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Chairman: Mr. Thanat KHOMAN (Thailand).

AGENDA ITEM 38

Question of South West Africa (*continued*):

- (a) Report of the Committee on South West Africa (A/3626; A/AC.73/L.10);
- (b) Study of legal action to ensure the fulfilment of the obligations assumed by the Mandatory Power under the Mandate for South West Africa: special report of the Committee on South West Africa (A/3625)

GENERAL DEBATE (*continued*)

1. Mr. ROLZ BENNETT (Guatemala) thought the Committee must not allow itself to be discouraged by the negative attitude of the Union of South Africa. It must, more than ever, declare itself firmly attached to those principles whereby the dependent peoples were entrusted to the care of the community of nations, whether under the Mandates System of the former League of Nations or under the regime laid down in the United Nations Charter, and it must reaffirm its conviction that those principles applied to South West Africa. If the Union of South Africa had a sacred trust of civilization in regard to the Territory, the United Nations had a no less sacred obligation to see that the people of the Territory, the United Nations had a no less sacred obligation to see that the people of the Territory advanced in every field of endeavour and in the end freely realized their own destiny.

2. He praised the report of the Committee on South West Africa (A/3626) while noting at the same time the disturbing nature of its findings. In annex I to the report the Committee drew attention to the statements made in 1956 by leaders in the Union and in the Territory confirming that the incorporation of the Territory into the Union was being pursued. The effect of the transfer of Native administration from the Territory to the Union had been to speed up the alienation of land belonging to the Africans and to make the inhuman policy of racial segregation still more stringent. That policy, which was contrary to the obligations assumed by the Mandatory Power under Article 22 of the Covenant of the League of Nations and under the provisions of the Mandate itself, could not fail to

have deplorable repercussions on the economic, social and political development of the Territory and bore witness to a firm intent to maintain the Africans in a permanent state of inferiority.

3. The Guatemalan delegation shared the apprehension felt by the Committee on South West Africa at seeing that land hitherto set aside for the Africans, for example the Aukeigas and Hoachanas reserves, was more and more frequently being handed over to European farmers; it also shared the Committee's anxiety in regard to the land of the Rehoboth Gebiet which likewise seemed to be threatened. The Territory seemed to be experiencing a period of economic prosperity, but generally speaking, the increased activity was profiting only the Europeans while the role of the African population was confined to that of supplying cheap labour. The social situation, which was dominated by the policy of apartheid, remained deplorable and seemed to have worsened. In labour matters, control measures were strict and relations were those of master and servant; new discriminatory measures prevented the advancement of African miners and did not allow the indigenous workers to enjoy the same right to organize and to participate in conciliation and arbitration proceedings as other workers. In matters of education also, the Mandatory Power was making no attempt to promote African advancement. There were three separate, unequal and racially discriminatory educational systems.

4. He paid a tribute to the members of the Committee for the clarity and frankness of the conclusions set forth in chapter VI of the report and singled out for quotation paragraph 161 of annex I to the report, in which the Committee stated its view that existing conditions in the Territory and the trend of the administration represented a situation contrary to the Mandates System, the Charter of the United Nations, the Universal Declaration of Human Rights, the advisory opinions of the International Court of Justice and the resolutions of the General Assembly. He believed that the Mandatory Power could not remain insensitive to so forthright a condemnation and continue to flout with impunity the basic principles of human society, its contractual obligations and world public opinion. It was inconceivable that the Union Government as well as public opinion in a country of such a standing as the Union of South Africa should refuse to seek a solution in keeping with the ideals which had inspired the Covenant of the League of Nations and the Charter of the United Nations. Although the circumstances were less than encouraging, it must be hoped that the Union would modify its attitude.

5. For ten years, the United Nations had tried to solve the problem by three principal means: action in the political and legal fields, negotiation, and moral influence. In the political and legal fields, the General Assembly, the Trusteeship Council and the Committee

on South West Africa had reaffirmed the competence of the United Nations, the international status of South West Africa as a mandated territory, the obligations of the Mandatory Power and the right of the population to be administered in a way which would promote its advancement.

6. Among the attempts at negotiation had been the establishment, under General Assembly resolution 449 A (V), of a five-member committee to confer with the Union of South Africa concerning the procedural measures necessary for implementing the advisory opinion of the International Court of Justice in 1950.^{1/} The members of that committee had met with representatives of the Union Government and certain proposals had been made, but no agreement had been reached.

7. Lastly, the United Nations had exerted moral pressure through the overwhelming majorities by which the General Assembly had adopted its resolutions, and through the voices of those who had deplored the situation of the people and urged the Mandatory Power to amend its attitude and respect its obligations. The history of international law and international relations offered few cases in which the moral judgement of the international community had been expressed so unanimously and so often as in the case of South West Africa.

