SEPARATE OPINION BY SIR ARNOLD McNAIR

I concur in the Replies given by the majority of the Court to the General Question and to Questions (*b*) and (*c*). As to Question (*a*), I regret that I differ as to the obligation to make reports and as to the transfer of the administrative supervision of the Council of the League of Nations (including its Rules of Procedure in respect of Petitions) to the United Nations. As my approach to the main problems differs somewhat from that of the majority, I shall give my own reasons for answering each question, except in regard to Question (*b*).

General Question, and Question (a)

The crucial problems raised by Question (*a*) submitted to the Court are: What is the effect of the dissolution of the League of Nations in April, 1946, upon the Mandate for South-West Africa, and which, if any, of the obligations arising from it are still binding upon the Union of South Africa (which I shall also refer to as "the Union").

The solution submitted by Counsel for the Union Government for the first of these problems can be stated very simply: the Mandate is based on the analogy of the contract of mandate in private law, the League being the Mandator and the Union the Mandatory; the relationship cannot subsist without a Mandator at one end and a Mandatory at the other; "as between the League and the Union Government, the Mandate therefore came to an end, and that means that, as from the dissolution of the League, there has been no Mandate"; "the Mandates lapsed and the Covenant itself ceased to be a legally valid document"; and "the dissolution of the League had the effect of extinguishing all international legal rights and obligations under the Mandates System". This conclusion left it to be inferred that the Union Government would thereupon be free to regulate the future status of South-West Africa as a domestic matter.

For three separate reasons I have formed the opinion that a Mandate is a more durable and a more complex institution than this solution suggests, and I cannot accept it. My reasons rest on:

1. The legal nature of the Mandates System.

2. The objective character of Article 22 of the Covenant of the League of Nations.

3. The terms of the Mandate for South-West Africa and their legal nature.

* * *

1. *The legal nature of the Mandates System.* The principal documents responsible for the creation of the Mandates System are Article 22 of the Covenant of the League of Nations and the several Mandates confirmed in pursuance of it by the Council of the League. The main rule of policy proclaimed by Article 22 of the Covenant is that to certain territories "which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant". This policy was applied to certain colonies and territories, including South-West Africa, "which, as a consequence of the [then] late war have ceased to be under the sovereignty of the States which formerly governed them". The earliest document (or at any rate one of the earliest documents) to contain an exposition of this new policy is the Memorandum by General Smuts, called "The League of Nations: A Practical Suggestion", which will be found in Volume II, pages 23-60, of Hunter Miller's book, "The Drafting of the Covenant". This Memorandum, so far as the Mandates System is concerned, deals with policy and principles rather than with legal machinery. Its author held the view that the "authority, control or administration" of these dependent territories should be vested in the League, but that, as "joint international administration in so far as it has been applied to territories or peoples, has been found wanting wherever it has been tried", it would be preferable that the League, instead of exercising these powers itself, should delegate them to a "mandatary State". Beyond that the Memorandum does not discuss the legal nature of the relations between the League and the Mandatory. From page 508 of Volume I of the same book, it seems probable that, in the course of the preparatory work for the treaties of peace, the critical resolution regarding the Mandates System was presented and adopted in English; in the French text there appear the words "mandat", "mandataire" and "tutelle".

What is the duty of an international tribunal when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and institutions of private law? To what extent is it useful or necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38 (1) (*c*) of the Statute of the Court bears witness that this process is still active, and it will be noted that this article authorizes the Court to "apply .... (*c*) the general principles of law recognized by civilized nations". The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law". In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions. I quote a sentence from a judgment by Chief Justice Innes in the decision of the Supreme Court of South Africa in *Rex* v. *Christian*, South African Law Reports [1924], Appellate Division, 101, 112:

> "Article 22 [of the Covenant] describes the administration of the territories and peoples with which it deals as a tutelage to be exercised by the governing Power as mandatory on behalf of the League. Those terms were probably employed, not in their strict legal sense, but as indicating the policy which the governing authority should pursue. The relationship between the League and the mandatory could not with any legal accuracy be described as that of principal and agent."

