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Chairman: Miss Angie BROOKS (Liberia).

AGENDA ITEM 47

Question of South West Africa (continued):

(a) Report of the Committee on South West Africa (A/4926, A/4957, A/AC.73/4, A/AC.73/L.15, A/C.4/L.711 and Corr.1, A/C.4/L.712);

(b) Assistance of the specialized agencies and of the United Nations Children's Fund in the economic, social and educational development of South West Africa: reports of the agencies and of the Fund (A/4956 and Add.1)

GENERAL DEBATE AND CONSIDERATION OF DRAFT RESOLUTIONS (A/C.4/L.711 AND CORR.1, A/C.4/L.712) (continued)

1. Mr. LOUW (South Africa) recalled that at the 1218th meeting the Moroccan representative had inquired whether South Africa would participate in the further discussion of the matter before the Committee. His reply had been in the affirmative, but in order to remove any possible misunderstanding he would like to point out that at the fifteenth session he had participated in the discussion in the Fourth Committee with particular reference to the matter of the sub judice rule. Similarly, at the fourteenth session he had spoken at considerable length, dealing inter alia with a number of allegations in the report which the Committee on South West Africa had submitted that year. His delegation had been and would continue to be absent during the hearing of petitioners, in accordance with a principle to which his Government attached great importance. In replying to questions and comments on points raised in the course of the debate, he would not deal with any matters that were sub judice. He would not, therefore, refer to the charges and allegations in the memorials addressed to the International Court of Justice by Liberia and Ethiopia. For the same reason, he did not intend to deal with any questions having a direct bearing on the administration of the Territory of South West Africa.

2. He hoped that the rest of the debate would not be marred by the insults and abusive language to which his delegation had been obliged to object the previous week.

3. He had been asked whether his Government would abide by the decision of the International Court of Justice. Statements made in the Committee in 1960 and 1961 showed that the majority of its members did not observe the sub judice rule; the same applied to the Committee on South West Africa. Whatever the attitude of other delegations might be with regard to that generally observed legal principle, he would not transgress it by trying to anticipate the verdict of the Court.

4. At the 1218th meeting the Iraqi representative and the Chairman of the Committee on South West Africa had questioned his conclusion that any attempt by the Committee on South West Africa to cross the border from Bechuanaland into South West Africa would be illegal. As he had already said in his statement at the meeting in question, all countries regarded entry contrary to their laws and regulations to be illegal entry and had enacted regulations empowering them to detain persons attempting to enter their territory without the necessary travel documents or visas. He regretted the fact that despite his own earlier denial the Chairman of the Committee on South West Africa had persisted in attributing to him the statement that the members of the Committee on South West Africa would have been "arrested" if they had crossed from Bechuanaland into South West Africa. He would again assure the Committee that on no occasion had he said such a thing. At the 1225th meeting one representative had even gone so far as to state that the members of the Committee would probably have been shot if they had crossed into the Territory. He was obliged to react strongly to such allegations.

5. South West Africa remained under the full control of the South African Government, as it had been during the existence of the Mandate. He would again remind the Committee that, in the words of the Original Mandate, South West Africa was to be administered "as an integral portion" of South Africa.

6. The proposed visit to the Territory by the Committee on South West Africa would have been in conflict with the procedure which had obtained during the existence of the Mandate. At the time of the League of Nations, the then Chairman of the Permanent Mandates Commission, Marquis Theodoli, had stated that he could not go to South West Africa except at the express invitation of the South African Government. That situation remained unchanged. Furthermore, that aspect did not fall within the scope of the advisory opinion given by the International Court of Justice in 1950.[1]

[1] International Status of South-West Africa, Advisory Opinion: I. C. J. Reports, 1950, p. 128. Transmitted to Members of the General Assembly by a note of the Secretary-General (A/1362).

7. The argument had also been advanced that since in crossing the border into South West Africa the Committee would be carrying out the General Assembly's instructions, it was entitled to do so. He was unable to accept that view since an illegal action could not be converted into a valid one because it purported to implement a General Assembly resolution. It was legitimate to ask whether, in similar circumstances, a United Nations committee would attempt to enter United Kingdom, French or USSR territory without the necessary visa. What could be described as a double standard was becoming more and more evident in United Nations discussions.

8. The representative of the United Arab Republic had asked why the South African Government had refused to grant visas to the Committee on South West Africa. In reply, he would refer the questioner to the South African Government's letter dated 10 May 1961 addressed to the Secretary-General, which appeared in section 4 of annex I to the report of the Committee on South West Africa (A/4926).

9. At the 1218th meeting the Philippine representative had stated that the South African delegation had questioned the truth of certain statements contained in the report and had invited it to give the full facts. Some of the material covered by the report of the Committee on South West Africa related to the contentious proceedings pending before the International Court of Justice. He would not comment on that because it was sub judice. His country's attitude in that regard was well known. Other allegations in the report, however, fell outside the scope of the complaints lodged by Liberia and Ethiopia. He had already dealt with some of its more extravagant allegations in his statement at the 1218th meeting.

