Chapter III

Implementation of the Advisory Opinion
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IMPLEMENTATION OF THE ADVISORY OPINION

Soon after the Advisory Opinion was delivered by the International Court of Justice in 1950 on the question of South West Africa, the question that arose was as to what follow-up action should be taken. This was the question on which the members of the Fourth Committee were sharply divided. How sharp was the division among the members on this question can be gauged from a comparison of the operative parts of two draft resolutions tabled in the Fourth Committee. One of the two resolutions was tabled by eight powers - Denmark, El Salvador, Iraq, Norway, Peru, Thailand, United States of America and Venezuela. It envisaged the establishment of a committee

to confer with the Union of South Africa concerning measures necessary to implement the advisory opinion of the International Court of Justice, to report its findings and make its recommendations to the next regular session of the General Assembly. 1

The other draft resolution was originally tabled by Brazil, Cuba, Mexico, Syria and Uruguay but the sponsors accepted some minor amendments proposed by India, Indonesia and Philippines. In the final shape it envisaged the

establishment of a Commission for South West Africa

to assist the General Assembly in the
consideration of the annual reports,
petitions and all other matters relat­
ing to the Mandated Territory of South
West Africa... 4

From the comparison of these draft resolutions, the
relevant operative parts of which have been quoted above,
it is clear that though the sponsors of the two resolutions
agreed that a Committee or a Commission should be established
as a step towards the implementation of the Advisory Opinion,
they sharply differed on the question of the nature of func­
tions to be assigned to the proposed Committee or Commission.

The aim of the sponsors of the eight power resolution
was to have a committee entrusted with the job of negotiating
or conferring with the South African Government regarding the
measures that should be adopted or the machinery that should
be brought into being to implement the Advisory Opinion. No
other function for the proposed committee on South West
Africa was envisaged in the eight power draft resolution.
How the Advisory Opinion of the International Court of Justice
was to be implemented and what machinery, if any, for the
supervision of the Mandatory's administration of South West
Africa, in consonance with that Opinion, was to be created
was not specified in it since it all depended upon the outcome

4 UN Doc. A/C. 4/L. 116/Rev. 1, n. 2, pp. 3-4. (This
para remained unaffected by the amendments tabled
by India, Indonesia and Philippines.)
of negotiations with the Union Government which the proposed committee was to hold with her.

The sponsors of the 8-power draft resolution and also those who lent support to it in the debate felt that the United Nations should not impose a supervisory machinery unilaterally. It was necessary, they pointed out, to secure the goodwill and cooperation of the Union Government in order to make the supervisory machinery operate successfully.

On the other hand, the aim of the sponsor of five-power draft resolution as amended through the amendment tabled jointly by India, Indonesia and Philippines was to hold no negotiations at all with the Union Government and to set up, unilaterally, the proposed supervisory machinery straightway. The Philippines delegate, J.D. Ingles, pointed out that there was hardly anything to negotiate with the Union Government since the procedure for the submission of reports had already been laid down by the Council of the League of Nations and the Permanent Mandates Commission. He further said that the setting up of the supervisory agency was the exclusive responsibility of the Council of the League of Nations. All that the Union Government was entitled to ask was that the degree of supervision exercised by the

Such was the view of, for example, the delegates of Netherlands, Norway, U.K. and Dominican Republic. G.A.O.R., 5th sess., 1950, 4th cttee., 192nd mtg., pp. 333, 336; ibid., 194th mtg., p. 343; ibid., 195th mtg., p. 352.
General Assembly or by the agency appointed to act on its behalf should not exceed the supervision exercised under the Mandates System.

No compromise could be reached between the sponsors of the two resolutions. The Fourth Committee finally adopted the five power draft resolution by 26 votes to 21 with 4 abstentions after accepting minor amendments proposed by India, Indonesia and Philippines. Before it was voted upon in the General Assembly, a compromise between the sponsors of the two draft resolutions in the Fourth Committee had already been reached and as a result of the compromise a new draft resolution had already been prepared. Had this compromise not been reached between the sponsors of the two draft resolutions, the resolution recommended by the Fourth Committee would not have been adopted by the General Assembly for lack of the required two-thirds majority. The General Assembly adopted this compromise draft resolution as Resolution 449A(V) by 45 votes to 6 with 5 abstentions on 13 December 1950 and not the draft resolution recommended by the Fourth Committee. The operative part of the General Assembly Resolution ran as follows:

6 Ibid., 194th mtg., p. 348.
8 Ibid., 322nd plen. mtg., p. 629.
1. **Accepts** the advisory opinion of the International Court of Justice with respect to South West Africa;

2. **Urges** the Government of the Union of South Africa to take the necessary steps to give effect to the opinion of International Court of Justice, including the transmission of reports on the administration of the Territory of South West Africa and of petitions from communities or sections of the population of the Territory;

3. **Establishes** a Committee of five consisting of the representatives of Denmark, Syria, Thailand, the United States of America and Uruguay, to confer with the Union of South Africa concerning the procedural measures necessary for implementing the advisory opinion of the International Court of Justice and to submit a report thereon to the next regular session of the General Assembly;

4. **Authorizes** the Committee, as an interim measure, pending the completion of its task referred to in paragraph 3, and as far as possible in accordance with the procedure of the former Mandates System, to examine the report on the administration of the Territory of South West Africa covering the period since the last report, as well as petitions and any other matters relating to the Territory that may be transmitted to the Secretary-General, and to submit a report thereon to the next regular session of the General Assembly.

It would be observed that paragraph 3 of the above Resolution represented the point of view of those delegates who favoured the setting up of a committee with the expressed object of holding negotiations with South African Government to devise measures to implement the Advisory Opinion of the International Court of Justice. Para 4 of the
Resolution, on the other hand, represented the point of view of those delegates who favoured the setting up of the supervisory machinery straightway by the General Assembly without any consultation with South African Government.

Thus the two points of view were accommodated and the Ad Hoc Committee thus set up was entrusted with the twin responsibility of conferring with South African Government regarding the measures necessary for the implementation of the Advisory Opinion of the International Court of Justice and of acting, at the same time, as a committee for the examination of petitions from the Territory and the annual reports of the Mandatory Power.

The rejection by the General Assembly of the resolution recommended by the Fourth Committee does not minimize the importance of the role of the Fourth Committee since the two points of view as contained in paras 3 and 4 of the General Assembly resolution were the gift of the Fourth Committee itself. The substance of para 3 of Resolution 449(V)A came from the 8-power resolution which was not voted upon in the Fourth Committee while the substance of para 4 was taken from the 5-power resolution recommended by the Fourth Committee. The thorough discussions in the Fourth Committee were further responsible for bringing to surface the conflict of opinions among the nations of the world. These were, of course, not reconciled in the Fourth Committee. The reconciliation eventually took place outside the General
142

Assembly before the final voting as the members were keen not to let that year go without a resolution on South West Africa.

The Ad Hoc Committee was the first of a series of committees set up by the General Assembly, one after the other, for the solution of the problem of South West Africa. Henceforth, all the work relating to South West Africa was done by the Fourth Committee on the recommendation of small committees like the Ad Hoc Committee. This went on till 1966 when the work relating to South West Africa was taken off the hands of the Fourth Committee also and was dealt with directly by the General Assembly.

Initially, the term of the Committee was one year as it was asked to submit its report to the General Assembly during the next session. However, its term was twice extended by the General Assembly, each time on the recommendation of the Fourth Committee. The first extension was granted to the Ad Hoc Committee by the General Assembly in 1951 and the second in 1952. Thus, in all, the Ad Hoc Committee functioned for three years. It was wound up in


10 General Assembly Resolution 570A(VI) of 19 January 1952.

11 General Assembly Resolution 651(VII) of 20 December 1952.
1953 when it was replaced by another committee, the Committee on South West Africa. Thus the proposal to set up a negotiating committee and the proposals to give it two extensions all originated in the Fourth Committee.

When the Fourth Committee, in 1961, recommended the granting of the first extension to the Ad Hoc Committee by the General Assembly, it was encouraged to do so because the Ad Hoc Committee, during the preceding year which was the first year of its extension, was able to arrive at a number of points of agreement with the representative of the Union Government over the question of South West Africa. In recommending the first extension the Fourth Committee seemed to be hoping that, in the following year, that is the second year of its existence, the Ad Hoc Committee might perhaps succeed in narrowing down further the differences between the South African Government and itself. In the second year of its existence, the Ad Hoc Committee succeeded in extracting one more concession from the South African Government, thus justifying the first extension granted to it in the year 1951. In recommending the second extension to the Ad Hoc Committee in 1952 the Fourth Committee seems to have been encouraged not only by the success achieved by the former in the preceding two years but also by the letter dated 11 December 1952 addressed by the delegate of the South African Government to the Chairman of the Ad Hoc Committee, which ran as follows:
I have been directed to inform you that the Union Government greatly regret the fact that these negotiations were broken off before the possibility of an agreement had been fully explored. The Union Government believe that further exploration of the points of agreement and disagreement outlined in paragraph 23 of the report might have led to a narrowing of the differences still existing.

The Ad Hoc Committee on its part never regarded the negotiations as "broken off"; hence it informed the South African Government delegate that it held itself ready to resume negotiations, should the General Assembly request it to do so.

The extension of the Ad Hoc Committee was opposed by many countries such as Guatemala, Liberia, U.S.S.R., Czechoslovakia, Poland and Byelorussia. A large number of countries including Chile, India, United Kingdom, France, Venezuela, Sweden, China, Cuba and Thailand, however, favoured the continuation of the Ad Hoc Committee.

The contention of most of the countries which opposed the continuation of the Ad Hoc Committee was that no useful purpose would serve by re-establishing the Committee since

13 Ibid.
14 Ibid., 6th sess., 1951, 4th cttee., 222nd mtg., p. 132; ibid., 223rd mtg., pp. 135, 137, 139; ibid., 224th mtg., pp. 146, 147.
15 Ibid., 223rd mtg., pp. 135-36, 136, 139, 140; ibid.; 224th mtg., pp. 148, 149.
its previous efforts had proved completely fruitless and that the Union Government did not sincerely wish to negotiate. The countries supporting the re-establishment of the Committee, however, felt that the door to negotiation should not be closed and that the Union Government should be given another opportunity to take account of the world opinion.

In the first year the members of the Committee were Denmark, Syria, Thailand, the U.S. and Uruguay. In the second and third years Norway replaced Denmark, while the other members remained unchanged.

