

DISSENTING OPINION OF Mr. DE VISSCHER

[*Translation.*]

I regret that I am unable to concur in the second part of the Court's answer to the question under letter (b). I concede that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to conclude a Trusteeship Agreement, in the sense that the Union is free to accept or to refuse the particular terms of a draft agreement. On the other hand, I consider that these provisions impose on the Union of South Africa an obligation to take part in negotiations with a view to concluding an agreement. In this respect, the Court's answer falls short of my opinion on the obligations resulting from the Charter for the Mandatory Power. My opinion is based on an interpretation of texts which differs from that adopted in the Court's Opinion.

The Opinion says: "The Charter has contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System." Furthermore, the relevant articles of Chapter XII dealing with the International Trusteeship System are clearly imperative: Article 75: "The United Nations shall establish under its authority an International Trusteeship System...."; "L'Organisation des Nations Unies établira, sous son autorité, un régime de tutelle...."; Article 77: "The Trusteeship System shall apply...."; "Le Régime de Tutelle s'appliquera....".

The Mandates System was maintained by Article 80 of the Charter only as a transitional measure. The terms of the first paragraph alone: "and until such agreements have been concluded" exclude the possibility of prolonged co-existence of the two régimes. As to Article 80, paragraph 2, its legal bearing in this connexion is clearly defined. It provides that the preceding paragraph, which maintains the *status quo* until such agreements have been concluded (the so-called safeguarding clause), "shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the Trusteeship System as provided for in Article 77".

I consider that the Opinion does not give to these provisions their proper place in the general framework of the provisions of Chapter XII, and, as a result, does not deduce from them all the consequences which follow therefrom. The Opinion minimizes their import to the point of considering them merely as expres-

sing the expectation that "the mandatory States would follow the normal course indicated by the Charter, namely, conclude Trusteeship Agreements".

It is an acknowledged rule of interpretation that treaty clauses must not only be considered as a whole, but must also be interpreted so as to avoid as much as possible depriving one of them of practical effect for the benefit of others. This rule is particularly applicable to the interpretation of a text of a treaty of a constitutional character like the United Nations Charter, above all when, as in this case, its provisions create a well-defined international régime, and for that reason may be considered as complementary to one another.

I cannot readily believe that the authors of the Charter would have warned the mandatory Powers, by means of an express and particularly emphatic provision, that the negotiation and conclusion of Trusteeship Agreements could not, by reason of the *status quo* temporarily guaranteed under Article 80, paragraph 1, "give grounds for delay or postponement" if the scope of this provision amounted simply to the expression of an expectation or, at the most, of a wish or an advice. The terms of article 80, paragraph 2, do not favour this interpretation.

The negative character of the phrase is not an argument in favour of the absence of an obligation. The warning given to the mandatory Powers that the *status quo* referred to in the preceding paragraph gives no valid ground for delaying or postponing the agreements which, as will be shown later, are the instrument for the application of the Trusteeship System, is clearly, in my opinion, a direction to those Powers to be ready, at the earliest opportunity, to negotiate with a view to concluding such agreements. What Article 80, paragraph 2, intended to prevent was that a mandatory Power, while invoking on the one hand the disappearance of the League of Nations, should refuse on the other hand to recognize the United Nations or to consider submitting itself to the only régime contemplated in the Charter, namely, the Trusteeship System. What this same provision intended to enact was that the mandatory Power should take appropriate measures for the negotiation of a Trusteeship Agreement.

If, as has already been said, we must endeavour to reconcile the texts rather than to set them in opposition to one another, and attempt to give each one its due by preserving its practical effect within the system as a whole, we are led to the following conclusions.

The wording of Articles 75, 77 and 79 is permissive in the sense that the placing under Trusteeship is contingent upon the conclusion of subsequent agreements, the mandatory Power being free to accept or to reject the terms of a proposed agreement.

This is where the so-called "optional" character of the Trusteeship appears. It is impossible, however, to reconcile these permissive provisions with Article 80, paragraph 2, and with the clear intent of the authors of the Charter to substitute the Trusteeship System for the Mandates System, without admitting that the mandatory Power, while remaining free to reject the particular terms of a proposed agreement, has the legal obligation to be ready to take part in negotiations and to conduct them in good faith with a view to concluding an agreement.