10. The Ghanaian representative at the 1218th meeting had asked whether his reference to the "former Mandated Territory" had implied that South West Africa was a Trust Territory. He had implied nothing of the sort. The South African Government's attitude on the issue had been stated repeatedly. In particular, he would refer the Ghanaian representative to his own statements before the Fourth Committee at the third session of the General Assembly. Since that particular matter was sub judice, he would not go into it any further.

11. In reply to the representative of the United Arab Republic, who had asked whether the South African Government had anything to hide in South West Africa, and to the Ghanaian representative, who had inquired why it intended to invite three former Presidents of the General Assembly to visit the Territory in their personal capacity, he would recall that in his letter of 10 May 1961 addressed to the Secretary-General he had stated that his Government was prepared to confirm its conviction that international peace and security was not threatened in the Territory of South West Africa, by requesting an independent person of international standing, to be mutually agreed upon by the President of the General Assembly and the South African Government, to conduct an impartial and objective inquiry into the validity or otherwise of that particular charge. The choice of such a person had to be made by mutual agreement, because otherwise the visit would have no value. Although more than six months has passed since that offer had been made, it had been completely ignored. What was more significant, it had not even been mentioned in the report of the Committee on South West Africa. The South African Government had therefore decided to take the initiative and to extend an invitation to three former Presidents of the General Assembly to look into the matter. In the light of the foregoing it was perfectly natural and correct that they should be invited in their personal capacity. If they accepted the invitation, they would be free to go wherever they pleased and no restrictions of any kind would be placed on their movements by the South African Government. In view of the fact that they would be invited in their personal capacity, any report they might make would naturally be made to the South African Government. The latter would, however, publish it in full.

12. In his statement at the 1218th meeting the Philippine representative had expressed the view that the sub judice principle applied only to the courts of individual countries and not to international courts. Article 38, sub-paragraph 1 c, of the Statute of the International Court of Justice provided, however, that the Court would apply "the general principles of law recognized by civilized nations". The sub judice rule was such a principle. In his book entitled The Development of International Law by the International Court, Judge Lauterpacht, referring to the case of the Electricity Company of Sofia and Bulgaria, had stated that the International Court "invoked 'the principle universally accepted by international tribunals ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to ... the decision to be given' ". 2/ At the 1218th meeting reference had already been made to the Anglo-Iranian Oil Company case, which was even more important by reason of the fact that the Security Council had applied the sub judice rule and further discussion had been stopped. He did not think that it could be claimed that the Fourth Committee was a more important body than the Security Council.

13. At the 1218th meeting the Ghanaian representative had stated that the fact that the African States had not attacked South Africa with arms should not be taken by the South African Government to mean that they would not fight for that cause; obviously, they had first to try all possible peaceful methods. That was a very serious and shocking statement which he wished to bring formally to the Committee's attention. In the light of that statement the alleged danger to international peace and security emanated from quarters other than the South African Government. He would like to know whether the Committee intended to take action or whether the double standard would again be applied.

14. One of the most serious charges brought against his country was that it planned to exterminate the indigenous inhabitants. In his earlier statement he had quoted figures to show the very considerable increase in the numbers of the Bantu population. As he had already informed the Committee, the Bantu population of South West Africa, which had numbered 190,000 at the time the Mandate had been conferred upon South Africa, had increased to 477,000 in 1960, as could be seen from paragraph 98 of the regular report of the Committee on South West Africa (A/4957). As such an increase in population accorded ill with the charge of planned extermination, his figures had produced consternation among certain delegations, whereupon some had suggested that those figures were

2/ Sir Hersch Lauterpacht, The Development of International Law by the International Court (London, Stevens and Sons Limited, 1958), pp. 167-168.

not correct. In point of fact they were correct and could be confirmed by reference to the United Nations Demographic Yearbook, 1960,[3] which indicated that the annual rate of increase of the population in South West Africa was 3 per cent. The Yearbook further revealed that the rate of population growth in South West Africa was higher than in any other African country listed, including South Africa, where the increase for the entire period 1951 to 1960 had been 16.12 per cent for the Whites, 26.26 per cent for the Bantus, 30.25 per cent for the Asians and 35 per cent for the Cape Coloureds.

15. In his statement at the 1218th meeting he had also shown the falsity of other allegations made in the report of the Committee on South West Africa (A/4926). Those allegations were such that it was impossible to escape the conclusion that the Committee had been deliberately misled.

16. With reference to the allegation that 4,000 South African armed police and troops had been sent to the Territory, he had already indicated that only sixty-six persons had been sent. In that connexion he would like to mention the fact that he had been reported in The New York Times as having "conceded" that 4,000 troops had been sent to South West Africa. The mistake had been brought to the attention of The New York Times and the newspaper had been asked to correct it, but he had not seen any such correction.

17. In referring to the points raised at the 1224th and 1225th meetings, he would not comment on the references made to the differences which seemed to have arisen within the Committee on South West Africa because that was not his country's concern.