Let us then seek to discover the underlying policy and principles of Article 22 and of the Mandates. No technical significance can be attached to the words "sacred trust of civilization", but they are an apt description of the policy of the authors of the Mandates System, and the words "sacred trust" were not used here for the first time in relation to dependent peoples (see Duncan Hall, *Mandates, Dependencies and Trusteeships*, pp. 97-100). Any English lawyer who was instructed to prepare the legal instruments required to give effect to the policy of Article 22 would inevitably be reminded of, and influenced by, the trust of English and American law, though he would soon realize the need of much adaptation for the purposes of the new international institution. Professor Brierly's opinion, stated in the *British Year Book of International Law*, 1929, pages 217-219, that the governing principle of the Mandates

System is to be found in the trust, and his quotation from an article by M. Lepaulle, are here very much in point, and it is worth noting that the historical basis of the legal enforcement of the English trust is that it was something which was binding upon the conscience of the trustee; that is why it was legally enforced. It also seems probable that the conception of the Mandates System owes something to the French *tutelle*.

Nearly every legal system possesses some institution whereby the property (and sometimes the persons) of those who are not *sui juris*, such as a minor or a lunatic, can be entrusted to some responsible person as a trustee or *tuteur* or *curateur*. The Anglo-American trust serves this purpose, and another purpose even more closely akin to the Mandates System, namely, the vesting of property in trustees, and its management by them in order that the public or some class of the public may derive benefit or that some public purpose may be served. The trust has frequently been used to protect the weak and the dependent, in cases where there is "great might on the one side and unmight on the other", and the English courts have for many centuries pursued a vigorous policy in the administration and enforcement of trusts.

There are three general principles which are common to all these institutions:

(*a*) that the control of the trustee, *tuteur* or *curateur* over the property is limited in one way or another; he is not in the position of the normal complete owner, who can do what he likes with his own, because he is precluded from administering the property for his own personal benefit;

(*b*) that the trustee, *tuteur* or *curateur* is under some kind of legal obligation, based on confidence and conscience, to carry out the trust or mission confided to him for the benefit of some other person or for some public purpose;

(*c*) that any attempt by one of these persons to absorb the property entrusted to him into his own patrimony would be illegal and would be prevented by the law.

These are some of the general principles of private law which throw light upon this new institution, and I am convinced that in its future development the law governing the trust is a source from which much can be derived. The importance of the Mandates System is marked by the fact that, after the experience of a quarter of a century, the Charter of the United Nations made provision for an "International Trusteeship System", which was described by a

Resolution of the Assembly of the League of April 18th, 1946, as embodying "principles corresponding to those declared in Article 22 of the Covenant of the League".

Upon sovereignty a very few words will suffice. The Mandates System (and the "corresponding principles" of the International Trusteeship System) is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance ; if and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the case of some of the Mandates, sovereignty will revive and vest in the new State. What matters in considering this new institution is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it. The answer to that question depends on the international agreements creating the system and the rules of law which they attract. Its essence is that the Mandatory acquires only a limited title to the territory entrusted to it, and that the measure of its powers is what is necessary for the purpose of carrying out the Mandate. "The Mandatory's rights, like the trustee's, have their foundation in his obligations ; they are 'tools given to him in order to achieve the work assigned to him' ; he has 'all the tools necessary for such end, but only those'." (See Brierly, referred to above.)

Some practical confirmation of these suggestions of the relevant principles can be obtained from judgments delivered by the Courts of two Mandatories—the Union of South Africa and the Commonwealth of Australia. (As the Reports of these decisions are not available everywhere, I must quote extracts from them.) In *Rex* v. *Christian*, already cited, before the Supreme Court of South Africa, the Honourable J. de Villiers, Judge of Appeal, said :

> "It is true there is no cession of the territory to the Union Government as in the case of other possessions which formerly belonged to Germany. By Article 257 South-West Africa is said to be transferred to the Union Government in its capacity as mandatory. But, as I shall show, by that is meant that the Union Government is bound by the terms of the treaty, as well as in honour, scrupulously to carry out the terms of the Mandate. South-West Africa is transferred to the people of the Union not by way of absolute property, but in the same way as a trustee is in possession of the property of the *cestui que trust* or a guardian of the property of his

ward. The former has the administration and control of the property, but the property has to be administered exclusively in the interests of the latter. The legal terms employed in Article 22—trust, tutelage, mandate—cannot be taken literally as expressing the definite conceptions for which they stand in law. They are to be understood as indicating rather the spirit in which the advanced nation who is honoured with a mandate should administer the territory entrusted to its care and discharge its duties to the inhabitants of the territory, more especially towards the indigenous populations. In how far the legal principles of these analogous municipal institutions should be applied in these international relations I shall not take upon myself to pronounce. But I may be permitted to say that in my opinion the use of the term shows that, in so far as those legal principles are reasonably applicable to these novel institutions, they should loyally be applied. No doubt most difficult questions will arise. In municipal law a principal can, e.g., revoke his authority at his own mere pleasure. Such is the rule. Could this be done in the case of South-West Africa where the Union Government, if there is a principal at all, must be considered as a joint principal together with all the other high contracting parties?" (P. 121.)