A. THE PROPOSAL OF THE UNION GOVERNMENT

As stated earlier, the Ad Hoc Committee was asked to negotiate with the Government of the Union of South Africa regarding the procedural measures necessary for implementing the Advisory Opinion of the International Court of Justice on South West Africa. During the course of negotiations on this question between the Ad Hoc Committee and the Union Government spread over three years, two proposals aimed at the solution of the South West African problem were considered. One of these was put forward on behalf of the South African Government, while the other was put forward by the Ad Hoc Committee.

At the negotiations the Union Government was represented
by G.P. Jooste advised and assisted by L.C. Steyn, the
Senior Law Adviser of the Union Government, J.R. Jordaan
and B.G. Fourie. The main essentials of the 'Proposal' of
the Union Government were unfolded by these representatives
in 1961 but certain clarifications were offered on behalf of
that Government in 1952 also.

The details of the 'Proposal' were as follows:

(i) A new international instrument relating to the terri-
tory of South West Africa should be negotiated.

(ii) The obligations that the South African Government
desires to assume in respect of South West Africa
would be derived by her from this new instrument only
and not from the original Mandate.

(iii) The South African Government was ready to re-assume
all those obligations which 'related directly to the
sacred trust'. These sacred trust provisions should
be incorporated into the proposed new agreement on
South West Africa.

(iv) While drawing up the obligations as stated in paragraph

16 Ibid., 6th sess., 1951, Annexes, Agenda Item 38,
UN Doc. A/1901, paras 13-25, pp. 3-5.

17 Ibid., 8th sess., 1953, Annexes, Agenda Item 36,
UN Doc. A/2261, paras 10-16, pp. 2-4.

18 UN Doc. A/1901, n. 16, para 13, p. 3.

19 Ibid. (Also UN Doc. A/2261, n. 17, para 13, p. 3).

20 UN Doc. A/1901, n. 16, para 13, p. 3.
(iii) above, and incorporating them in the proposed new international agreement, some changes should be made in order to bring them in line with the present day conditions. The new agreement, in particular, should take into account the question of the defence of the Territory also.

(v) The proposed new agreement should be negotiated with the three of the remaining Principal Allied and Associated Powers of World War I.

In 1952, the South African Government representative clarified as to why his Government had chosen the three powers as the second party to the proposed new agreement. Firstly, he said, they were the only remaining powers of those that had conferred the original mandate on the Union of South Africa; secondly, they were permanent members of the Security Council; thirdly, they were also great powers; and, fourthly, they had a recognized position in international affairs. In the view of the South African Government there would be assurance to the world that, due to the foregoing reasons, the 'sacred trust' provisions of the proposed new agreement would be fully honoured by her.

(vi) Whatever obligations were assumed by the South African Government

21 Ibid.
22 Ibid., para 14, p. 3.
23 UN Doc. A/2261, n. 17, para 13, p. 3.
Government would be assumed towards the Principal Allied and Associated Powers only because they were connected with the original mandate. The said three powers, the South African delegate clarified in the course of the second round of negotiations, would act only as principals and not as agents of the United Nations.

(vii) Before the negotiations for the proposed new agreement were opened, its general underlying principles would be submitted to the United Nations for prior approval. The draft agreement, finally arrived at, would also be submitted to the United Nations for confirmation before it was given effect to. In this way, this procedure would give the United Nations two opportunities for examining the draft agreement, at the time of approval of general principles before the opening of negotiations and again at the time of submission of the final draft agreement to it for confirmation.

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24 Ibid.
25 Ibid.
26 Ibid. Originally, in 1951, the stand of the Union Government was that the United Nations should not be connected with the new arrangement in any way except calling upon the Principal Allied and Associated Powers to negotiate the new instrument with the Union Government. However, as a gesture of her desire to cooperate, she agreed to permit the United Nations to confirm

(Contd. on next page)
(viii) Under the new international instrument the United Nations would not be allowed to perform any of those supervisory functions which used to be performed by the League of Nations vide Article 6 of the Mandate for German South West Africa, for the Union Government regarded it as untenable that the supervisory functions of the League had devolved upon the United Nations after the demise of the former. The Union Government made it clear that she was not required to renew Article 6 of the Mandate since, in her view, no other organization could legally claim to have assumed the League supervision.

(ix) The proposed new international agreement would provide for the judicial supervision as used to be held under the League of Nations, vide Article 7 of the Mandate, and the International Court of Justice would be rendered competent and given compulsory jurisdiction to deal with any dispute which, within the compass of the Charter, might be referred to it.

also the new agreement (UN Doc. A/1901, n. 16, para 16, p. 4).

Again, by a letter dated 20 September 1951, the Union Government went even so far as to state that the whole agreement would be concluded under the auspices of, and with the sanction of, the United Nations (Ibid., para 32, p. 8).

27 Ibid., para 18, p. 4.
28 Ibid.
The South African Government further agreed that she would make available information on the administration of South West Africa to those three powers only with whom she was prepared to sign the new instrument and that such information would be nearly as complete as that furnished to the League of Nations on the basis of the questionnaire of the Permanent Mandates Commission.

The most objectionable feature of the 'Proposal' of the Union Government was that there was no provision for the supervision of Mandatory's administration of South West Africa as it used to be held under the League of Nations. Even the Principal Allied and Associated Powers with whom the Union Government was prepared to negotiate the new agreement and towards whom she was prepared to assume obligations were not proposed to be entrusted with the job of administrative supervision on the pattern of the League. Their duties were to be confined to receiving the information supplied by the Union Government. It was not envisaged in the 'Proposal' of

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29 UN Doc. A/2261, n. 17, para 16, p. 3. This point was, in fact, a concession made by the Union Government in 1952. In her original proposal, the Union Government had taken the position that since, in her view, the annual reports submitted by her in the past had endangered the fulfilment of the sacred trust under the mandate, she was not prepared to incorporate in the proposed new agreement on South West Africa an obligation to submit annual reports. Such an obligation, according to the Union Government, was unnecessary and unsound for South West Africa which was a unique territory (UN Doc. A/1901, n. 16, para 18, p. 4).
the Union Government that the Principal Allied and Associated Powers were to step into the shoes of the Permanent Mandates Commission since the Union Government was not prepared to revive Article 6 of the Mandate under any form just because, according to her, the League had disappeared without bequeathing to the successor international organization the supervisory functions in respect of the mandate territories. According to her, the requirement of the implementation of the Advisory Opinion could be met without a system of supervision as outlined in Article 6 of the Mandate.

Now, the fundamental difference between the colonial system, on the one hand, and the International Mandates of Trusteeship System, on the other, is the provision in the latter for international supervision over the Trust Territories. Without a system of supervision, a mandate or trust territory would be as good as a colony. Since the 'Proposal' of South African Government envisaged no provision for supervision, the territory of South West Africa would have reverted to its old status of a colony which it was under the German rule. The status of South West Africa had improved after it was made a mandate territory since, unlike the colonial Power, the mandatory was made accountable to the world community for all her acts of omission and

30 Ibid., para 18, p. 4.
commission in respect of the Territory. The 'Proposal' tried to put the clock back as, by dispensing with the system of administrative supervision altogether, it tried to reduce the territory of South West Africa to the status of a colony once again. No doubt, the Union Government was prepared to incorporate in the proposed new agreement all those obligations towards the territory of South West Africa which she had under Articles 2 to 6 of the Mandate but, without an adequate system of supervision by the world community, there was no guarantee that those obligations were, in fact, being honoured by the administering Power both in letter and in spirit.

The only form of supervision acceptable to the Union Government under her 'Proposal' was judicial supervision by the International Court of Justice. In this connection it might be mentioned that the Permanent Court of International Justice under its Statute, had no power to do administrative supervision and likewise the International Court of Justice also enjoys no such power. The Permanent Court of International Justice was purely a judicial body concerned with the settlement of legal questions only. Similarly, the competence of the International Court of Justice also is limited to the settlement of disputes which are purely of legal nature. Judicial supervision which means the settlement of such disputes by the world Court can neither serve the purpose of,
nor be an adequate substitute for, the administrative supervision. The purpose of administrative supervision is to look into the question whether or not the obligations assumed by the Mandatory towards the Territory and its people are being complied with by her, whereas the purpose of judicial supervision is to settle a question of law. Hence 'judicial supervision' can not be a substitute for administrative supervision; it can be supplementary to it at the most.

Another objectionable feature of the Proposal of the Union Government was that it by-passed the United Nations not only as supervisory authority but also as a second party so essential to any contract or agreement. The Mandates System was based on the principle of Mandatory's accountability of her administration of the mandate territory to the world community as represented by the League of Nations. This was one of the pillars of the Mandate System, as we have seen in the 'Introduction'. The Trusteeship System of the United Nations is also based on the same principle. Yet, bypassing this fundamental principle of the two systems, the 'Proposal' of the Union Government sought to replace the accountability to world community by accountability to a couple of Powers only as if they represented the whole world.

In the course of its 9th and 10th meetings the Ad Hoc Committee examined and scrutinized the "Proposal" of the Union of South Africa. It finally decided to reject it since
it did not provide for a full implementation of the 1950 Advisory Opinion of the International Court of Justice. The most objectionable point in the South African Government proposal as noted by the Committee also was that the Union Government was not prepared to allow the United Nations to supervise the administration of the Territory of South West Africa in accordance with the Advisory Opinion of the International Court of Justice.

The Ad Hoc Committee was not prepared to accept any solution which was not in consonance with the following three fundamental principles decided upon by it at its 6th meeting:

1) An agreement could be negotiated if it is entered into under the authority of the United Nations.

2) The agreement should embody obligations contained in the Mandate as exercised under the League of Nations, including the sacred trust and the handling of annual reports and petitions.

3) The agreement should take into consideration modifications in the provisions of

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33 UN Doc. A/1901, n. 16, para 27, p. 5. The 'Proposal' of the Union Government remained unacceptable to the Ad Hoc Committee in 1952 also even after the Union Government had made some clarifications and offered some concessions already incorporated in the 'Proposal' (UN Doc. A/2261, n. 17, para 14, p. 3).

34 UN Doc. A/1901, n. 16, para 19, p. 4.
the Mandate dictated by changed conditions, as, for example, military provisions.

B. THE COUNTER PROPOSAL OF THE AD HOC COMMITTEE

After rejecting the 'Proposal' of the South African Government in 1951, the Ad Hoc Committee had offered its own solution of the problem in the form of a counter Proposal.