18. The statement made by the Philippine representative had included passages which discussed the very issues pending before the International Court of Justice. He did not intend to transgress the sub judice rule by commenting upon them. The same applied to the bulk of the statement made by the Burmese representative. The latter had, however, also alleged that in South West Africa the Whites were armed to the teeth and were ready to shoot the indigenous inhabitants. That was not true. Furthermore, as he had already indicated at the 1218th meeting, any indigenous inhabitant who wished to acquire arms could get a licence subject to the usual regulations relating to the applicant's character.

19. The Burmese representative had also quoted an allegation, published in a propaganda sheet, that there was a white organization in South West Africa which aided the Portuguese in Angola against the Natives. There was not one word of truth in that allegation. His Government was most meticulous not to interfere in such matters.

20. The Committee on South West Africa had indeed given proof of great credulity. Among the serious allegations it had apparently credited was the charge that the life expectancy in South West Africa was low. In his earlier statement he had already quoted figures to the contrary which appeared in the United Nations Demographic Yearbook. He would have thought that the Committee could have asked the Secretariat to check allegations of that kind before they were included in the report.

21. The Committee had been told that there were military bases at certain places in South West Africa, including Walvis Bay, which, as he had already pointed out, had never been part of South West Africa even at the time of the German occupation. He would have expected the members of the Committee to be aware of that fact. In fact, there was no military base at Walvis Bay; there were two landing strips in the bush, in the north, and at Windhoek there were only three officers and eleven other ranks.

22. It had been alleged that the rule of law was not observed in South West Africa. He had already informed the Committee of the case of a number of Africans who had been arrested in connexion with the Windhoek riots, all of whom had been discharged for want of evidence. In fact, the persons really responsible had been in New York.

23. Serious allegations had been made about Keetsmanshoop Hospital; he had already given figures to refute those allegations, but because a certain non-white nurse had had trouble with other non-white personnel of the hospital she had resigned and made those entirely false assertions.

24. It had been alleged that all Bantu residential areas were being fenced. He assured the Committee that that was untrue. Not one of the areas in question had been fenced except for the purpose of keeping out livestock.

25. Those were examples of the way in which the Fourth Committee was being misled. He had given the facts; the question was whether the members of the Committee would deal with those false allegations.

26. In past years the South African delegation had not participated in the discussion of draft resolutions in the Fourth Committee as a matter of principle. It would not discuss the two draft resolutions now before the Committee for the same reason, i.e., because at the stage the Court proceedings had reached, a discussion of such resolutions was likely to be regarded as a transgression of the sub judice rule.

27. The South African Government's invitation, which was confined to three past Presidents of the General Assembly, concerned a matter which his Government considered did not fall within the scope of the memorials presented to the Court.

Mr. Lulo (Albania), Vice-Chairman, took the Chair.

28. Mr. EASTMAN (Liberia) said that the Governments of Ethiopia and Liberia, acting on their own behalf and on behalf of other African States, had instituted contentious proceedings before the International Court of Justice against the Government of South Africa because of its failure to carry out the provisions of the Mandate in the interests of the indigenous people of South West Africa and its failure to report to the United Nations in that connexion. The South African Government had invoked the sub judice rule and had advanced once single case, the Anglo-Iranian Oil Company case, in support of its attitude. As a matter of law, however, no such rule applied to the General Assembly. Article 10 of the Charter conferred upon the General Assembly the power to discuss any questions or any matters within the scope of the Charter; the only exception was found in Article 12. Under Article 1 of its Statute the International Court of Justice was described as "the principal judicial organ of the United Nations". Hence the General Assembly, if it desired, had the power not only to discuss the question of South West Africa but to discuss the powers and functions of the Court itself.

[3] United Nations publication, Sales No.: 61.XIII.1.

29. At the 1218th meeting the South African representative had referred to the Anglo-Iranian dispute as a matter of policy and discretion but not as a matter of law. In that case the Security Council had decided not to discuss the question of competence since the Court itself had been asked to pass on the jurisdictional question. The United Nations had long since deemed that it had competence to deal with the question of South West Africa and the Court itself, in its advisory opinion of 11 July 1950, had expressly confirmed the international status of the Territory and the supervisory power of the United Nations with respect to it. Obviously, therefore, there could be no question of the right of the United Nations to deal with the matter, a fact which distinguished the question of South West Africa from the Anglo-Iranian Oil Company case. The General Assembly would be permitting South Africa to make a mockery of both its own case against South Africa and the proceedings in the International Court of Justice if it allowed South Africa's deplorable actions in South West Africa to continue under the flimsy pretext of sub judice.

30. Above all, however, it must be clear that legal action and political action were not contradictory but complementary and must be pursued concurrently. There was no inherent inconsistency in that fact because ultimately a political solution would prevail. The Government of Liberia would therefore support any action by the General Assembly that would put an early end to the situation obtaining in the international Territory of South West Africa.