And Sir J. W. Wessels, Judge of Appeal, said:

"This leaves us with the mandatory power. Now although the term mandatory power seems to imply that the mandatory acts as the agent of the League of Nations or of the associated powers, yet in fact that is not so. Neither by the Treaty of Versailles nor by the mandate of the League of Nations has the Union of South Africa been appointed as a mere agent. There is no question here of *respondeat superior*...." (P. 136.)

I share this view that the legal character of the Mandates cannot be explained by reference to the private law contract of mandate or agency. The words "Mandate" and "Mandatory" were employed as non-technical terms to denote that the Mandatory was doing something "on behalf of the League", and that that is all that can be extracted from their use. It is primarily from the principles of the trust that help can be obtained on the side of private law.

In *Ffrost* v. *Stevenson* (1937), 58 Commonwealth Law Reports 528, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, Case No. 29, the High Court of Australia, on appeal from the Supreme Court of New South Wales, had to decide, on a matter of extradition, whether or not "the Mandated Territory of New Guinea [also a C Mandate] is a place out of His Majesty's Dominions in which His Majesty has jurisdiction....". The High Court gave an affirmative answer. This decision involved a consider-

ation of the nature of a Mandate and the powers of a Mandatory, and the following extracts from the judgments of Chief Justice Latham and Mr. Justice Evatt are of interest. The former said :

> "The grant of mandates introduced a new principle into international law...." (P. 550.)
>
> "The position of a mandatory in relation to a mandated territory must be regarded as *sui generis*. The Treaty of Peace, read as a whole, avoids cession of territory to the mandatory, and, in the absence of definite evidence to the contrary, it must, I think, be taken that New Guinea has not become part of the dominions of the Crown." (P. 552.)
>
> "The intention of this provision [Article 257 of the Treaty of Peace] must be taken to have been to provide for the transfer of the territory to the mandatory, but only in its capacity as a mandatory. The mandatory, as a kind of international trustee, receives the territory subject to the provisions of the mandate which limit the exercise of the governmental powers of the mandatory. Thus the article quoted, while recognizing that the territory is actually to be transferred to the mandatory, emphasizes the conditions and limitations upon governmental power which constitute the essence of the mandatory system. Thus the title under which the territory is to be held as a mandated territory is different from that under which a territory transferred by simple cession would have been held. The article shows that the intention was to achieve a transfer of a territory without making that territory in the ordinary sense a possession of the mandatory. A territory which is a 'possession' can be ceded by a power to another power so that the latter power will have complete authority in relation to that territory. Such a cession by a mandatory power would be quite inconsistent with the whole conception of a mandate. A mandated territory is not a possession of a power in the ordinary sense." (Pp. 552, 553.)

Mr. Justice Evatt, after referring to a number of British decisions on the status of protectorates, said :

> "It is quite fallacious to infer from the fact that, in pursuance of its international duties under the mandate, the Commonwealth of Australia exercises full and complete jurisdiction over the territory as though it possessed unlimited sovereignty therein, either that the territory (*a*) is a British possession, or (*b*) is within the King's dominions, or (*c*) has ever been assimilated or incorporated within the Commonwealth or its territories...." (P. 581.)
>
> "Therefore, it can be stated that, despite certain differences of opinion as to such questions as sovereignty in relation to the mandated territories, every recognized authority in international law accepts the view that the Mandated Territory of New Guinea is not part of the King's dominions. Over and over again this fact

has been recognized by the leading jurists of Europe including many who have closely analyzed such matters in relation to the organization and administration of the League of Nations." (P. 582.)

He then adopted Professor Brierly's view, referred to above, as to the governing principle of the Mandates System.

Reference should also be made to Mr. Justice Evatt's judgment in *Jolley* v. *Mainka* (1933), 49 Commonwealth Law Reports 242, at pages 264-292, *Annual Digest, 1933-1934*, Case No. 17, relating to the same Mandated Territory.

