SEPARATE OPINION OF JUDGE BUSTAMANTE

[Translation]

Although I am in agreement with the reasoning and conclusions of the Judgment of the majority of the Court, I am availing myself of the right granted by Article 57 of the Statute of the International Court of Justice to develop in a separate opinion certain additional arguments based on my full personal interpretation of the international Mandates System in the light of the historical circumstances of its creation. I believe, moreover, that this process makes it possible to establish more clearly the responsibility of a Judge in the totality of a decision of the Court.

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The present proceedings were instituted by two separate Applications filed by the Agents of the Governments of Liberia and Ethiopia against the Republic of South Africa in its capacity as Mandatory for the territory of South West Africa, concerning various facts and situations related to the exercise of the Mandate. By a decision of the Court, the proceedings under the two Applications were joined. The Agent of the Republic of South Africa, without going to the merits of the claims, submitted four preliminary objections, the first two denying the jurisdiction of the Court, and the other two maintaining that the Applications are inadmissible owing to lack of fulfilment of certain conditions. The oral proceedings being over, the Court has to decide on the objections.

Since the bases of the objections are connected with the interpretation of the Mandate agreement for South West Africa, it seems to me necessary to examine first of all what, in the light of international law, are the nature and characteristics of the legal system of Mandates established by the Covenant of the League of Nations in 1919. The Mandate for South West Africa is but one example of the application of this system.

The creation of the international Mandates

At the end of the First World War, one of the problems to be dealt with was the determination of the fate of the colonial territories which, as a result of the war, had ceased to belong to the defeated States and were inhabited by peoples not yet able to stand by themselves. Under Article 119 of the Treaty of Versailles—28 June 1919—Germany renounced in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions, which they had already militarily occupied. These Powers did not themselves directly take over sovereignty over these possessions,

but, on 6 May 1919, shortly before the signature of the Treaty of Peace, agreed to allot them, *as Mandates*, to certain allied States which had occupied them[1]. When the time came for the signature of the Peace Treaty, those Powers gave substance to their decision to confirm the Mandates which had been allotted, but decided at the same time to embody them in a new legal system placed under the authority and guardianship of the League of Nations. This was the origin of Article 22 of the Covenant.

This historical background shows that the idea of the Mandate appeared for the first time outside the ambit of the League of Nations, and even before its foundation. At the beginning, it was confined to a direct allocation of the territories to the Mandatory by the Powers, but the legal regime governing this allocation had not yet been defined. It was only at the time of the signature of the Covenant that the Powers operated the real transfer of the Mandates, as Mandators, to the League of Nations and—in collaboration with the other founder Members of that organization—embodied in the text of Article 22 the basic concepts and rules of the international Mandates, which might be summed up as follows:

(a) recognition of certain fundamental rights as belonging to the inhabitants of the underdeveloped territories;

(b) establishment of a system of tutelage for such peoples under an advanced nation acting in the capacity of Mandatory and "on behalf of the League of Nations";

(c) attribution to States Members of the League of the « sacred trust of civilization », namely, the promotion of the well-being and development of the peoples concerned and the safeguard of their rights.

The sociological interpretation of the international Mandates

The events referred to above were indeed but the expression of the influence of a collective state of mind in the post-war world. At that time the general anti-colonialist conscience, which had been at work for some time, became particularly active and the preservation and protection of human rights appeared more and more incompatible with the survival of conquest and the maintenance of colonial regimes. President Wilson, with his "14 Points", was the leader of this movement at the Peace Conference called by the victorious Powers to draft the Peace Treaty. He proclaimed the "nationalities principle" which was used in the last resort by the Conference as the criterion for its decisions. One of the main assertions of this principle was the right of every underdeveloped people

[1] Communiqué of the Supreme Council of the Peace Conference, dated 6 May 1919. A. Millot: *Les Mandats internationaux*, p. 36, É. Larose, Paris, 1924. Official Journal of the League of Nations, June 1920.

to fulfil its own destiny and aspire to political independence under the protection and with the respect and assistance of the international community [1].

The Allied and Associated Powers, in their wisdom, endorsed these concepts in the Covenant of the League of Nations. The League, whose assigned purposes were of universal scope, is generally agreed by legal writers to have acquired the significance of being the first organized expression of the international community. Indeed, one has only to read the introduction and Articles 23, 24 and 25 of the Covenant, together with the Preamble of Part XIII of the Treaty of Versailles concerning the International Labour Organisation, to realize that the creation of the League of Nations as a body designed to give organic structure and a general legal framework to the nations of the world as a whole was inspired by a new humane approach. This was a positive realization of ideas already perceived by Vitoria and Grotius in their thoughts concerning a joint community of purpose inspiring the coexistence of nations in a framework of law. In respect of the underdeveloped peoples, Article 22 of the Covenant reflects the new ideological requirements of the world in its statement of the two characteristic features of international tutelage: the well-being and development of the people under tutelage and the joint co-operation of the community of States in the achievement of these purposes.