31. He reserved the right to speak on the report of the Committee on South West Africa and the statements made by the petitioners at a later stage in the debate.

32. Mr. CASTAÑEDA (Mexico) said that his delegation considered the report of the Committee on South West Africa (A/4926) to be of exceptional importance, because the recent action undertaken by that Committee represented the greatest effort the United Nations could make to solve the problem of South West Africa with the voluntary co-operation of the South African Government. That last attempt was the supreme test, and the decision on what should be the direction of the future action of the United Nations depended upon its outcome. Unfortunately the results had been entirely negative. After so many years of fruitless efforts, the Committee on South West Africa considered that the path previously followed was completely closed and it was recommending a radically different approach. The realism, sincerity and courage with which each member was prepared to face the new situation would have an important influence on the future of the United Nations.

33. In general his delegation endorsed the conclusions and recommendations in the Committee's report. The Committee's basic recommendation was that the Mandate entrusted by the League of Nations to the Union of South Africa should be terminated, so that the administration of the Territory could be assumed directly by the United Nations for a period of time with a view to eventual independence. As the Committee had not examined in detail the problem of the legal grounds for revoking the Mandate, and as that was no doubt a question which would give rise to some debate, he wished to give his country's views on that subject.

34. Previous United Nations efforts on the question of South West Africa had been confined to seeking the fulfilment on the part of the South African Government of its obligations under the League of Nations Mandate. The purpose of seeking an advisory opinion from the International Court of Justice in 1950 had been to determine whether South Africa was still bound by the Mandate and whether Chapter XII of the Charter was applicable to South West Africa. That had also been basically the purpose of General Assembly resolution 749 (VIII) setting up the Committee on South West Africa. Ever since then, the resolutions adopted annually by the Assembly had been based on the assumption that South West Africa was a Territory with an international status and had been designed to secure the compliance of the South African Government with its obligations under the Mandate. Yet not one of those resolutions had been heeded by the South African Government; in particular it had ignored resolutions 1568 (XV) and 1596 (XV). Hence there no longer seemed to be any real possibility that the South African Government would comply with the terms of the Mandate, nor was there any indication that it would submit reports on the situation in the Territory or permit petitioners to leave it freely. It was quite clear that there would be no political, economic or social advancement for the people of the Territory so long as the present régime continued; that was the Committee's view, expressed in paragraph 160 of its report (A/4926).

35. It was frequently thought in the United Nations that any solution which represented a real advance in dealing with a particular problem was of a political nature. It was said that lawyers were basically technicians whose principal mission was to elaborate legal arguments to justify already existing political positions and that law was fundamentally conservative inasmuch as it tended to maintain the status quo and to prevent a radical change in the existing situation. For that reason most of the progress made in the protection of dependent peoples had been achieved through political action and in many cases the possibilities of legal action to change the existing situation had not been fully explored. Yet it was often possible to use legal machinery to alter situations which had become unsatisfactory and it would certainly be worth while to explore the possibilities offered by international law to deal with the situation in South West Africa.

36. So far all efforts had been confined to persuading the South African Government to comply with its obligations under the Mandate, which from the point of view of international law was a treaty. When one party to a treaty did not comply with its obligations, the other party had two alternative courses: to demand the fulfilment of the obligation, or to demand the abrogation of the agreement on the basis of that non-fulfilment. The ability to revoke obligations under a bilateral or synallagmatic treaty was implicit where one of the parties did not fulfil its obligations; in other words the obligation of one party was subject to the condition that the other party fulfilled its obligations. The same rule was to be found in most of the legal systems of the world and could be regarded as one of the "general principles of law recognized by civilized nations" mentioned in Article 38 of the Statute of the International Court of Justice. Furthermore, it was a basic principle of international law and should be regarded as a binding rule of international law concerning the fulfilment of treaties.

37. The Mandate which the League of Nations had given the Union of South Africa to administer the Territory of South West Africa constituted an international treaty and, like any other international treaty,

it was subject to the usual rules with regard to its fulfilment. The fact that there was no express provision in the text of the Mandate for action in the event of the Mandatory Power failing to fulfil its obligations faithfully did not mean that such failure did not entail the normal legal consequences. Indeed, scarcely any international treaties included a specific clause providing for rescission on the grounds of non-fulfilment. It would be absurd to claim that the League of Nations, in granting a mandate, had renounced the right to supervise the activities of the Mandatory and had left it free to fulfil its obligations or not, at its discretion, or that it had denounced the normal right of a party to a treaty to demand its revocation if the other party did not fulfil its obligation. The very nature of the Mandate, under which the Mandatory Power accepted the "sacred trust" of promoting the well-being of the dependent people of the Territory, reinforced the argument that the League could not have renounced the normal legal methods for controlling the fulfilment of the treaty.

