

SOUTH WEST AFRICA AND THE UNITED NATIONS

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A South West African of Herero and Ovambo descent who escaped overseas to give evidence as a petitioner before the Trusteeship Council of the United Nations at its 11th and 12th Sessions. A graduate of Lincoln University, now studying Political Science and Jurisprudence at the New School for Social Research in New York City.

UNDER the terms of article 119 of Versailles, the Germans ceded South West Africa to the Principal Allied and Associated Powers. They, in turn, assigned the Territory to His Britannic Majesty, to be administered, on his behalf, by the government of the Union of South Africa as a Class C Mandate, an action approved on December 17, 1920 by the Council of the League of Nations. Class C Mandates differed from others in that they were to be "administered under the Mandatory as integral portions of its territory, subject to the principle that the well-being and development of the indigenous peoples form a sacred trust of civilization." The Union was also required to submit reports to, and be subject to the supervision of, the Permanent Mandates Commission of the League, while possessing the privilege of applying its laws to the Territory.

The administrative powers were delegated by the Governor-General to an Administrator who acted on his behalf. Under the constitution adopted in 1925, the European inhabitants were given the right to elect members to a Legislative Assembly. The same privilege was denied to the "Africans," whose affairs were dealt with not by the Legislative Assembly, but by the Administrator in Advisory Council. Only one member of this Advisory Council was selected on the ground of his "thorough acquaintance with the reasonable wants and wishes of the non-European races in the Territory."

Since 1955, however, the powers of the Administrator over African Affairs have been transferred to the Union Minister of Native Affairs. And since 1951, the Territory has been represented in the Union Parliament by ten Union nationals of European descent; six in the House of Assembly and four in the Senate. Two of the Senators are elected by the Territory's Legislative Assembly and two are appointed by the Governor-General, one of the latter being nominated "mainly on the ground of his thorough acquaintance . . . with the reasonable

wants and wishes of the Coloured races of the Territory." There apparently exists no intention to give direct representation in the Union Parliament to the non-European inhabitants of South West Africa, though they comprise some 85 per cent. of the Territory's total population.

The Legislative Assembly of the Territory is composed of 18 members, all Union nationals of European descent and elected entirely by Union nationals. No non-European is entitled to sit in the Legislative Assembly or to vote in the election of its members.

The Union Government exercises both administrative and legislative control over the following matters which are integrated with the Union: African affairs, custom and excise, railways and harbours, police defence, the public service, external affairs, and immigration.

The Permanent Mandates Commission of the League of Nations, to which the Union reported on the administration of its Class C Mandate, was dissolved in the spring of 1946 at the last meeting of the League of Nations Assembly. By resolution of February 9, 1946 and letter of the Secretary-General of the United Nations, the General Assembly requested that the six mandatory powers draft trusteeship agreements to place the Mandated Territories within the international trusteeship system and under the supervision of the Trusteeship Council of the United Nations Organization.

At the San Francisco Conference, Field Marshal Smuts had announced South Africa's desire to incorporate or annex the Territory of South West Africa. In response to the Secretary-General's letter, the Union Government requested that the Provisional Agenda of the General Assembly include an item concerning the consultations which the Government had had with the peoples of S.W.A. about the future status of the Territory. And the South African delegation presented a proposal to the second part of the first session of the General Assembly calling for approval of the annexation of South West Africa by the Union of South Africa, on the basis of their geographical contiguity, ethnological kinship, and the state of integration already achieved. The Union maintained that the Legislative Assembly of the Territory had requested incorporation and that a majority of the Native population had also been consulted and had voted strongly in favour of incorporation.

By resolution of December 14, 1946, passed 37 for, none

against, and 9 abstentions (#65 (1)), the General Assembly found itself unable to accede to the incorporation of the Territory into the Union of South Africa; recommended that the Territory be placed under the international trusteeship system; and invited the South African Government to propose a trusteeship agreement for the Territory: giving as its reasons that (1) Articles 77 and 79 of the Charter provided that the trusteeship system should apply to all territories then under mandate, and (2) it considered that the African inhabitants of the Territory had not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation. By letter of July 23, 1947, the Union Government informed the U.N.O. that it had decided not to proceed with incorporation, but declared that, in view of the wishes of the majority of the European inhabitants of S.W.A., it could not agree to placing it under international trusteeship; not did it consider itself under any legal obligation to propose a trusteeship agreement. It would therefore maintain the *status quo*, administering the Territory in the spirit of the existing mandate, and though it would transmit an annual report on its administration as required under Article 73e of the Charter, it would not allow the right of petition, the League no longer being in existence and the U.N.O. having no jurisdiction over S.W.A. On September 17, 1947, the Union Government again reported having consulted the Europeans of the Territory and claimed that they, by overwhelming majority, still favoured incorporation.