* * *

2. *The objective character of Article 22 of the Covenant of the League of Nations*

From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international régime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence. This power is used when some public interest is involved, and its exercise often occurs in the course of the peace settlement at the end of a great war. In 1920 the Council of the League had to deal with a dispute between Finland and Sweden, which, *inter alia*, involved an examination of the existing condition of a Convention dated March 30, 1856, between France and Great Britain on the one hand and Russia on the other, whereby Russia, in compliance with the desire of the other two States, declared "that the Aaland Islands shall not be fortified, and that no military or naval base shall be maintained or created there". (This Convention was attached to and became an integral part of the General Treaty of Peace of the same date, made between seven States, which brought the Crimean War to an end.) Sweden claimed that this status of demilitarization was still in force in 1920 in spite of many intervening events, and that she, though not a party to the Convention or Peace Treaty of 1856, was entitled to the benefit of it; her claim was based on the allegation of an international servitude. As the Permanent Court of International Justice had not then come into existence, the Council of the League set up a Commission of Jurists, Professor F. Larnaude (President), Professor A. Struycken and Professor Max Huber, and referred certain legal questions to them. They received written statements and heard oral arguments on behalf of Finland and Sweden. The Jurists rejected the argument based on an alleged servitude and reported that the provisions of the Convention and Treaty of 1856 for demilitarization were still in force.

> "These provisions [they said] were laid down in European interests. They constituted a special international status, relating to military considerations, for the Aaland Islands. It follows that until these provisions are duly replaced by others, every State interested [including Sweden which was not a party] has the right to insist upon compliance with them. It also follows that any State in possession of the Islands must conform to the obligations binding upon it, arising out of the system of demilitarization established by these provisions."

The Report [1] contains many expressions which illuminate this conclusion, e.g.,

> "The Powers have, on many occasions since 1815, and especially at the conclusion of peace treaties, tried to create true objective law, a real political status the effects of which are felt outside the immediate circle of contracting parties",

and again, "the character of a settlement regulating European interests", "European law", and "the objective nature of the settlement".

It may seem a far cry from the Aaland Islands to South-West Africa, but reference to this case is demanded by the high standing of the members of the Commission and by the relevance of their reasoning to the present problems. I may also refer to the statement by the Permanent Court in the SS. *Wimbledon* case (Series A. No. 1, p. 22) that as a result of Article 380 of the Treaty of Versailles of 1919 the Kiel Canal "has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world"—which was referred to as "its new régime".

The Mandates System seems to me to be an *a fortiori* case. The occasion was the end of a world war. The parties to the treaties of peace incorporating the Covenant of the League and establishing the system numbered thirty. The public interest extended far beyond Europe. Article 22 proclaimed "the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in the Covenant". A large part of the civilized world concurred in opening a new chapter in the life of between fifteen and twenty millions of people, and this article was the instrument adopted to give effect to their desire. In my opinion, the new régime established in pursuance of this "principle" has more than a purely contractual basis, and the territories subjected to it are impressed with a special legal status, designed to last

[1] L. N. Off. Jo. Oct. 1920, Spec. Sup. No. 3.

until modified in the manner indicated by Article 22. The dissolution of the League has produced certain difficulties, but, as I shall explain, they are mechanical difficulties, and the policy and principles of the new institution have survived the impact of the events of 1939 to 1946, and have indeed been reincarnated by the Charter under the name of the "International Trusteeship System", with a new lease of life

3. *The terms of the Mandate for South-West Africa and their legal nature*

What obligations and other legal effects were produced by the Mandate for South-West Africa? From the first paragraph of Article 22 of the Covenant it appears that German sovereignty had already disappeared before the Mandate was granted on December 17, 1920. Nothing more is said about sovereignty. The penultimate paragraph tells us that the Council of the League will define "the degree of authority, control or administration to be exercised by the Mandatory": this is not the language of sovereignty and indicates some new relationship between a State and the territory for which it is to become responsible—a title more limited in character than the normal title of the sovereign State, a title which is possessory rather than proprietary.