38. In order to prove that the Mandate over South West Africa should be terminated, it was first necessary to show that South Africa had not fulfilled its obligations. There was no difficulty in that respect: the case submitted by Liberia and Ethiopia to the International Court of Justice gave a full account of the many instances of South Africa's violation of the Mandate, and the debates in the General Assembly, year after year, had confirmed the numerous cases in which South Africa had not complied with the terms of the Mandate and of the corresponding article of the League Covenant. Not only had South Africa failed to fulfil its obligation to promote the well-being of the people, but, through racial segregation and the suppression of fundamental rights and freedoms, it had hampered the material and moral welfare of the people and prevented their normal development towards independence. Contrary to the obligation imposed by the Mandate, it only allowed persons of European origin to vote or to be a candidate for election in the Territory; it maintained a system of racial segregation in education; it established zones of segregated residence; it refused to allow members of the aboriginal races or tribes of Africa to join trade unions; and it denied Africans the entry to numerous professions and activities. The law qualified some workers in the Territory as "servants" and their employers as "masters"; the "servants" were subject to corporal punishment in case of a breach of their labour contract. In the towns the Native population had to live in certain areas and there was a complicated system of permits and passes governing their movements in the Territory. The indigenous inhabitants could not rent certain lands in the Territory and it was forbidden for White people to transfer such lands to "Natives, Asians or Coloured persons". The Governor-General had the right to remove any tribe or individual African to another part of the Territory. The indigenous inhabitants were forbidden to belong to political organizations, under pain of criminal sanctions.

39. The South African Government had also systematically violated article 6 of the Mandate in refusing to submit to the General Assembly annual reports on conditions in the Territory, an obligation which had been confirmed by the 1950 advisory opinion of the International Court of Justice. Again, many laws of the Territory constituted a violation of article 7 of the Mandate, which prohibited any modification of the terms of the Mandate without the consent of the League of Nations. As was indicated in paragraph 156 of the report of the Committee on South West Africa (A/4926), the South African Government had failed to respect the Territory's international status in that it had given the European population representation in the South African Parliament, had integrated the administration of the entire Native population with that of South Africa and had incorporated South West African Native reserve land into the South African Native Trust. Lastly, South Africa had violated article 4 of the Mandate by encouraging the European population of the Territory to arm and by establishing military fortifications and large defence forces in the Territory.

40. The second point which required to be demonstrated was the link between the legal situation existing at the time when the Mandate had been granted and the present situation. South Africa's argument was that the Mandate had lapsed as a result of the demise of the League of Nations, on the grounds that if one of the parties to a treaty ceased to exist legally, the treaty lapsed. The International Court of Justice had, however, spoken indirectly but clearly against that argument. In its advisory opinion of 1950, it had maintained that the need for international control continued to exist despite the disappearance of the League. The Court had concluded that the United Nations could legally exercise the functions of supervision which the League had previously exercised in relation to the administration of the Territory and that South Africa was under a legal obligation to submit to the supervision of the General Assembly and to present annual reports, as also to allow the submission and examination of petitions from elements representing the people of the Territory. In other words, the Court had clearly confirmed the international legal status of the Territory despite the fact that one of the two parties to the Mandate no longer existed. That meant that South Africa's obligations as a Mandatory Power still existed. The Court had limited itself to defining the scope of those obligations, but the essential point was the legal grounds upon which it had based itself in declaring that South Africa was still under an international obligation to perform certain acts. The fact that the Court recognized that the Union of South Africa had certain international obligations with regard to the Territory of South West Africa, whereas it had no such international obligations with regard to the people of its own territory, showed that the legal basis of those international obligations and the grounds for the international status of the Territory was the international act which had created that international status, and that that status was still valid despite the fact that one of the parties no longer existed. In other words, if the obligations derived from the Mandate continued to exist, it was not legally possible to deny that the Mandate itself was still in force and was still the legal basis of the international status of the Territory.

41. The legal position was somewhat complex because it was not a question of applying the usual methods governing the transmission of rights and duties. In the arrangements made in 1946 for the liquidation of the League of Nations no provision had been made for the transfer to the United Nations of the mandates granted by the League. Moreover, South Africa had not concluded a trusteeship agreement with the United Nations and the Court had recognized by a small majority that it was not obliged to conclude such an agreement for South West Africa. Thus, in order to

find the legal basis for the Court's opinion, it was necessary to resort to ideas which, though they did not belong to positive international law in its narrowest sense, nevertheless constituted its foundation.

42. The key idea was the concept of the international community or community of nations. Fundamentally, the party which had granted the Mandate had not really changed or disappeared: what had happened was that its international agent had been replaced by another. To take the analysis of the situation a little further, it must be agreed that in reality the League had not been the real mandator but only its agent or representative, so that its demise could not affect the existence of the Mandate. The basis of the Court's reasoning was that the real mandator had been the organized international community, i.e., the association of countries which had constituted the League and which at that time had represented the large majority of the countries in the international community. That organized international community had been one of the parties to the Mandate and the League had been the instrument acting on its behalf. When the League of Nations had been dissolved, it had been succeeded in its capacity as the embodiment of the international community by the United Nations. There had been no formal transfer of the Mandate because there had been no change in the two parties to the Mandate; only the instrument representing the mandator had changed. Had that not been so, the International Court could not legally have recognized the continuance of the international status of the Territory and the continuance of South Africa's obligations once the League of Nations had disappeared.