By resolution of November 1, 1947 (141 (II)), the General Assembly took note of the decision not to proceed with incorporation, firmly maintained its previous recommendation, urged the Union to propose a trusteeship agreement by the third session of the General Assembly, and authorized the Trusteeship Council to examine the report received from the Union Government. The Trusteeship Council examined the report, but found itself unable to make a thorough study of it in the absence of the South African delegate. The Union Government did, however, submit additional written information on request. In the Fourth (Trusteeship) Committee meetings, November 9-19 1947, the South African delegate pointed out that the report had been submitted voluntarily and that the Union had replied to requests for additional information, but that this was not

to be taken as a precedent or commitment, since his Government felt that the Trusteeship Council had exceeded its powers. S.W.A. was not a Trust Territory; the Union felt it neither in its nor the Territory's interest to submit a trusteeship agreement; and finally, it was planned to give the Territory representation in the Union Parliament, though this was not to be considered incorporation, but a grant of necessary self-government. By resolution of November 26, 1948, the General Assembly took note of this and recommended the continuance of the annual report until agreement between the Union and U.N.O. had been reached. By letter, July 11, 1949, the Union advised U.N.O. that, in the interest of efficient administration, no further reports would be forwarded. It also enclosed a copy of the S.W.A. Affairs Amendment Act of 1949, providing representation for the Territory in the Union Parliament, legislation which it maintained was in keeping with the spirit of the Mandate.

In its resolution of December 6, 1949 (337 (IV)), the General Assembly expressed regret that the Union would not submit further reports, renewed its recommendation that a trusteeship agreement be submitted, and invited resumption of the submission of reports. In another resolution of the same date (338 (IV)), it requested an advisory opinion from the International Court of Justice on the present international status of S.W.A. The case was argued on May 16-23, 1950, by the Assistant Secretary in charge of the Legal Department of the U.N., the Government of the Philippines, and the Senior Legal Adviser to the Ministry of Justice of the South African Government.

The Court found unanimously, July 11, 1950, that S.W.A. was still to be considered a territory held under the Mandate of December 17, 1920; that the degree of supervision of the General Assembly should not exceed that which applied before and should conform as much as possible to the procedure followed by the League of Nations; that the Union was under an obligation to accept the compulsory jurisdiction of the Court; that it had an administrative obligation to promote the material and moral well-being and social progress of the inhabitants and to submit to control and supervision by the Council of the League; that the League had presupposed its functions would be taken over by the U.N.; that the necessity for international supervision continued to exist, despite the demise of the League;

that the provisions of Chapter XII of the Charter applied, in that they provided a means whereby S.W.A. could be brought under trusteeship; and that, while the Union was under no legal obligation to place S.W.A. under trusteeship, the Union acting alone could not modify the international status of the Territory, but required the consent of the United Nations, the proper procedure being to place the Mandate under trusteeship. The Court considered that the Mandate had not lapsed because the League had ceased to exist, that such an opinion was a misconception of article 22 of the League Covenant and of the Mandate itself, that the authority exercised by the Union was based on the Mandate, and if the Mandate had lapsed, so had the authority of the Union Government. To retain rights derived from the Mandate and to repudiate the obligations could not be justified. The terms of the Mandate involved no cession of territory or transfer of sovereignty to the Union.

In the Fourth Committee debates of November-December, 1950, the South African delegate maintained that the advisory opinion of the Court did not constitute a judgment binding on the parties concerned, and that, since the delivery of the opinion, new facts had come to light indicating that the League did not intend to transfer its supervisory functions to the U.N. In other words, South Africa stated bluntly that it would ignore the decision.

By resolution of December 13, 1950, the General Assembly created an Ad Hoc Committee to confer with South Africa on the procedures necessary for implementing the decision of the Court. This Committee reported on March 17, 1951, that the Union delegate had proposed that South Africa reassume its international obligations by negotiating a new international instrument with France, the United Kingdom, and the United States, the three remaining members of the Principal Allied and Associated Powers to whom Germany had ceded S.W.A., and stated that the South African Government would agree to final confirmation of any such new contractual agreement by the U.N. (providing for judicial supervision by the International Court of Justice). The Committee considered this proposal unacceptable, feeling itself bound to act toward implementing the Court's advisory opinion, and counter-proposed such implementation by a procedure as nearly as possible analogous to that which had existed under the League. There would be a 15 member Committee on South West Africa

with supervisory powers similar to those previously exercised, and a Special Committee on South West Africa to undertake examination of the annual report. This was opposed by the South African Government on the grounds that it imposed obligations more extensive than those implicit in the mandate system. The Committee expressed regret, could not reconsider its decision, and reported to the General Assembly that it had been unable to comply with instructions. The Fourth Committee took up the question of requests for hearings from representatives of the peoples of S.W.A., heard the Reverend Michael Scott, and deliberated the report of the Ad Hoc Committee. The General Assembly, by resolution of January 19, 1952 (570 (A and B VI)), made a solemn appeal to South Africa to reconsider its position, reconstituted the Ad Hoc Committee, and reaffirmed its previous stand.