The 'Counter Proposal' consisted of eight articles. Article 1 described the territory to which it would be applicable. Articles 2 to 5 imposed some obligations upon the Union Government in respect of South West Africa. Articles 6 and 7 envisaged the establishment of a new administrative and supervisory machinery in place of the one which was defunct as a result of the demise of the League of Nations. The last Article, that is Article 8, provided for the manner of modification of the terms of the proposed new agreement as well as for the judicial settlement of disputes relating to the interpretation or application of the new agreement under the 'Counter Proposal'. The details of the 'Counter Proposal' were as follows:

(a) Regarding the obligations of the Union Government to promote to the utmost the material and 35

Ibid., para 27, pp. 5-7.
moral well-being and the social progress of the people, to discontinue the practice of slave trade and forced labour, to take measures for the defence of the Territory, to control traffic in arms and ammunition, to be responsible for the peace, order and good government of the Territory, to ensure in the Territory freedom of conscience and free exercise of all forms of worship, and to permit freedom to travel and reside anywhere in the Territory. All these obligations were covered by Articles 2 to 5 of the 'Counter Proposal'.

(b) The supervisory functions in respect of South West Africa as envisaged in the 'Counter Proposal' under Articles 6 and 7 thereof were to be performed by (a) Committee on South West Africa, and (b) Commission on South West Africa.

The composition and functioning of the supervisory machinery was proposed to be as follows:

1. The Committee on South West Africa was proposed to be elected by the General Assembly and was to consist of not more than 15 members, including the Union of South Africa. This
Committee was to exercise with respect to the territory of South West Africa the supervisory functions previously exercised by the Council of the League of Nations. Annual reports on the administration of the Territory were also to be received by this Committee.

2. The Committee on South West Africa in its turn was to establish a Special Commission on South West Africa composed of members for the sole and specific purpose of undertaking *vis-a-vis* the territory of South West Africa the functions and responsibilities of the former Permanent Mandates Commission, especially the examination of annual reports and petitions, *vide* Article 6(b) of the 'Counter Proposal'.

3. The Committee on South West Africa was to carry the instructions to report to the General Assembly of the United Nations on the performance of its functions.

4. Both the said Committee and the Special Commission, in the exercise of their functions in respect to the territory of South West Africa were to conform as far as possible to the procedure followed by the Council of
the League of Nations and the Permanent Mandates Commission respectively.

5. The Government of the Union of South Africa was to submit an annual report on the basis of a questionnaire drawn up by the Permanent Mandates Commission on 25 June 1926. The Report was to contain full information with regard to the territory of South West Africa including measures taken to carry out the obligations assumed under Articles 2 to 5 of the 'Counter Proposal'.

(c) The disputes, if any, arising between the Government of South Africa and another member of the United Nations relating to the interpretation or the application of the provisions of this new agreement under the 'Counter Proposal' were to be referred to the International Court of Justice if they could not be settled by the parties themselves through direct negotiations.

(d) The terms of the agreement could be modified only with the consent of the General Assembly of the United Nations, vide Article 8 of the 'Counter Proposal'.

A reading of the 'Counter Proposal' of the Committee would indicate that it did not insist on the conclusion of a
trusteeship agreement in respect of South West Africa. It merely envisaged a system of supervision specially devised for the Territory. This in itself should be considered a great concession on the part of the United Nations. If accepted, South West Africa would have become a mandate territory under the United Nations, a situation for which there was no provision in the Charter of the United Nations.

Subjecting the 'Counter Proposal' to a close scrutiny the first thing that strikes us is that, since the League of Nations could not be revived and since also the United Nations Trusteeship provisions could not be thrust upon the Union of South Africa against its will, the Ad Hoc Committee tried to create a complete supervisory machinery on the lines of the one existing under the League of Nations. Both in respect of organization and functions the proposed 15-member Committee on South West Africa was to resemble the Council of the League of Nations closely. The membership of the Council of the League of Nations fluctuated between 8 and 17 whereas the strength of the proposed Committee was fixed at 15. The functions of this Committee were also to be exactly the same as those of the Council of the League of Nations. The proposed Committee, in the discharge of its functions, was also to follow the procedure of the Council.

of the League as far as possible. The inclusion of the Union of South Africa in the proposed Committee was decidedly an advantage from the point of view of the Union Government, since it enabled her to safeguard her own interests.

The proposed Special Commission on South West Africa also resembled the Permanent Mandates Commission closely inasmuch as it was also assigned the duty of examining annual reports and petitions in respect of South West Africa as the Permanent Mandates Commission used to do. No new function was entrusted to the proposed Commission.

Another striking thing about the 'Counter Proposal' was that the modus operandi of both the Commission and the Committee was to be borrowed from the Permanent Mandates Commission and the Council of the League of Nations respectively. This was intended to assure the Union of South Africa that she would not have to put up with more cumbersome and more onerous procedure in respect of South West Africa than she had to do under the League.

Further, the obligation to send annual reports on the administration of the territory of South West Africa by the Union of South Africa under the Counter Proposal was not at all new since such an obligation had existed under the League as well vide Article 6 of the Mandate for German South West Africa. The Union of South Africa had unfailingly complied

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37 Appendix 'B'.
with it year after year under the League and had done so once under the United Nations also in 1946. The information to be supplied by the Union of South Africa in the annual report was to be based on a questionnaire which too was to be borrowed from the Permanent Mandates Commission.

Another attractive feature of the 'Counter Proposal' was that the role assigned to the International Court of Justice was exactly similar to, neither less nor more than, the one assigned to its predecessor Court under the League of Nations as the following comparison would show:

<table>
<thead>
<tr>
<th>Role of the Permanent Court of International Justice</th>
<th>Role offered to the International Court of Justice under the Counter Proposal of the Ad Hoc Committee</th>
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<tr>
<td>The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another member of the League of Nations relating to the interpretation of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations. 39</td>
<td>The Government of the Union of South Africa agrees that, if any dispute whatever should arise between the Government of the Union of South Africa and another member of the United Nations relating to the interpretation or the application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation, shall be submitted to the International Court of Justice as provided for by Article 37 of the Statute of the Court. 40</td>
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39 Article 7 of the League of Nations Mandate for German South West Africa (Appendix 'B').

40 Article 8 of the 'Counter Proposal' (UN Doc. A/1901, n. 16, para 27, p. 7).
That there could be no unilateral modification of the proposed new international agreement on South West Africa was yet another attractive feature of the 'Counter Proposal'. The only difference that the 'Counter Proposal' created was that instead of the Council of the League of Nations it was the General Assembly whose consent was to be taken for every modification.

Moreover, the demand of the South African Government that the United Nations should not be the supervisory authority was conceded to a great extent, if not fully. Supervision of a trust territory by the United Nations means primarily supervision by the Trusteeship Council which was totally kept out of picture in the Counter Proposal. The main supervisory body under the 'Counter Proposal' was to be the proposed Special Commission on South West Africa accountable to the proposed Committee on South West Africa. The said Committee itself was to be accountable to the General Assembly. This means that under the 'Counter Proposal' the supervisory functions could be performed by the General Assembly only remotely, the direct hand being of the proposed Special Commission and the Committee only.

Further, the obligations of the Union Government in respect of South West Africa under the 'Counter Proposal' were neither to increase nor decrease to her disadvantage as the following comparison of the relevant Articles of the
League of Nations Mandate for German South West Africa with those of the 'Counter Proposal' would show:

Mandate for the Administration of German South West Africa

Article 2

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

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

Article 3

The mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the

Counter Proposal offered by the Ad Hoc Committee appointed by the General Assembly

Article 2

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

The Government of the Union of South Africa shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory subject to the present Agreement.

Article 3

The Government of the Union of South Africa shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

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

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

**Article 4**

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

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

**Article 4**

1. The Government of the Union of South Africa shall be responsible (a) for the peace, order, good government and defence of the Territory, and (b) for ensuring that it shall play its part in the maintenance of international peace and security.

2. The Government of the Union of South Africa having regard for the security provisions of the Charter of the United Nations, shall be entitled to establish naval, military and air bases, to erect fortifications, to station and employ their own forces in the Territory and to take all such other measures as are in their opinion necessary for the defence of the Territory and for ensuring that the Territory plays its part in the maintenance of international peace and security. To this end the Government of the Union of South Africa may make use of volunteer forces, facilities

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41 The Convention in question was signed on 10 September 1919 and not on 19 September 1919, as stated in the Counter-Proposal (League of Nations Treaty Series, vol. 7, 1921-22, Registered Document No. 200, p. 333).
Subject to the provisions of any local law for the maintenance of public order and public morals, the mandatory shall ensure in the Territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State member of the League of Nations, to enter into, travel and reside in the Territory for the purpose of prosecuting their calling.

The above comparison would show that Articles 2, 3 and 5 of the 'Counter Proposal' were, word for word, the reproduction of Articles 2, 3 and 5 of the League of Nations Mandate for German South West Africa. Article 4 of the 'Counter Proposal' was not the same as Article 4 of the League of Nations Mandate for German South West Africa but, from the point of view of the Union Government, it was a distinct improvement. The League of Nations Mandate clearly prohibited not only the giving of military training to the natives, except for internal police and the local defence of the Territory, but also the establishment of military or naval
bases in South West Africa. Article 4 of the 'Counter Proposal' removed these restrictions and permitted the establishment of naval, military and air bases and it enjoined upon the Union Government to make the Territory play its part in the maintenance of international peace and security. The establishment of peace and order was made a special responsibility of the Union Government. The Union Government could also utilize the volunteer force, facilities and assistance from the Territory for fulfilling her obligations towards the United Nations whereas she could not do such things under the League of Nations Mandate. These additions were incorporated in the 'Counter Proposal' because the South African Government representative had stated that some provision would have to be made for the defence of the Territory.

The 'Counter Proposal' thus had many attractive features from the point of view of the Union Government. To the credit of the Ad Hoc Committee it might be stated that, by reproducing in its 'Counter Proposal' almost the same supervisory procedure and the same institutions of supervision with different names as were obtaining under the League, it made sincere efforts to prevent the Union Government from getting any excuse to reject them. The Court's advice that

42 UN Doc. A/1901, n. 16, para 13, p. 3.
the supervisory procedure should conform to, and should not exceed, the procedure obtaining under the League, was adhered to with such minor changes as were inevitable due to changed circumstances. At the same time there were no provisions in the 'Counter Proposal' that were offensive to the United Nations Charter also. In spite of all this the 'Counter Proposal' was rejected by the Union Government on the plea that it would impose on her greater obligations than she had assumed originally. This rejection was repeated by the Union Government in the year 1952 with the remarks that she would not undertake anything which would meet the Advisory Opinion of 1950 in toto. The representative of the Union Government, while rejecting the 'Counter Proposal', did not explain as to how the obligations of his government would be increased as a result of the acceptance of the 'Counter Proposal'. However, in the year 1953, the representative of the Union Government explained in the Fourth Committee as well as in the Ad Hoc Committee as to how his Government's obligations would be increased if the United Nations was made the supervisory authority in respect of South West Africa.