8. To sum up, the Committee on South West Africa had rendered very great service and, with the assistance of the Secretariat, had supplied the Fourth Committee each year with a well-considered, well-documented report, on the situation in the Territory, in so far as that was possible without any co-operation from the Mandatory Power. However, he wondered whether the dual nature of the functions of the Committee, which had been instructed both to negotiate with the Union and to study the information available on the Territory, had not impaired the success of its negotiations. It might perhaps have been wiser to separate the task of international supervision, which, in view of its nature, must be governed by very specific terms of reference, from the other task which was more of a diplomatic order and could consequently be more flexibly interpreted. Furthermore, it was noteworthy that the Mandatory Power had used the Committee's terms of reference as a pretext for breaking off negotiations. That point might well be borne in mind in the ensuing discussion.

9. As the Assembly could not admit that all possibilities of negotiation were exhausted, a new line of approach was desirable and in that connexion the report requested of the Secretary-General in General Assembly resolution 1059 (XI), which also asked him to explore ways and means of solving the question, would be most useful in giving a new orientation to those attempts. The United Nations debates and resolutions would undoubtedly exert some pressure on public opinion in the Union and the Territory and on the conscience of responsible citizens of the Union, though it might not do so immediately. Nevertheless, in order to add to such moral pressure, Members of the Or-

ganization should all reaffirm their convictions, and their unalterable and unanimous judgement should be set against the obstinate refusal of the Union Government. In that connexion, he drew attention to the silence of certain Member States which, owing to the special responsibilities incumbent upon them with regard to the advancement of dependent peoples or owing to their relations with the Union of South Africa, should be contributing to the debate and giving their views on the question.

10. The special report of the Committee on South West Africa (A/3625) contained a detailed and very interesting analysis of possible legal action. With regard to chapter V, concerning the legal action open to Members of the United Nations, he shared the views of a number of members of the Committee on South West Africa, as stated in paragraph 26. With regard to chapter VI, concerning the legal action open to former Members of the League of Nations, he drew attention to the sentence in paragraph 32 in which the Committee stated that there could be little doubt that the right to invoke article 7 of the Mandate was enjoyed by those former Members of the League of Nations which had been Members at the date of dissolution of the League which were now Members of the United Nations or were otherwise parties to the Statute of the Court.

11. However, the Committee's excellent report, which deserved detailed study by the competent services of all countries, had been circulated only recently. The possibilities of legal action could not be examined superficially. The debate would therefore be more valuable if Member States had the time to analyse the possible repercussions of the legal action open to the Organization and its Members. Accordingly, the attention of Member States should be drawn to resolution 1060 (XI) and to the Committee's special report; they should be requested to submit written observations if they saw fit to do so; and the examination of the special report should be fixed for the thirteenth session of the General Assembly.

12. He thanked the petitioners, who had made very useful contributions to the debate and whose presence and statements made it possible to hope that a satisfactory solution would eventually be reached.

13. Mr. CHAMANDI (Yemen) pointed out that the General Assembly was dealing with the question of South West Africa for the twelfth time, but that it had not yet been able either to find a solution or to persuade the Government of the Union of South Africa to co-operate with the United Nations. Instead of showing good will, the Union Government had been intransigent in its refusal to take the General Assembly's resolutions into account. The Committee could only be surprised by that attitude and could only deplore the discriminatory measures taken by the South African Administration against the indigenous inhabitants of South West Africa.

14. Each year Members of the Committee had protested against such practices without avail. The Yemen delegation sincerely believed that, since the dissolution of the League of Nations, all former mandated territories automatically fell within the competence of the United Nations. The Committee, in co-operation with the Secretary-General, should therefore explore new means of persuading the Government of the Union of South Africa to seek, together with the United Nations, a just and equitable solution of the problem.

^{1/} International status of South-West Africa, Advisory Opinion I.C.J. Reports 1950, p. 128. (Transmitted to Members of the General Assembly by the Secretary-General under cover of document A/1362.)

15. He hoped that the Union Government would understand that a final solution of the question would be in its own interests.

16. Mr. EILAN (Israel) stated that, in order to solve the problem of South West Africa, the General Assembly at the eleventh session had proposed diplomatic action, by requesting the Secretary-General to intervene (resolution 1059 (XI)); and legal action, by requesting the Committee on South West Africa to study the legal action open to organs of the United Nations, its Members and former Members of the League of Nations to ensure that the Union of South Africa would fulfil the obligations assumed by it under the Mandate (resolution 1060 (XI)).

17. The legal aspect of the question should not be underestimated though the human aspect of the problem was the most important. The General Assembly should ask itself what practical steps it could take at present to help the population of South West Africa, and whether paraphrasing old resolutions or a new debate on the exact meaning of the advisory opinions of the International Court of Justice would promote the well-being of that population.