In my view, consideration of the sociological factors which operated from the beginning of the 1919 system of tutelage must be of prime importance for the interpretation of the nature and significance of that system. Since the law is a living phenomenon which reflects the collective demands and needs of each stage of history, and the application of which is designed to achieve a social purpose, it is clear that the social developments of the period constitute one of the outstanding sources for the interpretation of law, alongside examination of the preparatory work of the technicians and research into judicial precedents. The law is not just a mental abstraction, nor the result of repeated applications of judicial decisions, but is first and foremost a rule of conduct which has its roots in the deepest layers of society.

It is in the light of this criterion that the constituent elements and distinguishing features of the system of international mandates must, in my view, be studied.

The elements of the international Mandate

Three kinds of element must be regarded as making up the system of international mandates: the operative *personal* and *real* elements, and the *purposes* on the institution.

[1] A. Millot, *op. cit.*, pp. 5 ff.

The *purposes* have already been mentioned in the foregoing paragraph: they are the well-being and development of the mandated peoples, so as to lead them on to higher stages of civilization and to political independence. These purposes are sought to be obtained through a complex legal system, which has fairly close similarities—in the views of writers—with the legal concepts of guardianship, trust and mandate in private law, and with the protectorate regime in public law. It seems to me that, without exaggerating these analogies, the rules governing other similar institutions should be adapted to international mandates to the extent that is reasonable, and that the sovereign nature of States permits.

In an objective sense the achievement of the purposes of the Mandate is entrusted, as a fiduciary attribution of responsibility, to an advanced nation in the capacity of Mandatory. The extent of the Mandate differs according to the degree of development of the people under tutelage, and a number of other circumstances (A, B, and C Mandates), but in none of those categories does the Mandatory acquire sovereignty over the mandated people (Art. 22, paras. 3 to 6).

As a *real* element of the system, mention must be made of the physical territory inhabited by the people under mandate. But it must be noted that this territory is inseparable from the population and constitutes an instrument to be used in its service. The territory is handed over to the Mandatory only temporarily for administrative purposes, and in no category of mandate can this be taken to signify a transfer of sovereignty.

Among the *personal* elements of an international mandate mention must, in my view, first be made of the populations under mandate; secondly, of the League of Nations and the States of which it is made up; and thirdly, the Mandatory State.

I do not here mention the Principal Allied and Associated Powers which, before the foundation of the League of Nations, had directly allocated the colonial possessions acquired as a result of the war to certain States as Mandatories. This allocation, which clearly involved legal acts, in reality represented a stage prior to the operation of the true international system created by the Covenant. The League of Nations found the appointment of the Mandatories and the handing over of the ex-colonial territories already accomplished. It received this heritage from the Powers and, on that basis, began its functions as an international tutelary institution.

The history of this preparatory period is quite conclusive.

The first step by the Council of the League of Nations was—in accordance with the advice of the Belgian Representative, M. Hymans, expressed in a report adopted by the Council on 5 August 1920—to request the Principal Allied and Associated Powers:

(*a*) to name the States to which they had decided to allocate the Mandates provided for in Article 22 of the Covenant;

(b) to inform it as to the frontiers of the territories to come under those Mandates;

(c) to communicate to it the terms and the conditions of the Mandates that they proposed should be adopted by the Council following the prescriptions of Article 22.

According to the Hymans report, when the Powers had replied to those questions the Council would take cognizance of the Mandatory Power appointed and would examine the draft Mandates communicated to it, in order to ascertain that they conformed to the prescriptions of Article 22 of the Covenant; it would then notify each State appointed as Mandatory that it was invested with the Mandate [1].

It was in connection with this approach that the Powers informed the Council of the allocation of the Mandates to the countries which they had already appointed as Mandatories on 6 May 1919, and also sent it the drafts containing the terms and conditions of each Mandate. These drafts included that which the Government of Great Britain had directly agreed upon with the Government of the Union of South Africa for the Mandate for South West Africa. (This draft is known as the "Balfour Draft" [2].) The Council approved it with some non-essential changes [3], which were never the subject of reservations or complaints by either Great Britain or the Union of South Africa.

These details have to be mentioned to bring out the fact that the "Mandate Declaration" for South West Africa made by the Council of the League of Nations on 17 December 1920—at the same time as several other similar declarations—was in origin a direct bilateral convention, including the compromissory clause in Article 7, between Great Britain and the Union of South Africa. This convention was confirmed by the Council in accordance with Article 22, paragraphs 2 and 8, of the Covenant of the League of Nations.