The Mandate in this case is a document dated December 17, 1920, whereby, after a preamble containing important recitals, the Council of the League: "Confirming the said Mandate, defines its terms as follows" in seven articles. Article 1 says that: "The territory over which a mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa .... comprises the territory which formerly constituted the German Protectorate of South-West Africa." Article 2 provides that: "The Mandatory shall have full power of administration and legislation over the Territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require. The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants subject to the present Mandate." This language does not make the Territory a part of the territory of the Union of South Africa, and negatives any such inference. Article 3 relates to the slave trade, forced labour, the traffic in arms and ammunition, and the supply of intoxicating spirits and beverages to the natives. Article 4 prohibits the military training of the natives "otherwise than for purposes of internal police and the local

defence of the territory", the establishment of military or naval bases and the erection of fortifications. Article 5 provides for "freedom of conscience and the free exercise of all forms of worship" and for the admission, travel and residence of missionaries who are nationals of any State Member of the League of Nations. Article 6 provides that :

> "The mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the Territory and indicating the measures taken to carry out the obligations assumed under Artcles 2, 3, 4 and 5."

Article 7 provides that :

> "The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.
>
> The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations...."

These obligations possess two distinct characters. The provisions of the Mandate are in part contractual and in part "dispositive" (upon which term see Westlake, *International Law* (2nd edition), ii, pp. 60, 294). In English terminology, it is both a "contract" and a "conveyance", that is to say, a document which transfers or creates rights connected with property or possession. In addition to the personal rights and obligations referred to above, it also created certain "real" rights and obligations. Coupled with the effect of the assent of the Principal Allied and Associated Powers, in whose favour Germany renounced her rights and titles over South-West Africa and who are expressly described in the preamble of the Mandate as the proposers of the Mandate, the Mandate transferred to the Mandatory, or created and recognized in the hands of the Mandatory, certain rights of possession and government (administrative and legislative) which are valid *in rem—erga omnes*, that is, against the whole world, or at any rate against every State which was a Member of the League or in any other way recognized the Mandate ; moreover, there are certain obligations binding every State that is responsible for the control of territory and available to other States.

In short, the Mandate created a status for South-West Africa. This fact is important in assessing the effect of the dissolution of the League. This status—valid *in rem*—supplies the element of

permanence which would enable the legal condition of the Territory to survive the disappearance of the League, even if there were no surviving personal obligations between the Union and other former Members of the League. "Real" rights created by an international agreement have a greater degree of permanence than personal rights, because these rights acquire an objective existence which is more resistant than are personal rights to the dislocating effects of international events. The importance of this point is that it makes it unnecessary to determine the respective roles of the Principal Allied and Associated Powers and the Council of the League in the creation of the Mandate or to consider whether those Powers became *functi officio* after the allocation and confirmation of the Mandate, as was submitted by counsel for the Union Government, or not. As Chief Justice Marshall said in *Chirac* v. *Chirac* (1817), 2 Wheaton 259, 277 (cited in Moore, *Digest of International Law*, Section 780), speaking of a treaty which had expired :

> "A right once vested does not require, for its preservation, the continued existence of the power by which it was acquired. If a treaty, or any other law, has performed its office by giving a right, the expiration of the treaty or law can not extinguish that right."

* * *

I now turn to consider the effect of the dissolution of the League.

The dissolution of the League on April 19, 1946, did not automatically terminate the Mandates. Each Mandate has to be considered separately to ascertain the date and the mode of its termination. Take the case of Palestine. It is instructive to note that on November 29, 1947, the General Assembly of the United Nations adopted a resolution approving a plan of partition of Palestine, which was firmly based on the view that the Palestine Mandate still continued, as is evident from Articles 1 and 2 of Part A and Article 12 of Part B of the Plan. Again, in the Peace Treaty with Italy of February 10, 1947, it was considered necessary (Article 40) that Italy should renounce all her rights under the Mandates System and in respect of any mandated territory.

The Mandate for South-West Africa was never formally terminated, and I can find no events which can be said to have brought about its termination by implication. Paragraph 3 of the Resolution of the Assembly of the League regarding the Mandates, dated April 18, 1946, does not say that the Mandates come to an end but that, "on the termination of the League's existence, its functions with respect to the Mandated Territories will come to an end".

Which then of the obligations and other legal effects resulting from the Mandate remain to-day? The Mandatory owed to the League and to its Members a general obligation to carry out the terms of the Mandate and also certain specific obligations, such as the obligation of Article 6 to make an annual report to the Council of the League. The obligations owed to the League itself have come to an end. The obligations owed to former Members of the League, at any rate, those who were Members at the date of its dissolution, subsist, except in so far as their performance involves the actual co-operation of the League, which is now impossible. (I shall deal with Article 6 and the first paragraph of Article 7 later.) Moreover, the international status created for South-West Africa, namely that of a territory governed by a State in pursuance of a limited title as defined in a Mandate, subsists.