18. According to the 1950 advisory opinion of the International Court of Justice, the Charter did not impose any legal obligation on the Union of South Africa to place South West Africa under trusteeship. The Union Government was merely under an obligation to accept the compulsory jurisdiction of the Court and United Nations supervision of its administration and, in particular, to administer the Territory in conformity with the Mandate of the League of Nations. The latter obligation was expressed in General Assembly resolution 1060 (XI), which instructed the Committee to study what legal action could ensure that the Union of South Africa would fulfil the obligation assumed by it "under the Mandate", and not under the Charter, the provisions of which did not apply to the Territory of South West Africa. In the subsequent clause of resolution 1061 (XI), namely, "pending the placing of the Territory of South West Africa under the International Trusteeship System", by using the word "pending", the General Assembly had temporarily shelved the question of the method to be used to persuade the Union Government to place the Territory under the Trusteeship System.

19. The obligations of the Union of South Africa were described generally in Article 22 of the Covenant of the League of Nations and in greater detail in article 2 of the Mandate. The latter article provided that the Union of South Africa "... may apply the laws of the Union of South Africa to the Territory" and "... shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory...". It was doubtful whether the present legislation of the Union was calculated to promote the well-being of the indigenous population and whether its application in the Territory was not contrary to the spirit of the Mandate. The Union of South Africa might of course dispute the point of view, and it was not certain whether the International Court of Justice would consider itself competent to give an opinion on the matter. There was indeed a fundamental distinction between the decisions taken by the Court under Article 94 of the Charter, which were binding upon Members of the United Nations, and the advisory opinions which it handed down under Article 96. The

Court could not exercise contentious jurisdiction unless the State concerned had consented to the binding jurisdiction of the Court. With regard to its advisory competence, the Court had discretion to decide whether or not it should reply to a request for an opinion, as was pointed out in paragraph 20 of the special report (A/3625). It was likely, although by no means certain, that it would decline to give an advisory opinion if it thought that that opinion was being invoked merely to disguise the fact that the State principally concerned had not consented to judicial proceedings.

20. In chapter IV of the special report it was suggested that an advisory opinion should be asked regarding the status of the Territory or the relationship between clauses of the Mandate and acts of administration of the Territory. The Court had given an opinion on the status of the Territory in 1950, when it had decided unanimously that South West Africa was a Territory under the international Mandate assumed by the Union of South Africa on 17 December 1920. It was difficult to see what could be added to that. What was needed was implementation, and not an ever-growing body of advisory opinion.

21. Furthermore, the situation had changed since 1950. At that time, the Union of South Africa had participated in the proceedings before the International Court. Since then its position had become better defined. It had submitted no oral or written statements to the Court in connexion with the advisory opinions of 1955 and 1956. It might be difficult to show the existence of a dispute between the Union of South Africa and any other State concerning South West Africa. The dispute was rather between that country and the United Nations or, more accurately, the majority of the General Assembly.

22. Chapters V and VI of the special report dealt with the possibility that a contentious case might be brought against the Union Government. That theory was based on article 7 of the Mandate and a passage from page 138 of the advisory opinion of 1950, according to which "... this clause in the Mandate is still in force and ... therefore the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions". The advisory opinion simply stated that in the Mandate the reference to the Permanent Court of Justice was to be replaced by a reference to the International Court of Justice. The meaning of the passage was difficult to ascertain; that difficulty lay in deciding what State was entitled to invoke the compulsory jurisdiction of the Court. Article 7 of the Mandate referred to disputes between the Mandatory and another Member of the League of Nations. In 1950, the International Court had left open the question whether the expression "another Member of the League of Nations" was conditional on the existence of the League, or was merely descriptive.

23. He had raised those legal considerations, not in order to justify the attitude of the Union, but to help to decide whether the Committee was advancing towards a practical solution of the human problem concerned.

24. Resolution 1059 (XI) provided for intervention by the Secretary-General. The Israel delegation considered that the Secretary-General had not as yet been able to undertake the necessary steps to find a solution for the problem. He alone was competent to choose

the appropriate time for approaching the Union Government. The situation was extremely delicate and the diplomatic approach might have more chance of success than the adoption of yet another resolution.

25. It should be borne in mind that there had been a time when the Union Government had made certain proposals. Those proposals, which were outlined in Chapter III of the special report of the Committee on South West Africa, had not been acceptable to the General Assembly, but they had shown willingness to negotiate on the part of the South African Government. Although certain considerations might make that Government disinclined to attend the Assembly, it was the Committee's duty to seek all practical methods of reaching a solution. If the Secretary-General felt that the time had not come for him to intervene, some Member States might be prepared to act as intermediaries to explore the possibilities of an arrangement which would guarantee the implementation by the

Union Government of principles of administration in conformity with the "sacred trust" referred to in Article 22 of the Covenant of the League of Nations.

26. There were yet other possibilities, such as the procedure, followed by the League of Nations, of establishing an *ad hoc* advisory committee of jurists to examine a given question. That procedure would have the advantage of avoiding the publicity inevitably connected with the deliberations of the International Court, and it had sometimes been used with great success. He regretted that the Committee in its report had not considered the possibility of arbitration, which had some diplomatic advantages over the more formal procedure of the Court.

The meeting rose at 4.5 p.m.