43. Turning to the question of the legal consequences of a revocation of the Mandate, he said that it would mean that the international community which had conferred the Mandate on the Union of South Africa would resume all the rights which it had had at the time the Mandate had been granted. It would resume all the rights and titles concerning the Territory which might be necessary to achieve the objective laid down by the Covenant of the League and by the Charter of the United Nations, namely, to promote the well-being and progress of the people and to prepare them for self-government or independence. Once the United Nations had resumed those powers, the selection of one or more methods to attain that objective would be a political rather than a legal problem and would depend upon the decision of the Assembly. For the moment it was sufficient to stress that when the Mandate was revoked, jurisdiction over South West Africa would be vested in the United Nations.

44. In considering the situation at the time when the Mandate had been granted it was necessary to clarify one point which might lead to confusion. By the Treaty of Versailles Germany had renounced all rights to its colonial possessions, including South West Africa, in favour of the Principal Allied and Associated Powers. If the Mandate were to be revoked sovereignty over the Territory would not, however, revert to the Allied and Associated Powers, since by placing the Territory under the Mandates System they had divested themselves of all sovereignty over it and had placed it under the authority of the organized international community, of which the League of Nations had been the instrument. That was the essence of the Mandates System. The third preambular paragraph of the Mandate stated that His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, had undertaken to exercise it "on behalf of the League of Nations", not on behalf of the Principal Allied and Associated Powers. Thus, if the Mandate were to be revoked all rights over the Territory would revert to the community of nations, which was now represented by the United Nations.

45. It might be asked what would happen if the South African Government were to oppose a decision that the Mandate was no longer in force and that the Territory should revert to the direct responsibility of the international community. It might be said that there would be no improvement in the situation, since the South African Government would ignore that decision, as it had ignored other decisions of the General Assembly. The situation, however, would be entirely different. Up to the present the United Nations had made every effort to induce the South African Government to comply with its obligations under the Mandate. The Charter provided no direct means of enforcing such obligations. There were obligations which could not be enforced and it was for that very reason that the law gave an injured party to an agreement the choice between forcing compliance where possible or the revocation of the agreement and the payment of damages. Direct force could be applied by the law to compel the handing over of something which had been unlawfully withheld, but not to compel the fulfilment of moral obligations. In the absence of willingness to comply with the obligations of the Mandate, any action by the United Nations must of necessity be limited and indirect as long as the Mandate remained in force.

46. The situation would be entirely different if the international community decided that the Mandate had been revoked and assumed direct responsibility for the population of the Territory. In that event the legal basis for the exercise of any authority over the Territory by the South African Government would have disappeared and if that Government failed to comply with its obligation to transfer authority to the United Nations it would be responsible for unlawfully exercising political authority over an alien people. The appropriate organs of the United Nations would then have to take suitable action to put an end to that situation. It was important to note that as long as the legal basis for the administration of the Territory by South Africa continued to exist, the United Nations could not legally dispossess that Government but could only adopt indirect methods of persuasion, which so far had been ineffective and would probably continue to be so in the future.

47. The Committee on South West Africa had made a series of recommendations based on the assumption that the status of the Territory would be changed. Those recommendations were summed up in paragraph 162 of the report (A/4926). According to that paragraph the final objective was independence and the first step would be for the United Nations to take over the administration of the Territory, directly or indirectly, as a guarantee that independence would be achieved in the most favourable conditions for the indigenous population. That method of solving the problem had the full support of the Mexican delegation, which felt that the recommendations of the Committee on South West Africa were entirely in accordance with the decisions of the General Assembly expressed in resolution 1596 (XV).

48. The Committee's other recommendations related to the means of carrying out the principal recommendation. He would not comment on them at the present

time but would wait to hear the views of other delegations before taking up a definitive position in that respect.

Miss Brooks (Liberia) resumed the Chair.

49. Mr. EDMONDS (New Zealand) said that at the first session of the General Assembly, when South Africa had announced its desire to amalgamate the Mandated Territory with the Union, the Prime Minister of New Zealand had stated that, whatever the merits of the suggested amalgamation, the proper and only way of bringing it about would be for the State concerned to acknowledge the authority of the United Nations and the Trusteeship Council by transferring its Mandate to the Trusteeship System and then, and only then, to place its proposals before the United Nations. That counsel had unfortunately not been followed.

50. New Zealand had also supported the initiative that had led to the advisory opinion of 1950 by the International Court of Justice, which had been accepted by the General Assembly. Thus it concurred in the view that the supervisory functions of the League of Nations under the Mandate had devolved on the United Nations. South Africa had continuing international obligations for South West Africa under Article 22 of the League Covenant and although, as the Court had pointed out, there was no legal obligation to place the mandated area under the Trusteeship System, South Africa was not competent, acting alone, to modify the international status of the Territory.

