 votes to none and 11 abstentions, granted Rev. Scott an oral hearing. Accordingly, Rev. Scott made an oral statement in the Fourth Committee during its 138th meeting held on 26 November 1949.

Rev. Scott, in his maiden speech before the Fourth Committee on 26 November 1949 quoted at length from a large number of petitions which he had brought with him from the people of South West Africa to convince the members of the Fourth Committee on two points; firstly, that the people of

138 Ibid., 133rd mtg., p. 231.
139 Ibid., p. 233.
South West Africa were totally opposed to the incorporation of their territory into the Union of South Africa and, secondly, that they were subjected to intolerable hardships and indignities by the Union Government.

Rev. Scott quoted from the petition of Westus Kanjo as follows:

It is being said that Ovambos favoured incorporation. And yet they are the most ill-treated people in the whole of the territory. A person who does not know his own name, how can he know what incorporation means? 140

Rev. Scott also quoted from the statement of the Bishop of Damaraland as follows:

...The 30,000 who were against annexation by the Union are the only Natives who have any idea of the meaning and significance of the matter at issue... they are the most sophisticated and educated natives.... 141

Rev. Scott then quoted from a statement made by one of the Ovambos leaders, whose people were said to have voted in favour of incorporation:

Major Hahn (who conducted the referendum) didn’t mention anything about the incorporation into the Union of South Africa. Taking it for granted that they were being asked if they wanted to be under the British Crown, they said they wanted to be under the British. Since no mention was made of incorporation into the

140 Ibid., 138th mtg., p. 262.
141 Ibid.
Union, it must be stated that in reality they voted against incorporation and for being brought under British rule. 142

These quotations amply, and in full measure, refuted the claim of Smuts that the aims of referendum had been fully explained to the natives through their chiefs.

Rev. Scott also told the Fourth Committee that the indigenous peoples had not been in favour of incorporation, since they had asked for the assurance that such incorporation would not bring with it the effects which it was bound to bring, namely, the possibility or even the probability that they would no longer find themselves under the protection of the Crown of King George of England. 143

The miserable condition of the natives is best reflected in the following extract from the statement of David Witbooi quoted by Rev. Scott during his oral testimony before the Fourth Committee:

If we have to put down in writing the conditions of our life, then we do not know where to begin and where to end. Should we be born and live and close our eyes under this unending imprisonment? Are we a cursed generation because our chiefs fought for the freedom of their people, their nation and their land? 144

A memorandum signed by Hosea, Kutako and others was

142 Ibid., pp. 262-63.
143 Ibid., p. 262.
144 Ibid., p. 264.
handed over to Rev. Scott. It was quoted by Rev. Scott in the Fourth Committee and it contained the following appeal to the international community:

We respectfully ask you to give favourable consideration to our appeal, believing that peace and goodwill which we all desire, and which is the desire of all nations, will be brought nearer to realization in this land of racial differences by allowing our appeal to be heard for a constitutional system of trusteeship to be established whereby all races can look forward with confidence and hopes of fulfilment for the right aspirations of all sections.

The decision of the Fourth Committee to grant an oral hearing to Rev. Scott and then subsequently to many others in later years proved highly useful since it enabled the members to have first hand information about the conditions prevailing in South West Africa otherwise the Union Government could convincingly claim that all was well in the Territory and that the General Assembly was making a fuss about the matter unnecessarily. The annual reports had already been stopped and, even if they had been continued, they would have at best given a one-sided view of the situation. The large number of written petitions and the oral testimony of the petitioners from the Territory helped the members of the Fourth Committee to see the other side also.

The disclosures made by Rev. Scott and the picture
drawn by him of the conditions prevailing in South West Africa as seen by him with his own eyes emphasized the urgency of the problem as much as the need for its solution without any delay.

I. ANOMALIES IN THE STAND OF THE UNION GOVERNMENT

The stand of the Union Government, as stated above, was full of contradictions. Firstly, the Union Government, while on the one hand, was prepared not to proceed with the incorporation of South West Africa in compliance with General Assembly Resolution 65(I) of 1946, she was at the same time not prepared to put the territory of South West Africa under trusteeship. Secondly, while she did not recognize the right of the United Nations to supervise the Union's administration of South West Africa, she had, at the same time, sent an annual report on the Territory to the Secretary-General of the United Nations, the examination of which by the General Assembly and the Trusteeship Council constituted an act of supervision. Thirdly, if the United Nations had jurisdiction to receive and examine annual reports, it ought to have jurisdiction to receive petitions also but the Union Government denied any such jurisdiction to the United Nations. From a practical standpoint, the annual reports and petitions could not be treated on different footings because both constituted the means of supervision and the ultimate purpose of both was
to throw light on the conditions prevailing in South West Africa.