After these events in the initial period of activity of the Council, the intervention of the Allied Powers as such, at least as far as appearances are concerned, vanished from the legal and political setting in which the new Mandates system was to operate. Those Powers continued, as Members of the League of Nations, to take part in debates in the Council and the Assembly, but any individual activity by them as Mandators or virtual sovereigns of the Man-

[1] A. Millot, *op. cit.*, pp. 36 and 55.

[2] Photostat copy distributed to Judges of the Court by the Registry in October 1962, containing the document received from the Secretariat of the United Nations in Geneva entitled "Mandate for German South West Africa—Submitted for Approval (9596)".

[3] A. Millot, *op. cit.*, pp. 61.

dated territories disappeared. Article 22 of the Covenant does not mention whether the Powers were to preserve for the future the power to appoint Mandatories where necessary, or whether that power was to be conferred on the League of Nations through the Council. I would personally opt for the latter presumption since, in my view, the intention of the Powers was to renounce finally any rights to the former colonies. Moreover, the question was no longer of any importance from the time of the promulgation of the Charter of the United Nations, Article 81 of which confers on the Organization the right to make such appointments.

The populations under Mandate are in my view an essential element of the system, because Article 22 of the Covenant recognized them as having various rights, such as personal freedom (prohibition of slavery), freedom of conscience and religion, equitable treatment by the Mandatory, and access to education, economic development and political independence (self-determination). They were thus recognized as having the capacity of legal persons, and this is why in the Mandate agreements those populations are, as I believe, parties possessed of a direct legal interest, although their limited capacity requires that they should have a representative or guardian.

The tutelary function of the League of Nations, of which the Council was the organ to define and supervise the conditions of the Mandate, derives from the provisions of Article 22, particularly paragraphs 1, 2, 7, 8 and 9.

The Mandatory exercises its function *on behalf of* or as delegated by the League of Nations (Article 22, paragraph 2). While, through the Council, it is for the League to "define" the degree of authority, control or administration to be exercised by the Mandatory (Article 22, paragraph 8), the latter gives its consent and accepts or refuses the function (Article 22, paragraph 2). Therefore one of the features of an international Mandate is that the Mandatory performs its function completely willingly.

In my view there is no valid reason for disregarding the applicability of the legal principles governing certain private law institutions in the field of international law. During the elaboration of legal doctrine recourse has sometimes been had—and this is well known—to municipal legal sources to establish and shape, on the principle of analogy, new systems to regulate the legal relationships between peoples. One such case is that of international tutelage, where the striking analogy with municipal guardianship can be seen in Article 22 of the Covenant of the League of Nations and in Chapters XI-XIII of the Charter of the United Nations. If that is true, I cannot see any reason for not recognizing the populations under international Mandate as having the status of legal persons and for not applying to them the principle of the necessity of their legal representation by "third parties" since these

peoples have the rights recognized by the Covenant together with a certain capacity, although a diminished one, as in the case of wards under municipal law, and having regard to the fact that an organized international power (the League of Nations), personifying the international community, takes over, in accordance with the Covenant itself, the tutelage and protection of the populations concerned. The function assigned by the Covenant to the League of Nations, as a clearly characterized "tutelary authority" for such territories, comes particularly clearly out of the text of paragraph 2 of Article 22, according to which the Mandatory is required to exercise its functions "*on behalf of* the League".

It seems to me that this point is of prime importance for the decision in this case because, starting from the recognition of the direct legal interest which the populations under tutelage possess in their mandate regime and having regard to their capacity as legal persons—for whom the League of Nations is the tutelary authority —many legal consequences flow therefrom. In the first place, the populations under Mandate are in fact parties to the Mandate agreements and represented by the League of Nations. Secondly, the Mandatory's obligation to submit to the supervision of the tutelary authority and account for the exercise of the Mandate is obvious. Finally, from this concept it follows that all the Members of the Organization are jointly and severally responsible for the fulfilment of the "sacred trust" and for watching over the populations whose destiny has been put under their aegis. Evidence of this joint and several responsibility is the fact that paragraph 2 of Article 22 of the Covenant enables the capacity of Mandatory to be conferred on any Member of the League whatever, which means that all must be prepared to accept such a mission. Moreover, paragraph 4 of the same Article stipulates that the wishes of the communities formerly belonging to the Turkish Empire must be heard in the selection of the Mandatory from among the advanced nations. This link of responsibility between all the States Members and the underdeveloped countries is the natural effect of the "sacred trust" prescribed by the Covenant. In the light of these inferences it cannot be a matter for surprise if Article 7 of the Mandate for South West Africa grants States Members the right to apply the compromissory clause with regard to the Mandatory. These States are not "third parties" outside the Mandate but jointly and severally responsible associates of the tutelary organization entrusted with ensuring the proper application of the Mandate.