43 Ibid., para 32, p. 8.
44 UN Doc. A/2261, n. 17, para 15, p. 3.
It might be mentioned here that the Union Government could not technically object to the act of supervision as such since the League of Nations also used to supervise the administration of South West Africa by the Union Government. Obviously her objection was not to the principle or manner of supervision as such but to the supervision 'by the United Nations' and the reasons, as given out by the delegate for the Union Government, were two-fold.

The first objection of the Union Government to the supervision by the United Nations was based on the fact that that Organization had larger membership than the League.

This larger membership of the United Nations would adversely affect the South African Government in two ways, as her delegate put it. Firstly, she would have to admit to the territory of South West Africa missionaries from larger number of countries than she had to do under the League of Nations. Secondly, due to larger membership of the United Nations more countries would acquire the right to summon and arraign her before the International Court of Justice which had compulsory jurisdiction.

The second objection of the Union Government to the supervision by the United Nations was based on the fact that the Organization took its decisions on the basis of two-thirds
majority and not on the basis of unanimity as the League of Nations used to do. In other words, the League of Nations had conferred a sort of veto upon every Member State which enabled it to block resolutions to which she was fundamentally opposed. This could not be done under the United Nations because in the General Assembly no Member-State enjoyed the power of veto and decisions on all important matters were taken on the basis of two-thirds majority. This second objection of the South African Government seemed to imply that resolutions thus passed by the United Nations on the basis of two-thirds majority and not on the basis of unanimity, might place on her shoulders responsibilities and duties which did not exist before. The Union Government, in the absence of the unanimity rule, would not be able to veto such resolutions in the General Assembly as were not acceptable to her.

Because of the above mentioned reasons the South African Government expressed her inability to accept the 'Counter Proposal' of the Ad Hoc Committee.

It would be seen that the first objection of the Union Government was not really so substantial as to place any insuperable obstacle in the way of a final settlement and this was pointed out by the Pakistani delegate, L.S. Bokhari,

48 Ibid.
49 UN Charter, Article 18 (Appendix 'C').
also in the Fourth Committee. He pointed out that even under the League a handful of Member States had sent missionaries to South West Africa. There was no reason to suppose that under the United Nations there would be any wholesale extension of it.

The same could be said about the other point of the Union Government that under the United Nations more countries would acquire the right to summon her before the International Court of Justice. There was no reason to believe that every country of the United Nations would have a cause to summon the Union Government before the International Court of Justice. Unless there was a dispute between the Mandatory and another member of United Nations regarding the application or interpretation of the new agreement on South West Africa, the former could not be summoned before the International Court of Justice.

In any case these objections were not really substantial ones and, if they alone were the hindrance to a new agreement on South West Africa, surely a way could be found to meet them but the basic point was to agree upon the essentials first.

The second objection of the Union Government was that under the United Nations she would not have any right of

veto which she had under the League because the former, unlike the latter, followed the two-thirds majority rule. The Pakistani delegate, Bokhari, pointed out in the Fourth Committee that the defect of the unanimity rule had come to light even in the life time of the League and this was why it had not been incorporated in the United Nations' Charter. The two-thirds majority rule as provided in the Charter should be sufficient to safeguard the rights and interests of the Union of South Africa against any encroachment. The unanimity rule was not intended to enable a Mandatory power to block even reasonable and workable schemes but its real object was to prevent an extremely unreasonable resolution from being adopted, and this object, in his view, could also be served by the two-thirds majority rule of the United Nations.

In addition, it may be stated that the resolutions adopted by the General Assembly could not be put at par with those adopted by the League of Nations. The resolutions of the League of Nations were binding on all Member States whereas the resolutions of the General Assembly are not. They are only recommendatory which is clear from the language of Articles 10, 11(1), 11(2), 13(1) and 14 of the Charter. Hence the two-thirds majority rule of the United Nations could not work to any disadvantage of the Union Government.

51 Ibid.
However, the above analysis also leads to the conclusion that when the South African delegate said that his country's obligations would increase if the United Nations' supervision was accepted, he did not seem to mean that the substantive obligations of the Union Government as enshrined in Articles 2 to 5 of the Mandate for German South West Africa would increase by any appreciable degree but that the Union of South Africa would not be able to enjoy the privilege of vetoing the resolutions unacceptable to her due to the absence of any provision for the unanimity rule in the United Nations' Charter.

The foregoing analysis and scrutiny of the 'Proposal' and 'Counter Proposal' shows that there were many points on which the two parties, the Ad Hoc Committee and the South African Government, held identical views, while there were many points on which the differences between the two sides continued to persist and awaited solution.

The points of agreement between the two parties so far were as follows:

(i) Both the South African Government and the Ad Hoc Committee agreed that a new instrument should be negotiated to replace the former Mandate for German South West Africa.

(ii) The two parties also agreed that in the proposed new international agreement concerning South West Africa "sacred trust" provisions which were contained in Articles 2
to 5 of the Mandate for German South West Africa would be incorporated with such minor modifications as had become necessary by the changed circumstances, though the fundamental principles underlying the idea of 'sacred trust' would not be adversely affected.

(iii) The South African Government agreed to furnish necessary information on her administration of South West Africa under certain conditions, such information being as complete as that furnished to the League of Nations since it would be based on the questionnaire prepared by the defunct Permanent Mandates Commission.

(iv) The South African Government agreed to revive her international responsibility towards South West Africa by accepting some sort of supervision of her administration of the Territory.

The points of disagreement between the two parties were as follows:

(i) While agreeing that the administration of South West Africa by South African Government should be subject to some sort of supervision, the two parties held diametrically opposite views as to the authority by which the proposed supervision should be exercised. The Ad Hoc Committee, in a spirit of compromise had proposed, in its 'Counter Proposal', only indirect supervision by the United Nations through the proposed Committee and the Commission on South West Africa. The South African Government could not agree.
even to this indirect supervision by the United Nations because she felt that even such supervision would ultimately result in placing on her shoulders responsibilities more onerous than those existing under the Mandates System. The utmost which the South African Government could agree to was judicial supervision by the International Court of Justice, but this was not acceptable to the Ad Hoc Committee as it failed to meet the requirements laid down in the Advisory Opinion of the International Court of Justice which had been accepted by the General Assembly.

(ii) The second point of difference between the Ad Hoc Committee and the South African Government was equally serious. While agreeing that a new international agreement embodying the 'sacred trust' provisions of the Mandate should be drawn up, the two parties could not agree as to who the second party to such an agreement should be. In the view of the Ad Hoc Committee the second party should obviously be the United Nations or an agency appointed by, and responsible to, the United Nations. The South African Government did not agree to the suggestion of the United Nations being made the second party to the new instrument; she wanted to make three of the remaining Principal Allied and Associated Powers viz., United Kingdom, United States and France, as the second party to the new instrument.

The Ad Hoc Committee was striving for an agreement which might provide for total United Nations' involvement
since, according to it, it was the United Nations that might be the second party to the proposed new agreement, and, subsequently also, it was the United Nations that might be the ultimate supervisory authority, though the actual day-to-day supervisory duties might be performed by the proposed Special Commission and Committee on South West Africa under the 'Counter Proposal'. On the other hand, according to the South African Government, the United Nations should wash its hands off the whole affair after performing the limited role of approving the principles of the new agreement before the negotiations are opened and of confirming them after the conclusion of negotiations. In other words, the United Nations should neither negotiate the actual agreement with the South African Government nor should it perform any supervisory functions, directly or indirectly, in respect of South West Africa. Thus, although the foregoing analysis of the points of agreement and disagreement would appear to show that there were two major points of disagreement between the two parties, in fact, there was only one point of disagreement, that is, about the extent to which the United Nations should be allowed to play its role in respect of South West Africa.

The real reason why a solution to the problem of South West Africa could not be hammered out during the protracted negotiations between the Ad Hoc Committee and the Union Government was that there was conflict of objectives which
the two parties were pursuing in relation to South West Africa. The United Nations' efforts were directed towards drawing South West Africa into the fold of the Trusteeship System in the manner in which the other former mandate territories had come. This objective of the United Nations was clearly in conflict with the declared intention of the Union Government to incorporate the territory of South West Africa. This intention of the Union Government could not be translated into reality if she placed the Territory under trusteeship of the United Nations. The Union Government seemed to fear that if the United Nations exercised any authority in respect of South West Africa, directly or indirectly, the Territory would, de facto, if not de jure, become a trust territory. A trust territory would mean an independent country sooner or later because the Trusteeship System does not permit the indefinite continuance of the 'trust' status in respect of any territory; rather, it envisages its evolution into an independent and sovereign State. Thus the objective of the South African Government to annex South West Africa would be thwarted if the Territory was placed under the trusteeship of the United Nations.

Therefore, it may be stated that the two parties, that is, the Ad Hoc Committee and the Union Government, could not arrive at an agreement in respect of South West Africa because their fundamental objectives were poles apart. In
order to arrive at some agreed solution through negotiations the parties to a dispute have to come to an agreement regarding the objective that they want to pursue and achieve through their combined efforts. If there is no fundamental agreement regarding the ultimate objective, the solution to the problem would not come into their grasp. Once there is an agreement regarding the final objective, the means to achieve it may not present insurmountable obstacles as they were there in the case of South West Africa. Unless substantial modification was brought about by the Union Government in her objective in respect of South West Africa, it appears that no agreement could possibly be reached between the two parties under the existing circumstances. If the two parties were pursuing different objectives, on the face of it there appeared to be no justification for continuing the negotiations. In spite of it, the United Nations was justified in continuing the negotiations with the Union Government because her representative had stated that his Government sincerely desired to settle once and for all the unfortunate differences which existed with the United Nations and that his Government was still anxious to find some means by which a final settlement could be reached.

52 Ibid., 357th mtg., p. 286.
C. THE COMMITTEE ON SOUTH WEST AFRICA

The Ad Hoc Committee submitted its report to the General Assembly after its last round of negotiations with the Union Government in 1953. The General Assembly adopted a resolution recommended by the Fourth Committee after giving due consideration to the report of the Ad Hoc Committee. The resolution disapproved of the entire stand taken by the Union Government during her negotiations with the Ad Hoc Committee on the question of South West Africa. At the same time it reiterated that the solution to the problem of South West Africa could be found only through full implementation of the Advisory Opinion of the International Court of Justice.

The term of the Ad Hoc Committee was not renewed after it had functioned for three years. In its place, a new seven-member Committee called the Committee on South West Africa was constituted. Under its terms of reference

53 UN Doc. A/2261, n. 17, pp. 1-29.
54 General Assembly Resolution 749A(viii) of 28 November 1953.
55 Ibid., para 12. (At its 467th plenary meeting on 3 December 1953, the President of the General Assembly approved the nomination of the following members to serve on the Committee: Brazil, Mexico, Norway, Pakistan, Syria, Thailand and Uruguay).
56 Ibid.
this new Committee was asked to

(a) examine, within the scope of the Questionnaire adopted by the Permanent Mandates Commission of the League of Nations in 1926, such information and documentation as may be available in respect of the Territory of South West Africa;

(b) examine, as far as possible, in accordance with the procedure of the former Mandates System, reports and petitions which may be submitted to the Committee or to the Secretary-General.