51. The 1950 advisory opinion did not make it clear whether the United Nations was itself competent unilaterally to alter that status. That was a most delicate question. Suggestions had been made that the General Assembly or the Security Council should revoke, suspend or transfer the Mandate, or even declare the Territory independent. The New Zealand delegation endorsed the objective of self-determination and the eventual assumption of separate national sovereignty by the people of South West Africa if that should be their wish, but it could not see how it would help for the Assembly simply to revoke or suspend the Mandate, even if that proved legally possible, which was extremely doubtful. The practical difficulties would become even greater and the legal situation even less satisfactory, for it was the Mandate that gave the United Nations the solid legal basis for its supervision of the Territory. It had also provided the basis for the Court action which Ethiopia and Liberia were at present actively prosecuting against South Africa. If as a result of that legal action judgement were given against South Africa, and South Africa accepted it, that would inevitably have profound effects on the policies followed by that Government in the Republic itself as well as in the Mandated Territory. If, on the other hand, South Africa failed to comply with an adverse decision in the International Court, the position would be different. Ethiopia and Liberia would then have the right, under Article 94 of the Charter, to have recourse to the Security Council. At that stage, no doubt, the Council would find it most helpful to know its precise powers with regard to the transfer or revocation of the Mandate and there seemed therefore to be sound sense in the recommendation of the Committee on South West Africa that the General Assembly should now arrange for a study of the ways and means by which South Africa's administration of the Mandated Territory might be terminated.

52. The matter bristled with both legal and practical problems. He felt sure that the representative of Mexico, whose valuable contribution to the debate would, he hoped, be circulated in full, would readily admit that there were weighty arguments against the termination of the Mandate. A thorough study of the matter was essential before any attempt was made to reach a final decision on what unilateral course of action was likely to end the dispute. Impatience, however natural, was one of the greatest obstacles to the effectiveness of the United Nations. Due process of law might seem unduly slow, but it must be remembered that the International Court of Justice was the principal judicial organ of the United Nations and the defender of the legal rights of all sovereign States. The maintenance of its prestige and authority was especially important to smaller States, such as New Zealand, which had bound themselves without reservation to accept the Court's jurisdiction in all cases. Moreover, the Court was an intrinsic part of the United Nations machinery and of the Charter, under Article 94 of which each Member State undertook to comply with the Court's decision in any case to which it was a party.

53. Article 94 was binding on all Member States, including South Africa—a fact which might well deter those who at times spoke in terms of immediate expulsion. The New Zealand delegation would agree, however, with those who declared that the South African Government should be much more ready to express willingness to accept any judgement the Court might make. In that connexion he had been greatly disappointed by the statement just made by Mr. Louw, the Minister for Foreign Affairs of South Africa. Surely South Africa could indicate in some way that if the Court decided in favour of its competence, Article 94 of the Charter would apply. It could be done in a manner which would not prejudice South Africa's preliminary arguments concerning the Court's competence in the case—an issue that it would be for the Court to decide. It should be possible to devise some phrasing which would satisfy members of the Fourth Committee on the one hand and meet South Africa's legal scruples on the other. He urged South Africa to reconsider its position in that respect and to make explicit what it said was already implicit.

54. His delegation considered that any decision concerning the disposition of the Mandate should and indeed must await the outcome of the Court action brought by Ethiopia and Liberia. At the same time the study of ways and means for legally effecting the removal of the Mandate from South Africa should begin so that no time would be wasted. Presumably that would be one of the principal matters determined by any special commission set up to study the future of the Territory, as proposed in the United Kingdom draft resolution (A/C.4/L.712). Incidentally, his delegation had no doubt that the Mandate for South West Africa had been conferred on the South African Government; the constitutional formula employed in the preamble and in article 1 of the Mandate was perfectly clear to long-standing members of the Commonwealth. The United Kingdom Government and British Crown could no more be blamed for what had gone wrong in South West Africa than they could claim credit for what had gone right in Western Samoa, another former Mandated Territory.

55. All members of the Committee were surely united in their desire that the vexed problem of South West Africa should be solved as speedily and peacefully as

possible. Many had lost confidence in the Government of South Africa; some appeared almost to have lost hope of finding any peaceful solution. Frustration and anger had inevitably spread, especially among the African members whose brothers had to endure the indignities and disabilities of apartheid. In that connexion he emphasized that the New Zealand Government regarded as abhorrent a policy based on racial discrimination and segregation and was firmly opposed to policies based on concepts of racial superiority. The unhappy issue of apartheid had, moreover, inevitably injected into the debates on South West Africa an element of emotion which had certainly not assisted in solving what would in any case have been a delicate and difficult problem. Without in any way excusing the intransigent attitude of the Mandatory Power, anyone who had sat in the Fourth Committee in recent years must feel that at times, under great pressure and provocation, the Committee itself had made tactical mistakes. Too often what should have been an exercise in diplomacy had turned into a political demonstration. Statements, reports and even resolutions had at times used strong language or made sweeping charges that had probably done more harm than good to the cause. The case against South Africa was so strong that it could only be weakened by verbal hyperbole and factual inaccuracy. In denying exaggerated charges, the guilty could assume an air of injured innocence. Any allegation which departed from scrupulous fairness was far better left unmade and any initiative which was clearly impracticable was better left untaken. Too often the Committee had adopted resolutions which it knew could not, or would not, be implemented. That was not the way to enhance the standing and influence of the United Nations. Unfortunate compromises had at times been reached under pressure from extremists; on the other hand, countries with closer ties with South Africa had in the past been reluctant to foster any initiatives in the General Assembly. The submission by the United Kingdom of a constructive draft resolution was therefore a most significant development.