That an obligation so understood may form the valid and practical object of an international undertaking has been clearly recognized by the Permanent Court of International Justice in the following passage in its Advisory Opinion of October 15th, 1931: "The Court is indeed justified in considering that the engagement incumbent on the two Governments in conformity with the Council's Resolution is not only to enter into negotiations, but also to pursue them as far as possible with a view to concluding agreements." The Court added, however: "But an obligation to negotiate does not imply an obligation to reach an agreement¹." It is reasonable to believe that Article 80, paragraph 2, which mentions "the conclusion" in addition to "the negotiation", had no other meaning: the obligation to be ready to negotiate with a view to concluding an agreement.

Nor should we overlook the psychological value of the opening of negotiations, particularly when the object of the negotiations, as is the case here, is only to apply in practice principles forming part of a pre-established international régime. The opening of such negotiations is often a decisive step toward the conclusion of an agreement.

Difficulties of interpretation have arisen in connexion with the word "voluntarily" which appears in Article 77 only in respect of territories in category (c). It seems to me impossible that this provision, which is so clearly in contrast with the absence of any similar indication regarding territories in categories (a) and (b), should have been inserted without any definite purpose and should not correspond in the general framework of the system to a well-defined interest.

The word "voluntarily" has here the meaning of "spontaneously". It defines the unilateral act by which a State, while free from any obligation, decides of its own initiative to place a territory under the Trusteeship System by concluding a subsequent agreement as indicated in Chapter XII. It would be distorting the natural meaning of the word "voluntarily" and depriving it of its signification in the context to treat it as an equivalent of *by agreement*, thus making it a synonym to the terms "by means

¹ Publications of the Permanent Court of International Justice, Series A/B, fasc. No. 42, p. 116.

of Trusteeship Agreements" which appear at the beginning of Article 77, or the terms "a subsequent agreement" in paragraph 2 of the same article. The Trusteeship Agreement is a condition common to the three categories of territories enumerated by Article 77 as territories which may be placed under Trusteeship, whereas, on the contrary, the voluntary decision, that is the spontaneous decision of a State to place under Trusteeship a territory in category (c), is a condition peculiar to the last category. The decision precedes the agreement; it is by no means identified with it.

The term "voluntarily" which thus finds its own place in the context and its practical effect, shows that it is only with regard to territories in category (c) that the conclusion of a Trusteeship Agreement has been contemplated by the Charter as being free from any pre-existing obligation, even in the realm of negotiations. The difference in the wording is easy to explain by taking into consideration the differences between the territories enumerated in Article 77 from the point of view of the international interest which they respectively presented at the time of the drafting of the Charter: those in category (a) were already subject to an international régime, and moreover, were clearly known and defined; those in category (b) were detached from enemy States by the common victory of the Allied Powers. For various reasons they both possessed an international element, which marked them out as being *prima facie* the necessary objects of regulation by international agreement. The position of territories in category (c) was quite different in this respect. Complete freedom of decision was left to the States responsible for their administration to place them "voluntarily" under the system and consequently to consent to negotiations to that effect, or to refuse to take part in such negotiations.

The Charter has created an international system which would never have had more than theoretical existence if the mandatory Powers had considered themselves under no obligation to negotiate agreements to convert their Mandates into Trusteeship Agreements. In fact, apart from instances of accession to independence and from the case of Palestine, all mandatory Powers other than the Union of South Africa have consented to this conversion. The obligation to be ready to negotiate with a view to concluding an agreement represented the minimum of international co-operation without which the entire régime contemplated and regulated by the Charter would have been frustrated. In this connexion one must bear in mind that in the interpretation of a great international constitutional instrument, like the United Nations Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties, do not suffice. Under Article 76 of the Charter, "the basic objectives of the Trusteeship System" conform to "the purposes of the United Nations laid down in Article 1 of the present Charter". In

recognizing its obligation to be ready to negotiate with a view to concluding a Trusteeship Agreement, a mandatory Power, without thereby jeopardizing its freedom to accept or refuse the terms of such an Agreement, co-operates in a particularly important field in the attainment of the highest objectives of the United Nations.

(Signed) CH. DE VISSCHER.