(c) transmit to the General Assembly a report concerning conditions in the Territory taking into account, as far as possible, the scope of the reports of the Permanent Mandates Commission of the League of Nations; and

(d) prepare, for the consideration of the General Assembly, a procedure for the examination of reports and petitions which should conform as far as possible to the procedure followed in this respect by the Assembly, the Council and the Permanent Mandates Commission of the League of Nations.

Under para 13 of the same resolution the Committee on South West Africa was further authorized to continue negotiations with the Union of South Africa in order to implement fully the Advisory Opinion of the International Court of Justice regarding the question of South West Africa.

The new Committee consisted of 7 members as against 5 members in the outgoing Ad Hoc Committee. Now, whatever might have been the cause or causes of the failure of the Ad Hoc Committee to evolve a satisfactory solution of the problem
of South West Africa, at least one thing that can safely be said is that its failure was not due to the fact that the negotiations with the Union Government were held by a small negotiating team on behalf of the United Nations. Hence the enlargement of the Committee did not seem to improve the prospects of a satisfactory solution of the problem. In fact, the job of holding negotiations can be performed better by a smaller team than a bigger one. As the following comparison would show, the terms of reference of the new Committee regarding the holding of negotiations also remained substantially the same as those of the outgoing Ad Hoc Committee:

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<th>The Ad Hoc Committee</th>
<th>The Committee on South West Africa</th>
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<td>&quot;to confer with the Union of South Africa concerning the procedural measures necessary for implementing the advisory opinion of the International Court of Justice...&quot;</td>
<td>&quot;to continue negotiations with the Union of South Africa in order to implement fully the advisory opinion of the International Court of Justice regarding the question of South West Africa.&quot;</td>
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While still requiring agreement in respect of South West Africa to be arrived at within the framework of the Advisory Opinion of the International Court of Justice, the terms of reference of the new Committee emphasized that the said Advisory Opinion should be implemented 'fully' which ruled out any scope for extended negotiations since it laid down the terms of settlement on behalf of United Nations in advance leaving the other party with no other choice than to
accept them or reject them as they were. The terms of reference for the new Committee permitted no departure from the Advisory Opinion of the International Court of Justice; hence it can be maintained that they were made slightly more rigid than those of the Ad Hoc Committee by the addition of the word "fully".

The Ad Hoc Committee had not been able to explore all the possible solutions to the problem since such an exercise fell outside its terms of reference. According to its terms of reference, the Ad Hoc Committee could channel its exploratory efforts in one direction only, that is, the discovery of measures required to implement the Advisory Opinion of the International Court of Justice. Hence, in order to enable the new Committee to travel into wider and unexplored field also, it was imperative that the new Committee should have been allowed a free-er hand than was allowed to its predecessor. Modification with a view to bringing about liberalization in the terms of reference was, therefore, called for. The Fourth Committee not only did not do this but, in fact, made them more rigid for the Committee on South West Africa. What was needed was not the substitution of one Committee by another but more liberal terms of reference so that the Committee could consider and recommend all possible solutions to the problem which could be rejected by the Fourth Committee later on, if found incompatible with the fundamental position of the United Nations with respect to the problem of South
West Africa. Giving full effect to the Advisory Opinion of the International Court of Justice represented one approach to the problem, while acting on the lines of the South African Government 'Proposal' rejected by the Ad Hoc Committee was another approach. Yet there could be perhaps some other approaches or solutions also besides these two. The Fourth Committee could well have allowed the new Committee at least to explore these other solutions also keeping in view the fact that, in the ultimate analysis, it had not so much to satisfy the requirements of the United Nations Charter or the Advisory Opinion of the International Court of Justice as to serve the best interests of the people of South West Africa for whose sake the Mandates System under the League, and the Trusteeship System under the United Nations, were created.

The appeal of the Belgian delegate, Pierre Ryckmans, that the Committee be allowed to work rather freely without being subjected to rigid limitations and without its hands being tied down with preliminary conditions also went unheeded. The Fourth Committee did not give any such latitude to the new Committee.

The Union Government refused to negotiate with the Committee on South West Africa. Her categorical reply to

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the Chairman of the Fourth Committee, in 1954, was as follows:

As the terms of reference of your Committee appear to be even more inflexible than those of the Ad Hoc Committee, the Union Government are doubtful whether there is any hope that new negotiations within the scope of your Committee's terms of reference will lead to any positive results. 58

The reply of the Union Government remained unchanged 59 during the next two years also. Therefore, no negotiations were held between the Union Government on the one hand and the Committee on South West Africa on the other, for three years in succession, that is, 1954, 1955 and 1956. Therefore, the differences between the Union Government and the defunct Ad Hoc Committee on the question of the implementation of the 1950 Advisory Opinion of the International Court of Justice could not be narrowed down further.

There was further hardening in the attitude of the Union Government when it informed the Committee on South West Africa, by a letter dated 21 May 1955, that her offer to negotiate a new agreement with the three remaining Principal Allied and Associated Powers had also lapsed since it had been rejected by the United Nations repeatedly. 60

60 UN Doc. A/2913, n. 59, para 9, p. 2.
During the existence of the defunct Ad Hoc Committee there had at least been regular contact between it and the Union Government but, after the Committee on South West Africa was formed, not only was there no contact between it and the Union Government but also there had ceased to be even a semblance of cooperation from the side of the Union Government.

The Union Government reiterated her assertion that the Mandate in respect of South West Africa having lapsed as a result of the demise of the League of Nations, she had no other international commitment in respect of South West Africa.

At the same time the Union Government continued to maintain her objections to the United Nations' involvement. These objections might also be examined in order to judge whether, in the light of those objections, any solution to the problem of South West Africa could emerge in spite of tremendous efforts of the Fourth Committee. Apart from objecting to the two-thirds majority principle of voting, the delegate of the Union Government, Sole, objected to the United Nations' involvement on other grounds too. He said that the membership of the United Nations was different from that of the League, that it possessed no organ analogous to

61 Ibid.
the Council of the League or the Permanent Mandates Commission. According to him the Committee on South West Africa entrusted with supervisory duties could not be compared to the Permanent Mandates Commission which, as he put it, was a very different body inasmuch as the latter contained members chosen on grounds of personal qualifications in their capacity as experts and not as representatives of their Governments and were paid a salary by the League. According to him the Permanent Mandates Commission was a 'body of collaborators resolved to devote their experience and energy to a joint endeavour', whereas the Committee on South West Africa was a body with political character basing its supervisory functions on political considerations.

These objections of the Union Government implied that in the view of the Union Government the solution of the problem of South West Africa was not possible until and unless there was a drastic overhauling of the entire structure of the United Nations or until the League of Nations was itself revived. Obviously, the type of objections made by the Union Government could not perhaps be met as long as the United Nations retained its present structure and procedure. In the light of such objections and almost impossible demands of the Union Government, the job of the General Assembly to secure the solution of the problem of South West Africa,

within the scope of its powers, seemed to be very difficult if not impossible.

D. THE SECOND ADVISORY OPINION OF THE COURT

Although no agreement had been reached with the Union Government either about the future of the Territory or about the manner in which the supervision of its administration by the Mandatory was to be exercised, yet the Fourth Committee seemed to be determined to go ahead, even unilaterally, with the examination of reports and petitions that may reach the United Nations. Therefore, under paragraph 12(d) of Resolution 749A(viii) the Committee on South West Africa was asked to devise procedure for the examination of reports and petitions, as far as possible, in accordance with the one obtaining under the League of Nations. This condition was imposed because, as we have seen above, the International Court of Justice had advised in 1950 that the degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates System and should conform as far as possible to the procedure followed in this regard by the Council of the League of Nations. This set the limits within which the new procedure had to be framed. The wholesale adoption of the rules of procedure of

the League of Nations without any change was ruled out because the new procedure had to operate under the United Nations which was an institution different from the League of Nations and was functioning in accordance with its own Charter. Hence certain variations or changes in the rules of procedure of the League of Nations in respect of the examination of reports and petitions were inevitable. This is why the term 'as far as possible' had been used in para 12(d) of the Resolution 749 (VIII)A of 1953. The term 'as far as possible' was really designed to allow for adjustments and modifications necessitated by legal and practical considerations as the Advisory Opinion of the International Court of Justice later clarified it.

The Committee on South West Africa set up a Working Group to draft the new rules of procedure. This Working Group comprised of Mexico, Norway and Pakistan. It prepared a set of six Special Rules in the form of a Resolution - Resolution 'A', and submitted them to the Committee on South West Africa for approval.

Out of six Special Rules, one rule, that is, Special Rule 'F', caused controversy. Special Rule 'F' was as follows:

Adopts, subject to the concurring vote of the Union of South Africa as the State most directly concerned, the following Special Rule F.

**Voting Procedure**

**Special Rule F:** Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations. 65

The implication of this Special Rule was that all questions relating to South West Africa would be decided by a two-thirds majority of the members present and voting, such questions having been declared to be "important" questions under Article 18(2) of the Charter. By providing this procedure of voting the Working Group had complied with the requirement that the new rules of procedure should be in conformity with the one obtaining under the League of Nations as far as possible. The Working Group could not obviously provide for the "unanimity" rule because it was clearly not "possible" under the United Nations' Charter. The strongest vote provided under the Charter was a "two-thirds majority vote". This system of voting was the nearest to the 'unanimity rule' of the League of Nations.

Since the Working Group was unable to provide for the unanimity rule, it provided that Special Rule F should be

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adopted subject to its acceptance by the Union of South Africa. The acceptance of Special Rule F by the Union Government would have meant her acceptance of the two-thirds majority vote system in respect of the examination of reports and petitions relating to South West Africa. There would have been no need for the 'unanimity rule' in that case. The Working Group thus gave a sort of veto power to the Union Government on the question of the adoption of Special Rule F. This was a special concession to the Union Government since the Charter contains no provision whereby the General Assembly can grant a special voting privilege to any state even for the limited purpose of voting on one resolution.