56. The most regrettable consequence of those mistakes had been that frequently the United Nations had probably eased the position of the South African Government by providing it with the means of silencing its domestic critics and rallying its supporters. As the leader of the Indian delegation had pointed out in the Fourth Committee at the fourteenth session, it should not be forgotten that there were liberal elements among the enfranchised inhabitants of South Africa and some of the dialectic of democracy, however restricted in scope.

57. Despite the need to await the decision of the International Court of Justice, there were certain things that could and should be done. He had already mentioned a study on the lines recommended by the Committee on South West Africa. The Committee also recommended the inauguration of intensive study and training schemes for the indigenous inhabitants of the Territory. Schemes of that sort could surely be drawn up with the assistance of the specialized agencies and other appropriate United Nations bodies. He urged the Mandatory Power to co-operate fully with the United Nations, especially in the vital work of education, and to reconsider its regrettably negative response to General Assembly resolution 1566 (XV). Co-operation in the functional fields would not prejudice South Africa's juridical position and would greatly assist the people of the Territory.

58. The Committee also recommended, in paragraph 164 of its report (A/4926), the "immediate institution of a United Nations presence in South West Africa". The question arose how that could be done peacefully, for the use of force was clearly debarred. His delegation felt that the Committee on South West Africa might well have explored more fully the offer made by the South African Government to admit into the Territory an independent person of international standing to be mutually agreed upon by the President of the General Assembly and the South African Government. It also felt that the Committee would have been wise to mention the offer in its report. No matter what the motives of the South African authorities in making the proposal had been, it might have furnished an opportunity for introducing into the Territory the "United Nations presence" which the Committee recommended. Unfortunately South Africa now seemed to have changed its mind and intended itself to invite three past Presidents of the General Assembly to investigate the charge of a threat to international peace and security. That proposal in its present form was not enough, but the General Assembly had the grave responsibility of seeing how best to make use of the idea. It could not be simply ignored or rejected without furnishing aid and comfort to the very people whose attitude it was hoped to change. That was his delegation's objection to the purely negative reaction in draft resolution A/C.4/L.711 and Corr.1. It might be possible to insert into the proposal some elements which would make it a United Nations matter. South Africa should not object, for that very element had been present in its first offer. If, however, the proposal were then dropped by the originators, the onus would be on them. If, on the other hand, the proposal were not rescinded even after it had been fitted into a United Nations context, no harm would result and a much needed opportunity would be furnished for influencing the Mandatory Power in the right direction. His delegation felt, however, that the effort made by the United Kingdom draft resolution to link the proposal with United Nations efforts was somewhat unsatisfactory and he hoped that as a result of discussion improvements could be made in that part of the text.

59. If he had criticized the reports of the Committee on South West Africa, he had meant no disrespect to the Chairman and members of that body, for whom he had a high regard and who had had a difficult and thankless task and had received no co-operation from the Mandatory Power. At the fifteenth session they had been asked by the General Assembly to discharge additional functions which even at that time many members of the Committee had regarded as unrealistic. It was to be hoped that at the current session delegations would not again be confronted with impracticable proposals or resolutions which might prejudice the Court action and be requested to vote for them to prove their extreme distaste for the policies followed by the South African Government. As far as his delegation was concerned that distaste was very real. Members of the Committee were unanimous on that point, even if they differed concerning ways and means of changing those policies. In the present situation in South Africa there were many factors which were truly tragic. The tension would grow and a dénouement could not be indefinitely delayed. While his delegation could not agree that the situation in South Africa constituted a threat to international peace and security, it was likely to endanger that peace. The work of decolonization has assumed a new urgency. He appealed to the Government of South

Africa to resolve the dispute and not to allow it to deteriorate still further. Juridical reservations should not stand in the way of justice; all members of the Committee would welcome some frank and explicit gesture by South Africa which would be proof of good faith and an earnest of co-operation with the community of nations in determining the future of the Territory, whose international character had never been denied.

60. Mr. ASSELIN (Canada) proposed that the Mexican representative's speech should be circulated in full as a Committee document.

61. Mr. SKALLI (Morocco) and Mr. RODRIGUEZ FABREGAT (Uruguay) supported that proposal.

It was so decided. [4/]

The meeting rose at 1.15 p.m.

[4/] See A/C.4/507.

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