On November 28, 1953, the General Assembly established a Committee on South West Africa to examine information and documents and receive reports and petitions until such time as agreement was reached, and on May 21, 1955, the Union withdrew its offer to create a new instrument with the Principal Allied and Associated Powers. The Committee on South West Africa worked out its procedures and rules in the meanwhile, basing its reports on information and documentation submitted to it by the U.N. Secretariat, and submitted two resolutions to the International Court of Justice for advisory opinions. The first asked whether decisions of the General Assembly on S.W.A. required a two-thirds majority of all members present and voting, and this the Court endorsed as a correct interpretation on June 7, 1955. The second resolution asked whether it was consistent with the advisory opinion of the International Court of Justice of July 11, 1950, for the Committee on South West Africa to grant oral hearings to petitioners on matters relating to the Territory of South West Africa. This was confirmed as consistent by the Court in June, 1956, and authorized by a General Assembly resolution of January 23, 1957. Thus the Committee is empowered to take testimony from petitioners.

The South African Government has co-operated with the U.N. General Assembly in the following instances:

- (1) *by placing before the General Assembly its proposal for incorporation in the face of the General Assembly's disapproval;*
- (2) *in submitting an annual report to the General Assembly in*

1946;

- (3) *in stating its opinions clearly in meetings of the Fourth Committee, the plenary sessions of the General Assembly, and in the meetings of the Ad Hoc Committee of 1951;*
- (4) *in arguing its side of the case before the International Court of Justice;*
- (5) *in continuing its assurances that S.W.A. would be administered in accordance with the spirit of the Mandate.*

The Union Government has criticized the U.N. for placing its annual report of 1946 before the Trusteeship Council, the Trusteeship Council for exceeding its powers in its examination of the report, and the Fourth Committee for exceeding its powers in granting the privilege of oral petition to inhabitants of the Territory.

The Union Government has been unco-operative in the following respects:

- (1) *by its refusal to negotiate a trusteeship agreement;*
- (2) *by its refusal to continue the submission of annual reports;*
- (3) *by its refusal to recognize the advisory opinion of the International Court of Justice;*
- (4) *by its refusal to continue negotiations with the Ad Hoc Committee;*
- (5) *by its refusal to meet with the Committee on S.W.A.;*
- (6) *by its refusal to acknowledge the privilege of petition on the part of the African inhabitants, either written or oral;*
- (7) *by its recent refusal to participate in the discussion of matters pertaining to the future status of S.W.A.;†*
- (8) *by its refusal to permit petitioners to leave S.W.A. for the U.N.;*
- (9) *by its refusal to permit a U.N. Commission to enter S.W.A.;*
- (10) *by its refusal to allow the Reverend Michael Scott to visit the Territory.*

The South African Government acted unilaterally in modifying the international status of S.W.A. by:

- (1) *passing the S.W.A. Affairs Amendment Act of 1949, providing for South West African (European) representation in the Union Parliament;*
- (2) *by its transfer, on April 1, 1955, of the administration of "Native" affairs and any matters specially affecting "Africans", including the imposition of taxes upon their*

†This article was written before the visit of the U.N. Good Offices Committee to the Union and South West Africa. Comment on this latest development is contained in the Editorial.

persons, land, habitations or earnings, from the Administrator of the Territory to the Minister of Native Affairs of the Union.

These actions seem to be in conflict with the continued assurances that S.W.A. has not been incorporated and that it is still being administered in the "spirit" of the Mandate.

The U.N. seems to have accomplished the following things:

- (1) *the prevention of the outright annexation of S.W.A. by the Union;*
- (2) *the clarification of the international status of S.W.A. as a Class C Mandate to be administered by South Africa in accordance with Article 22 of the League of Nations covenant and the pertinent articles of the Mandate;*
- (3) *clarification of the obligations of the Union;*
- (4) *recognition of the fact that modification of the international status of S.W.A. may only be effected through a trusteeship agreement between the Union and the General Assembly;*
- (5) *the protection of the privileges of petition of the African inhabitants of S.W.A.*

The United Nations has acted within the limitations of its powers and has attempted to deal with the situation in South West Africa by the exercise of moral suasion. The measures it has taken have helped to prevent political turbulence in S.W.A., but it is not to be assumed that the patience and good faith of the African peoples are limitless in the face of the increasingly discriminatory and repressive measures imposed upon them by the Union Government.

Recent developments at the U.N.'s Twelfth General Assembly Session offer new promise. A three nation Good Offices Committee, consisting of the United Kingdom, the United States, and Brazil, has been established by the General Assembly to hold talks with the Union Government on a satisfactory definition of the status of the Territory of S.W.A. and the establishment of a working international agreement between the U.N. and the Union.

It is to be hoped that the United States will play a leading and positive role in these discussions and not allow this crucial issue, which involves the justifiable aspirations of an oppressed people, to become a pawn in the game of Cold War politics. Indeed, the results of these negotiations can do much to enhance or destroy her prestige in the eyes of the non-European nations of the world.