The Working Group did not fail to foresee the possibility of Special Rule F being rejected by the Union Government. Anticipating such an eventuality and not wanting to be accused later of having exceeded the procedure of the League of Nations in drafting the Special Rules of Procedure, it had simultaneously submitted to the Committee on South West Africa another draft resolution—Resolution 'B' which, inter alia, contained a recommendation that if Special Rule F should be approved by the required majority of the General Assembly but without the concurring vote of the Union of South Africa, the General Assembly should seek advisory opinion of the International Court of Justice on the question whether the General Assembly, in adopting the voting procedure as worded in Special Rule F, was correctly interpreting
the Advisory Opinion of the Court on the question of South West Africa and, if the answer of the Court to this question was in the negative, it should indicate what voting procedure should be followed.

Both the resolutions—Resolution 'A' and Resolution 'B'—were approved by the Committee on South West Africa. The Fourth Committee, too, put its seal of approval on the proposed Special Rules of Procedure and the proposed reference to the International Court of Justice by adopting both the draft resolutions. The General Assembly, however, adopted only Resolution 'A' containing Special Rules of Procedure vide Resolution 844(IX) of 11 October 1954 but only after rejecting the conditional clause attached to the Special Rule F, viz., "adopts, subject to the concurring vote of the Union of South Africa as the state most directly concerned, the following special rule F", by 8 negative votes, 13 members voting for the clause and 29 members abstaining. The General Assembly saw no need for voting on Resolution 'B' requiring the International Court of Justice to rule on the validity of Special Rule F. As the Working Group had recommended, reference to the International

66 Ibid., pp. 13-14.
68 Ibid., 494th plen. mtg., p. 248.
Court of Justice for advisory opinion was to be made only if Special Rule F was adopted without the concurring vote of the Union of South Africa. But the conditional clause giving special voting privilege to South Africa was itself defeated in the General Assembly; hence the question of seeking advisory opinion of the International Court of Justice also did not arise.

Many members of the Fourth Committee felt greatly agitated over this development, for they had considered the two proposals of the Working Group, one embodying the Special Rules of Procedure and the other requiring a reference to the International Court of Justice, as forming a single whole. In fact, some of them even said that, if they had known that the proposal to make a reference to the International Court of Justice would not be put to vote at all, they would have rejected the proposal embodying Special Rules of Procedure also.

The Fourth Committee set up a Sub-Committee to examine the controversy. In its report the Sub-Committee recommended that the question of requesting the International Court of Justice to give its advisory opinion on the validity or otherwise of Special Rule F should be reopened by the General Assembly in accordance with Rule 83 of the Rules of Procedure.

69 Ibid., Annexes, Agenda Item 34, UN Doc. A/C. 4/274, para 11, p. 10.

70 Ibid., para 14, p. 10.
This recommendation of the Sub-Committee was defeated in the Fourth Committee in spite of the threat of the delegates of Norway, Thailand and United States not to participate in the consideration of resolutions based on the substance of the report of the Committee on South West Africa if the question of seeking advisory opinion of the International Court of Justice was not reopened. Thereupon the delegates of Iraq, Sweden and United States, Awni Khalidy, (Mrs) Skottsberg-Ahman and Johnson respectively, expressed their inability to accept an invitation to serve on the Committee on South West Africa. The delegates of Brazil, Mexico and Pakistan, 3.A. Frazao, Joublanc Rivas and F.M. Khan respectively, reserved the position of their Governments with respect to their future participation in the Committee on South West Africa, and the delegate of Syria, N. Rifai, followed suit.

In view of this development the delegates of Guatemala and Lebanon jointly tabled a resolution in the General Assembly which, inter alia, sought the advisory opinion of

72 Ibid., 409th mtg., pp. 77, 78, 79; Ibid., Annexes, Agenda Item 34, UN Doc. A/2747/Add. 1, p. 12.
73 Ibid., 4th ctee., 426th mtg., pp. 197, 198.
74 Ibid., p. 198.
75 Ibid., 427th mtg., p. 201.
Requests the International Court of Justice to give an advisory opinion on the following questions:

a) Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950?

b) If this interpretation of the advisory opinion of the Court is not correct, what voting procedure should be followed by the General Assembly in taking decisions on question relating to reports and petitions concerning the Territory of South West Africa?

It may be pointed out that it was essential to obtain the advisory opinion of the World Court on the validity or otherwise of Special Rule F. Though most of the members of the General Assembly had no doubt about the correctness of Special Rule F, yet they felt it advisable to seek the opinion of the International Court of Justice in view of the statement of the representative of the Union Government, D.B. Sole, that the two-thirds majority rule would involve a degree of supervision greater than that required by the
League. Not only the Union Government but also her principal allies and supporters might perhaps have accused the General Assembly of having prescribed a voting procedure in respect of South West Africa which was not consistent with the 1950 Advisory Opinion of the International Court of Justice. Hence the refusal of the Fourth Committee to recommend to the General Assembly that the Advisory Opinion of the International Court of Justice be sought to set at rest the controversy about the validity or otherwise of Special Rule 'F' was not justified and it was an omission of serious nature. This omission was rectified by the General Assembly when, at its own initiative, it adopted Resolution 904(IX) by which the advisory opinion of the International Court of Justice was ultimately sought in 1954.

The International Court of Justice in its Advisory Opinion tendered in 1955 held that the Special Rule F was not incompatible with its Advisory Opinion of 1950.

The Court held that the statement that 'the degree of supervision to be exercised by the General Assembly should not exceed that which was applied under the Mandates System' meant that the General Assembly should not adopt such methods of supervision or impose such conditions on the Mandatory as were inconsistent with the terms of the Mandate or with a

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76 Ibid., 399th mtg., p. 16.
77 I.C.J. Reports, 1955, p. 77.
proper degree of supervision measured by the standard and
the methods applied by the Council of the League of Nations.
The Court held that the degree of supervision could not be
interpreted as extending to the voting system of the General
Assembly. In the view of the Court the General Assembly
could take decisions only according to the provisions of its
own Charter and not according to the provisions of the defunct
League of Nations since the authority of the General Assembly
to take decisions was derived from its own constitution.
The Court also said that the words 'degree of supervision'
used by it in the 1950 Advisory Opinion related only to the
extent of the substantive supervision and not to the manner
in which the collective will of the General Assembly was
expressed.

Thus the Advisory Opinion of 1955 put a seal of appro-
val to the voting procedure already approved by the Committee
on South West Africa, the Fourth Committee and the General
Assembly.

Irrespective of the fact whether or not Special Rule
F was correct, the representative of the Union Government,

78 Ibid., pp. 72-73.
79 Ibid., p. 74.
80 Ibid., p. 76.
81 Ibid., p. 72.
D.B. Sole, had already made the position of his Government clear long before the Advisory Opinion of the International Court of Justice was delivered on 7 June 1955. He stated in the Fourth Committee that Special Rule 'F' no doubt made the question of South West Africa important in order to attract the two-thirds majority rule but that it was still far short of the unanimity rule of the League which had enabled the Union Government in the past to prevent the taking of decisions considered unsatisfactory by her.

After the Advisory Opinion had been given by the International Court of Justice in 1955, the representative of the Union Government categorically stated that his Government, as an authority responsible for the administration of South West Africa, was not concerned as to what voting procedure was adopted in that respect by the General Assembly or as to whether or not it had the endorsement of the Court's opinion. In any case this statement of the Union Government seemed to foredoom the efforts of the Fourth Committee to bring about a negotiated and just settlement of the problem of South West Africa. It clearly showed that the Union Government was prepared to defy the Court also and that it was not prepared to modify her stand even if she was confronted

83 Ibid., 10th sess., 1955, 4th cttee., 491st mtg., p. 130.
with authoritative judicial pronouncement. This attitude of the Union Government was not justified particularly after she had taken part in the advisory proceedings of the Court and had contested the Application of the United Nations. If the South African Government was not concerned as to what voting procedure was adopted, she could very well have kept out of the advisory proceedings of the Court. Having taken part in those proceedings and then having failed to bend the Court to her view, it was ill-grace on the part of the South African delegate to say that he "was not concerned as to what voting procedure was adopted". Such an attitude was adopted by the Union Government because the Advisory Opinion had gone against her.

E. THIRD ADVISORY OPINION OF THE COURT

A job that was entrusted both to the Ad Hoc Committee, now defunct, and the Committee on South West Africa was the examination of petitions *vide* Resolution 449A(v) of 1950 and Resolution 749A(viii) of 1953. The Ad Hoc Committee was merely asked 'to examine petitions'. How those petitions were to be examined was not stated in Resolution 449A(v) although by the time of the passage of that Resolution the International Court of Justice had already tendered the advice to the effect that supervision should not exceed and should conform to, as far as possible, the procedure obtaining
under the Mandates System. However, the terms of reference of the Committee on South West Africa rectified this omission in Resolution 449A(v) by incorporating in paragraph 12 of Resolution 749A(viii) a clear injunction that both reports and petitions were to be examined, as far as possible, in accordance with the procedure of the former Mandates System. This was obviously intended to induce the Union Government to be more cooperative with the Committee on South West Africa than she was with the Ad Hoc Committee in the matter of examination of petitions because now there was clear assurance to her that she would not be subjected to more onerous supervisory procedure than what was there under the League - an assurance that was lacking under the terms of reference granted to the Ad Hoc Committee. However, the hopes of the Fourth Committee that she would be able to induce the South African Government into a more cooperative attitude were belied because the Union Government continued to be as uncooperative as before in the matter of examination of petitions. The Union Government had told the Ad Hoc Committee that 'they do not consider that they can take official cognizance of these communications as petitions or offer comments or consider them in any way as long as no basic agreement had been reached on the larger questions arising from the recommendations of the General Assembly on South West African question.' The Union Government was not prepared to consider
the question of petitions as isolated from the main issue. Almost in the same vein the Union Government informed the Committee on South West Africa also that she had never recognized any obligation to submit petitions to any international body since the demise of the League of Nations.

Hence there was no hope of petitions being received by the Committee on South West Africa through the Union Government but there was every possibility of their being received direct from the petitioners themselves. The Committee on South West Africa had no alternative but to examine such petitions, following as far as possible the procedure of the League of Nations. The Committee on South West Africa proceeded to comply with paragraph 12 of Resolution 749A(viii) by framing two sets of rules one of which was to apply if the Union Government changed her stand later and decided to cooperate in the examination of the petitions, while the other set was to apply in case the Union Government refused to cooperate with it. These later ones were called 'alternative rules of procedure'.