Although there is no longer any League to supervise the exercise of the Mandate, it would be an error to think that there is no control over the Mandatory. Every State which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate. The Mandate provides two kinds of machinery for its supervision—*judicial*, by means of the right of any Member of the League under Article 7 to bring the Mandatory compulsorily before the Permanent Court, and *administrative*, by means of annual reports and their examination by the Permanent Mandates Commission of the League.

The *judicial supervision* has been expressly preserved by means of Article 37 of the Statute of the International Court of Justice adopted in 1945:

> "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

This article effected a succession by the International Court to the compulsory jurisdiction conferred upon the Permanent Court by Article 7 of the Mandate; for there can be no doubt that the Mandate, which embodies international obligations, belongs to the category of treaty or convention; in the judgme t of the Permanent Court in the *Mavrommatis Palestine Concessions* (*Jurisdiction*) case, Series A, No. 2, p. 35, the Palestine Mandate was referred to as an "international agreement"; and I have endeavoured to show that the agreement between the Mandatory and other Members of the League embodied in the Mandate is still "in force". The expression "Member of the League of Nations"

is descriptive, in my opinion, not conditional, and does not mean "so long as the League exists and they are Members of it" ; their interest in the performance of the obligations of the Mandate did not accrue to them merely from membership of the League, as an examination of the content of the Mandate makes clear. Moreover, the Statute of the International Court empowers it to call from the parties for "any document" or "any explanations" (Article 49) ; and to entrust any "individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry...." (Article 50). Article 94 of the Charter empowers the Security Council of the United Nations to "make recommendations or decide upon measures to be taken to give effect to the judgment" of the Court, in the event of a party to a case failing to carry out a judgment of the Court. In addition, the General Assembly or the Security Council of the United Nations may request the Court to give an advisory opinion on any legal question (Article 96 of the Charter).

On the other hand, the *administrative supervision* by the Council of the League, as advised by the Permanent Mandates Commission, has lapsed, including the obligation imposed by Article 22 of the Covenant and Article 6 of the Mandate to make, in the words of the Mandate, "to the Council of the League of Nations an annual report to the satisfaction of the Council....". This supervision has lapsed because the League and its Council and Permanent Mandates Commission—the organs which were designated (i) to receive the reports, (ii) to be satisfied with them and (iii) to examine and advise upon them—no longer exist, so that it has become impossible to perform this obligation. (When a particular Mandate was under discussion by the Council, the Mandatory, if not a Member of the Council, was invited to sit with the Council, with full power of speaking and voting.)

But it was contended on several grounds in the statements submitted by certain governments to the Court, that the Union of South Africa is nevertheless under an obligation to accept the administrative supervision of the Mandate by the United Nations, and in particular to send annual reports to that Organization.

The first contention was that there had been an automatic succession by the United Nations to the rights and functions of the Council of the League in this respect ; but this is pure inference, as the Charter contains no provision for a succession such as Article 37 of the Statute of the International Court operates in the case of the compulsory jurisdiction of the Permanent Court in regard to the Mandates. The succession of the United Nations to the administrative functions of the League of Nations in regard to the Mandates could have been expressly preserved and vested in the United Nations in a similar manner, but this was not done. At the San Francisco Conference in May, 1945, when the Charter

was being drafted, the Union Government circulated to the delegations present a statement intimating that in due course it would claim "that the Mandate should be terminated and that the Territory should be incorporated as part of the Union of South Africa" (printed in United Nations General Assembly Official Records, 1st session, 2nd Part, Fourth Committee, Part I, p. 201). But either it was hoped that in spite of this intimation the Union Government would voluntarily elect to convert its Mandate into a Trusteeship Agreement under Chapters XII and XIII of the Charter, or the question of preserving the administrative supervision of the Mandate was overlooked.

A second contention was based on the expression occurring in Article 80, paragraph 1, of the Charter that "nothing in this Chapter [XII] shall be construed in or of itself to alter in any manner the rights whatsoever of any States or peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties". But the cause of the lapse of the supervision of the League and of Article 6 of the Mandate is not anything contained in Chapter XII of the Charter but is the dissolution of the League, so that it is difficult to see the relevance of this article.