The simple matter of accepting petitions and then disposing them of in accordance with the rules of procedure already framed by the Committee on South West Africa became

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84 UN Doc. A/2261, n. 17, p. 6.
85 UN Doc. A/2666, n. 53, p. 7.
complicated because some of the petitioners, instead of, and sometimes in addition to, submitting written petitions, desired that they be heard orally also. The Committee on South West Africa could very well have taken a decision on its own and disallowed oral hearings because the League practice provided no precedence in the matter but its members were not in such a frame of mind because evidently they saw an advantage in having the petitioners right before themselves, which would enable them to ascertain the facts and verify the allegations made by them against the Union Government by face to face cross-examination - an advantage which they did not enjoy if only written petitions were before them. Hence they were inclined to grant oral hearings but they also recognized that two questions were clearly involved in the disposal of petitions; firstly, whether the word "petitions" in paragraph 12 of Resolution 749A(viii) included both the written and oral petitions and, secondly, whether the Committee on South West Africa was competent to grant oral petitions also in view of the fact that the Permanent Mandates Commission under the League of Nations had not granted them.

On the face of it, it appeared that the Committee on South West Africa could not grant oral hearings because the Permanent Mandates Commission had not done so and it appeared that if the Committee on South West Africa made an innovation in this matter, it might be accused of having exceeded the
the supervisory procedure of the League of Nations.

Several members of the Fourth Committee vigorously opposed the granting of oral hearings to the petitioners. Laird Bell, the delegate of the United States, made three points: firstly, he said that neither the Permanent Mandates Commission nor the Council of the League of Nations had granted oral hearings; secondly, if the General Assembly granted hearings to petitioners concerning South West Africa, it would be complying with the Advisory Opinion of the International Court of Justice given in 1950; thirdly, if the General Assembly decided to ask the petitioners to present their problems orally, it would seriously weaken the position it had taken up in its efforts to establish an effective system of international supervision over the administration of South West Africa. The Thai delegate, Thanat Khoman, was of the view that the Court's opinion could not be construed to mean that requests for hearings were admissible. S.S. Liu, the Chinese delegate, said that 'if the General Assembly wished to give effect to the Court's Advisory Opinion it must decide that requests for hearings concerning the territory of South West Africa were not admissible.'

88 Ibid., 502nd mtg., p. 191.
89 Ibid., 500th mtg., p. 181.
J.M. McMillan, the delegate of Australia, said that, if requests for hearings were admitted, the United Nations would be exercising supervisory functions more extensive than those exercised under the League of Nations. R.L.D. Jasper, the British delegate, also opposed the granting of oral petitions. The Mexican delegate, Espinosa Y. Prieto, desired that only petitions in writing should be accepted.

On the other hand, there were many delegates who supported the grant of oral hearings. The Polish delegate, H. Altman, was of the view that the right to a hearing was an integral part of the right to petition. Hassan Saab, the delegate of Lebanon, said that he did not think it could be concluded from the Court's Advisory Opinions (of 1950 and 1955) that requests for hearings were inadmissible. He felt that the inhabitants of South West Africa ought to be convinced that the United Nations was always prepared to hear them. Rodriguez Fabregat, the delegate of Uruguay, said that there was no way the General Assembly could be informed of the situation other than by granting the Committee on South West Africa the right to hear persons who were prepared

90 Ibid., 504th mtg., p. 200.
91 Ibid., 500th mtg., p. 182.
92 Ibid., p. 180.
93 Ibid., 502nd mtg., p. 190.
94 Ibid., 504th mtg., p. 199.
to give it information. J.J. Calle Y Calle, the delegate of Peru, made a point when he said that he did not see how the degree of supervision exercised by the General Assembly could be increased if petitions were made orally rather than in writing. Gonzalo Apunte, the delegate of Ecuador, did not agree that the degree of supervision would be increased if requests for hearings were granted. Support for granting oral hearings was also lent by Miss Laili Roesad, Aleksandar Bozovic, T.T. Tazhibaev and M. Abou-Afia, the delegates of Indonesia, Yugoslavia, U.S.S.R. and Egypt respectively.

In the midst of such difference of opinion among the members of the Fourth Committee the best course was to make a reference to the International Court of Justice again. But, here too, the members were not united.

The Polish delegate, Altman, said that it would show a lack of consideration for the Court to apply to it on every pretext and that the General Assembly could itself settle the question. Fabregat, the delegate of Uruguay,

95 Ibid., p. 200.
96 Ibid., 506th mtg., p. 203.
97 Ibid., p. 204.
98 Ibid., 502nd mtg., p. 191; ibid., 501st mtg., p. 187; ibid., 502nd mtg., p. 190.
99 Ibid., 506th mtg., p. 203.
opposing a reference to the International Court of Justice for a third time, stated that the International Court of Justice had already stated that the General Assembly must conform wherever possible to the procedure followed in the matter by the Council of the League of Nations.

Georges Seraphin, the delegate of Haiti, felt, however, that the opinion of the International Court of Justice should be asked whenever certain legal subtleties prevented the Committee from reaching a decision but he warned that the Fourth Committee should not fall into the circle of consultations and discussions. Prieto, the Mexican delegate, favoured the reference to the International Court of Justice since in his opinion a point of law relating to the 1950 Opinion of the Court was involved. The United States delegate, Bell, also supported the suggestion that advisory opinion of the International Court of Justice should be obtained on the question of granting oral hearings to petitioners.

The Fourth Committee, having considered the views of the delegates, recommended a resolution, later adopted by the General Assembly, referring the question of admissibility.
or otherwise of the oral hearings to the International Court of Justice.

The question referred to the International Court of Justice for an advisory opinion was couched in the following terms:

Is it consistent with the advisory opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly resolution 749A(VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the Territory of South West Africa?

In 1956 the International Court of Justice tendered its Advisory Opinion as follows:

...it would not be inconsistent with its Opinion of 11 July 1950 for the General Assembly to authorize a procedure for the grant of oral hearings by the Committee on South West Africa to petitioners: provided that the General Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the Mandated Territory.

Arguing its Opinion the Court held that in the present circumstances in which the Committee on South West Africa was working without the assistance of the Mandatory, hearings might enable it to be in a better position to judge the

104 General Assembly Resolution 942(x) of 3 December 1955.

105 Admissibility of Hearings of Petitioners by the Committee on South West Africa. Advisory Opinion of 1 June 1956; I.C.J. Reports 1956, p. 23.
merits of petitions. That, the Court held, was in the interest of the Mandatory as well as of the proper working of the Mandates System. The Court was of the view that it could not be presumed that the grant of hearings increased the burden upon the Mandatory. Regarding the point that the Permanent Mandates Commission had never granted oral hearings, the Court held that the Council of the League was competent to authorize the Permanent Mandates Commission to grant oral hearings, had it seen fit to do so. Thus the controversy about the admissibility or otherwise of the oral hearings was set at rest and the Committee on South West Africa could not now be accused of performing an illegal act by granting oral hearings.

F. PREPARATION OF REPORTS ON SOUTH WEST AFRICA BY THE COMMITTEE

During the period 1951-56 the question of examining the annual reports on South West Africa was entrusted to two committees one after the other.

First this duty was assigned to the Ad Hoc Committee which functioned up to 1953. It was asked to examine the report on the administration of South West Africa 'that may

106 Ibid., p. 32.
107 Ibid., p. 30.
108 Ibid., p. 29.
be submitted to the Secretary-General'. During the three years of the existence of the Ad Hoc Committee, the Union Government did not submit any such report. Hence, the Ad Hoc Committee was not able to discharge this duty.

Therefore, in 1953, the Fourth Committee, while recommending the establishment of the Committee on South West Africa, did not leave the matter of annual reports to the sweet will of the Union Government. The Committee on South West Africa, under para 12(b) of Resolution 749A(VIII), was not only asked to examine the report on South West Africa that might be submitted by the Union Government to the Secretary-General but was also asked, vide para 12(c) of the same resolution, to prepare its own report concerning the conditions prevailing in the territory of South West Africa, taking into account the scope of the reports of the Permanent Mandates Commission of the League of Nations.

This work was accomplished by the Committee on South West Africa with commendable success year after year. Receiving no report from the Union Government on the plea that she had never recognized any obligation to submit reports and petitions to any international body since the demise of the League of Nations, the Committee had to rely

109 General Assembly Resolution 449A(V) of 13 December 1950.
110 UN Doc. A/2666, n. 58, p. 6.
on such statistics, facts and figures as were made available to it by the Secretariat of the United Nations in order to prepare its own report.

These reports, year after year, tell the same story, the story of ruthless application of apartheid, progressive integration of South West Africa with the territory of South Africa, the story of the denial of human rights, the exclusion of the natives from all political activities, the story of the oppression of the blacks by the whites, the story of exploitation and plunder of the wealth of the territory, in short, the story of the violation of the mandate, of betrayal of sacred trust, of senseless disregard of her responsibilities by the guardian towards her own wards.

For example, the first report of the Committee on South West Africa on the conditions in South West Africa contained these concluding remarks:

In conclusion, the Committee wishes to observe that, after thirty-five years of administration under the Mandates System, the Native inhabitants are still not participating in the political development of the Territory, that their participation in the economic development is restricted to that of labourers and that the social and educational services for their benefit are far from satisfactory. 111

In its second report the Committee on South West

111 Ibid., para 160, p. 31.
Africa stated that it had found no significant improvement in the moral and material welfare of the Native inhabitants.

The said report also contained this remark:

...It is apparent that the main efforts of the Administration are directed almost exclusively in favour of the European inhabitants of the Territory, often at the expense of the Native population.... 112

In its third report the Committee on South West Africa had this to say:

For the third year in succession, the Committee has been unable to escape the conclusion that conditions in the Territory after nearly four decades of administration under the Mandates System are for the most part - and particularly for the "Native" majority - still far from meeting in a reasonable way the standards of either endeavour or achievement implicit in the purposes of the Mandates System and in the attitudes prevailing generally today in respect of peoples not yet able to stand by themselves. The "Native" of South West Africa still has no part whatsoever in the management of the Territory's affairs; he lives and works in an inferior and subordinate status in relation to a privileged "European" minority and his opportunities for advancement in his own right are limited not only by the inadequacy of technical facilities but also by a restrictive system of law and practice.... 113

These reports convincingly emphasized that the United Nations could not be a silent spectator of what was happening.

113 UN Doc. A/3151, n. 59, para 166, p. 27.
in South West Africa. Its silence or ineffective action would mean the perpetuation of the plight of the people of South West Africa.

Although the reports were prepared with the help of the official documents acquired by the Secretariat, yet the representative of the Union Government, D.B. Sole, stated in the Fourth Committee that they contained 'a number of inaccuracies, some of them serious, others of minor consequence, more important were the omissions'.

In this connection it might be conceded that some inaccuracies and omissions might have been left inadvertently in the Reports prepared by the Committee on South West Africa but these could not grossly distort the picture of the conditions prevailing in South West Africa as drawn by it. This is because the reports of the Committee on South West Africa were prepared with the help of documents, blue books, departmental reports and other governmental publications of the Union Government; hence they could be said to give, by and large, an accurate picture of the conditions prevailing in South West Africa. As far as minor inaccuracies in the Reports are concerned, the Union Government was herself to blame for them since she had not forwarded annual reports to the General Assembly which were "accurate" in her view.

The reports prepared by the Committee on South West Africa on the conditions prevailing in South West Africa were followed up by the Fourth Committee with suitable draft resolutions in 1954, 1955 and 1956 which were later approved by the General Assembly without change.

Resolution 851(IX) of 23 November 1954, requested the Committee to examine the extent to which the specialized agencies and extra-budgetary organs of the United Nations were prepared to contribute to the social, economic and educational advancement of the inhabitants of the Territory. This had become necessary because the very first report prepared by the Committee on South West Africa had revealed utter backwardness of the Territory in these respects due to the total neglect on the part of the Mandatory.

Resolution 941(X) of 3 December 1955 urged the Union Government to give serious consideration to the observations and recommendations of the Committee on South West Africa and to study the possibility of adopting measures to implement them in order to ensure the fulfilment of her obligations and responsibilities under the Mandate; it also urged that Government to cooperate with the Committee on South West Africa by submitting to it reports and petitions concerning the Territory.

Resolution 1054(XI) of 26 February 1957, adopted after the third report of the Committee on South West Africa called upon the Union Government to bring about the
progressive transfer of responsibility to representative, executive and legislative institutions proper to the Territory, to revise the existing policies and practices of "Native" administration in accordance with the spirit of the Mandates System, to extend to all the inhabitants representation in the existing territorial legislature, to base public employment on qualifications other than race and the progressive training of non-Europeans for higher posts in the Administration, to review and revise the land settlement policy, to discontinue residual restrictions based on a policy of racial separation and repeal laws of discriminatory nature, to eliminate discriminatory restrictions upon freedom of movement, to eliminate racial discrimination from the educational system and to unify the whole system progressively.

The value of these reports and petitions does not lie so much in the nature of recommendations made in them, as in the disclosures that they make about the conditions prevailing in the territory of South West Africa and in the exposure of the betrayal of the sacred trust assumed by the Mandatory. Such disclosures and exposures help to arouse the conscience of the world community of nations. Thus the reports and petitions had great propaganda value. At the same time these reports gave an idea as to the extent to which help from the international community was needed to wipe out the backwardness of the territory and people of South West Africa.
G. GRADUAL CHANGE IN THE STATUS OF THE TERRITORY OF SOUTH WEST AFRICA

Till the International Court of Justice delivered its Advisory Opinion in 1950, the efforts of the Fourth Committee were directed at giving the territory of South West Africa the status of a trust territory.

As we have seen, after, and due to the 1950 Advisory Opinion the efforts of the Fourth Committee were directed at giving the Territory the status of a mandate territory under the United Nations, such being the main thrust of the Counter Proposal as already discussed above.

We have also seen that the Union Government did not accept any proposal for a change in the status of the territory of South West Africa which might result in making her responsible to the United Nations for her administration of the Territory.

While the efforts of the Fourth Committee were directed towards giving the territory of South West Africa the status of a trust territory so that it might see its way to independence one day, the efforts of the Union Government were to bring about closer integration of the Territory with the Union of South Africa.

On 18 April 1955 the Prime Minister of the Union of South Africa made an important statement in the Union House of Assembly regarding the future status of the territory of
South West Africa. He said:

The policy of the National Party is that the Mandate no longer exists, that the old League of Nations is defunct. Our policy is what it was in the past, namely, that we will nevertheless administer South West in the spirit of the original mandate as an integral part of South Africa; that South Africa is now the sovereign body and that without necessarily incorporating South West we shall regard it as an integral part of South Africa. That is why we passed legislation in this House to give South West Africa representation in Parliament and to give them certain powers as far as their own domestic affairs are concerned.

In the second place our attitude is that because the mandate no longer exists the United Nations has no say as far as South West Africa is concerned, that therefore we will not report to the United Nations and that we will not take part in any further discussions with regard to this matter.... I say again that the Union of South Africa is not prepared to sacrifice her sovereignty over South West. It is an integral part of South Africa... 115

On 5 May 1955, the Minister of External Affairs of the Union of South Africa, also said in the Union House of Assembly as follows:

...I hope that the day is not far off when South West will be part of the Union in every sense of the word. The honorable member need therefore not fear that the Government will adopt a different policy from the one we have in the past.... 116

115 UN Doc. A/Ac. 73/L. 8, question 1, paras 6, 7-9 (cited in UN Doc. A/3151, n. 59, pp. 6-7).

These forthright statements indicate that the real reason why a negotiated settlement of the problem of South West Africa could not be arrived at between the Union of South Africa and the United Nations was not that the concept of accountability to the United Nations would cast upon the Union Government greater and more onerous responsibilities but that the Union Government wanted to make the territory of South West Africa an integral part of the Union Territory. If integration or annexation was the aim of the Union Government with respect to South West Africa, then placing of that Territory under some form of Trusteeship System or modified form of Mandates System would thwart that aim because a trust territory must eventually see its way to full independence and statehood.

The committee on South West Africa drew attention of General Assembly to the implications contained in the above quoted statements. The Committee felt that a progressive and unilateral change in the status of the territory of South West Africa was being brought about by the Union Government and, as evidence of this assertion, it cited two developments - the parliamentary representation given to South West Africa in the Parliament of the Union of South Africa and the transfer of the native administration to the Union. The

117 UN Doc. A/3151, n. 59, para 14, p. 8.
Committee had expressed its fear in 1954 also that any representation of the territory of South West Africa in the Union Parliament and its continued representation therein by the Union nationals of European descent was likely to prejudice the development of the Territory.

Regarding the assumption of sovereignty over the Mandate Territory by the Union Government, the Committee felt that any assumption of sovereignty would represent a change in the status of the Territory. The Committee expressed its gravest doubts as to whether the "integral part" provision in Article 2 of the Mandate authorized a degree of integration, on political as well as administrative level, which tended towards the establishment of sovereignty over the Territory or contributed in any other way towards a change in its status.

The Committee on South West Africa also pointed out that the fact that the Territory was represented in the Union Parliament had been used to justify the integration of additional sectors of South West African administration with that of the Mandatory Power. The Committee, in its

118 UN Doc. A/2666, n. 58, para 30, p. 16.
119 UN Doc. A/3151, n. 59, para 18, p. 8.
120 Ibid., para 21, p. 9.
121 Ibid., para 19, pp. 8-9.
report submitted in 1955, had stated that the Union Government had interpreted the power vested in her under Article 2
of the Mandate, as authorizing her to

i) integrate with the administration of the Union the following sections of the administration of South West Africa: Native affairs, customs and excise, railways and harbours, police, defence, the public services, external affairs, air services and immigration; and

ii) administer the Eastern Caprivi Zipfel, territorially a part of South West Africa, as an integral part of the Union. 122

At that time also the Committee had questioned whether the administrative separation of any section of the Territory was conducive to the attainment of the objectives of the Mandates System. The Committee repeatedly urged the General Assembly to consider the advisability of clarifying the legal effects and implications of these developments by seeking legal advice from a joint trusteeship and legal committee or by referring the matter once again to the International Court of Justice for an advisory opinion.

The Fourth Committee, however, ignored this recommendation of the Committee on South West Africa and did not seek any legal advice in the matter from anywhere. It merely

122 UN Doc. A/2913, n. 59, para 22, p. 10.
123 Ibid., para 23, p. 10.
124 Ibid., para 33, p. 11; and UN Doc. A/3151, n. 59, para 21, p. 9.
adopted resolutions to the effect that the normal way of modifying the international status of the territory of South West Africa was to place it under Trusteeship System by means of a trusteeship agreement in accordance with the provisions of Chapter XII of the Charter. This response of the Fourth Committee was weak as well as inadequate. It ought to have recommended sterner resolutions to the General Assembly calling upon the Union Government to repeal or amend the laws through which closer integration of South West Africa with South Africa had been brought about.

H. TWO NEW STEPS IN 1956

By 1956 it had become amply clear to the Fourth Committee that it would have to give a new direction to its efforts for solving the problem of South West Africa since the methods it had pursued till then had not been fruitful. Till 1956 the Fourth Committee had adopted the method of negotiations and persuasion through the Ad Hoc Committee and the Committee on South West Africa. A new approach to the problem had become necessary not only because negotiations, thus far held, had failed to produce a just and fair solution of the problem but also because the true intentions of

125 General Assembly Resolutions 852(IX) of 23 November 1954, 940(X) of 3 December 1955 and 1055(XI) of 26 February 1957.
the Union Government with regard to the territory of South West Africa had become clear as a result of the statements made by the Prime Minister and Foreign Minister of South Africa quoted above. As part of its new strategy, the Fourth Committee took two new steps in 1956. One was to involve the Secretary-General also in the efforts already being made for the solution of the problem of South West Africa.

By resolution 1059(XI) adopted on 26 February 1957 it requested the Secretary-General to explore ways and means of solving satisfactorily the question of South West Africa and to take whatever steps he shall deem necessary with a view to finding such a solution in line with the principles of the Charter of the United Nations and the advisory opinion of the International Court of Justice.

The Secretary-General does not seem to have taken any initiative in the matter.

The other new step taken by the Fourth Committee in 1956 was to initiate a study of the legal remedies available under international law which could be successfully applied for the solution of the problem of South West Africa. The General Assembly, on the advice of the Fourth Committee, asked the Committee on South West Africa, vide Resolution 126 G.A.O.R., 11th sess., 1956-57, Annexes, Agenda Item 37, UN Doc. A/3541, para 34, pp. 7-8.
1060 (XI) of 26 February 1957 to study the following question:

What legal action is open to the organs of the United Nations, or to the Members of the United Nations, or to the former Members of the League of Nations, acting either individually or jointly, to ensure that the Union of South Africa fulfils the obligations assumed by it under the Mandate, pending the placing of the Territory of South West Africa under the International Trusteeship System.

Explaining the need for such a study the Indian delegate to the Fourth Committee, K. Raghu Ramach, stated that the rulings thus far given by the International Court of Justice were in the nature of advisory opinions which, although morally binding, were not capable of legal enforcement. The Indian delegate explained further that resort should be had to Article 7 of the Mandate which contemplated a binding judgement by the Court in the exercise of its compulsory jurisdiction.

The Fourth Committee, as we have seen in the preceding pages, had so far tried to be accommodating to the extreme by meeting, as far as possible, the viewpoint of the Union Government. However, an equally accommodating and cooperative attitude, on the part of the Union Government, was lacking with the result that the Fourth Committee was being driven to the point of adopting gradually a tough attitude leading ultimately to a confrontation between the Union Government and the United Nations.