A third contention was based on statements made on behalf of the Union Government in letters and in the speeches of its delegates attending meetings of the organs of the United Nations and generally upon the conduct of that Government since the dissolution of the League. An example of these passages—one which has received a considerable degree of prominence—occurs in the following extract from a speech by Mr. Leif Egeland, delegate of the Union Government, at a meeting of the Assembly of the League on April 9, 1946:

> "... it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South-West Africa a status under which it would be internationally recognized as an integral part of the Union. As the Assembly will know, it is already administered under the terms of the Mandate as an integral part of the Union. In the meantime, the Union will continue to administer the Territory scrupulously, in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.
>
> The disappearance of those organs of the League concerned with the supervision of Mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete com-

pliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory."

There are also many statements to the effect that the Union Government will continue to administer the Territory "in the spirit of the Mandate". These statements are in the aggregate contradictory and inconsistent; and I do not find in them adequate evidence that the Union Government has either assented to an implied succession by the United Nations to the administrative supervision exercised by the League up to the outbreak of the war in 1939, or has entered into a new obligation towards the United Nations to revive the pre-war system of supervision.

A fourth contention is based on a Resolution on the Mandates adopted by the Assembly of the League on April 18, 1946, by virtue of which, the Assembly

"3. Recognizes that, on the termination of the League's existence, its functions with respect to the Mandated Territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions of the Members of the League now administering Territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective Mandatory Powers."

By this Resolution the Assembly recognized that the functions of the League had come to an end; but it did not purport to transfer them, with the consent of all States interested therein, to the United Nations. I do not see how this Resolution can be construed as having created a legal obligation by the Union to make annual reports to the United Nations and to transfer to that Organization the pre-war supervision of its Mandate by the League. At the most it could impose an obligation to perform those obligations of the Mandate—and there are many—which did not involve the activity of the League.

In these circumstances, I cannot find any legal ground on which the Court would be justified in replacing the Council of the League by the United Nations for the purposes of exercising the administrative supervision of the Mandate and the receipt and examin-

ation of reports. It would amount to imposing a new obligation upon the Union Government and would be a piece of judicial legislation. In saying this, I do not overlook the competence of the General Assembly of the United Nations, under Article 10 of the Charter, to discuss the Mandate for South-West Africa and to make recommendations concerning it, but that competence depends not upon any theory of implied succession but upon the provisions of the Charter.

For these reasons I am of the opinion that the continuing international obligations of the Union of South Africa under the Mandate for South-West Africa do not include the obligation to accept the administrative supervision of the United Nations and to render annual reports to that Organization.

* * *

Question (b)

I concur in the Opinion of the majority of the Court with respect to this question.

* * *

Question (c)

There remains to be considered the effect of the dissolution of the League upon the first paragraph of Article 7 of the Mandate, whereby "the consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate" —a provision which appears in all the Mandates. The effect of this paragraph is that thereby the Members of the League, as the States interested in the Mandate, empowered the Council of the League on their behalf to consent to any modification of the Mandate which the Council might consider to be appropriate.

The party who was expected to bring about any modifications which the passage of years might show to be necessary was the Mandatory but, as I have endeavoured to show in answering Question (*a*), the Mandatory's title is limited and it has no power, acting alone, to modify the international status of the Territory, either by incorporating it into its own territory or otherwise.

What then is the effect of the disappearance of the League and the ensuing impossibility of obtaining the consent of its Council? In my opinion, the effect is that the first paragraph of Article 7 of the Mandate has now lapsed. But this event in no way alters the quality or amount of the Mandatory's title or enlarges its power to modify the terms of the Mandate, because the international obligations affecting the Territory (except those which, as I have stated, have already lapsed) and the international status of the Territory continue to exist. Moreover, the Charter provides one

method by which the international status of the Territory can lawfully be modified by the Mandatory, namely, by negotiating with the United Nations and placing it under a trusteeship agreement, as described in Chapters XII and XIII of the Charter.

On the last day of the existence of the League, April 18, 1946, the Assembly adopted a Resolution on the subject of Mandates of which paragraphs 3 and 4 have been quoted above on page 112.

My reply to Question (*c*) is that the effect of this Resolution is that the League and those States which were Members of it at the date of its dissolution consented to any arrangements for the modification of the terms of the Mandate that might be agreed between the United Nations and the Union Government, and that competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations.

(*Signed*) ARNOLD D. MCNAIR.