For these same reasons there can be no question, in my view, of qualifying as mere "humanitarian" or "moral" recommendations the provisions of the Covenant of the League of Nations and of the Charter of the United Nations in which the "sacred trust" of the States Members is described and established in respect of the populations of the Mandated or Trusteeship territories. This approach unjustifiably reduces the scope for the operation and application

of the law, and confines within an ambit of mere equitable choice what in fact are clearly characterized rights pregnant with social implications. The "sacred trust" relates not only to duties of a moral order but also to legal obligations correlative with the rights recognized as belonging to the inhabitants of those territories by Articles 22 of the Covenant and 76 of the Charter. By these provisions international law claimed for such peoples the quality of human and legal persons. This is the same process of legal advance under which the abolition of slavery was first proclaimed and which then led to the promulgation of the Declaration of Human Rights [1]. By an interesting coincidence *all* the rights set forth in Articles 22 and 76 for the benefit of the under-developed populations are embodied—as well as many others—in this Declaration.

Characteristic features of the international Mandate

From all of the foregoing, it may be inferred that the Mandate System instituted by the Covenant of the League of Nations has the following characteristic features:

1. The Mandate is a complex institution which—at base—has similarities with other private and public law concepts but which—in substance—constitutes a form of tutelage in which certain ex-colonial populations, having regard to their partial incapacity, are the subject of protection by the civilized States assembled in a body—the League of Nations—which in fact represents the international community.

2. The Mandate, in respect of its external forms and general aspect, is a legal institution incorporated in international legislation (Article 22 of the Covenant of the League of Nations). The latter prescribes all the features, organs, conditions of and securities for the system and, in this sense, the Mandate is an integral part of the Treaty of Versailles, in which the Covenant is included. For each particular case the Mandate adds certain special details and conditions relating to a specific territory and Mandatory. The instrument in which these details are defined is given the name of "Mandate Declaration" or "Mandate Agreement". The Mandate agreements or conventions constitute a subsequent phase of implementation, and represent the concrete or objective aspect of the system, its application to a particular case. But there can be no disjoining of the *agreement* from the *system:* the former takes its inspiration from the principles of the latter, and those principles are an integral part of the agreement. The system and the agreement operate as an inseparable whole whose elements, which are conditional one upon the other, form an organic unit.

[1] General Assembly, Official Documents, 3rd Session, Resolutions, Part I, 21 September-12 December 1948.

3. The function of the Mandatory is a *responsibility* rather than a right (Article 22, paragraph 2 of the Covenant). The less developed the population under Mandate, the heavier the responsibility of that Mandatory, as in the case of C Mandates (Article 22, paragraph 6). It is for this very reason that the Mandatory must be willing to accept the Mandate (Article 22, paragraph 2); it is for the Mandatory to refuse the trust if it cannot bear the burden. This is one of the most characteristic features of the system: the Mandatory signifies its acceptance not as a party with an interest in the prospects flowing from the contract but as a collaborator of the international community in its trust of civilizing a certain under-developed people. It is one of those cases where the bilateral aspect of the agreement does not seek to establish or suppose any real balance between the obligations and the rights of the parties. The legal concept is nearer that of the unilateral contracts of private law rather than that of synallagmatic contracts. The rights granted to the Mandatory are for the purpose only of the better fulfilment of its obligations towards the country under tutelage. The concept of obligation predominates. Once the Mandate has been accepted, the mission of the Mandatory becomes a mission which, to a varying extent, must always surpass the Mandatory's own interests and, first and foremost, serve the interests of the population under tutelage. The C Mandates do not constitute an exception to this rule. It is true that under them the Mandatory enjoys wider powers and may even legitimately obtain greater economic benefits by the use made of the ex-colonial territory; but as far as the Mandatory is concerned, the territory is *res aliena* as in all the Mandates, and its inhabitants are legal persons who will one day have the capacity to decide for themselves.

4. An international Mandate is, by its very nature, temporary and of indeterminate duration. Its duration is limited by the fulfilment of the essential purpose of the Mandate, that is to say, by the completion of the process of development of the people under tutelage through their acquisition of full human and political capacity. It follows that any Mandate agreement remains in force until such time as the people concerned attains the desired degree of structural organization as a nation.

5. The corollary to the two foregoing paragraphs is that an international Mandate, through which tutelage is exercised, does not and can never imply a transfer of sovereignty to the Mandatory or the annexation of the mandated territory by the tutelary State. It is only at the conclusion of the Mandate that the people can choose for itself between independence or incorporation in the administering State. It is true that C Mandates (Article 22, paragraph 6 of the Covenant) brought the mandated territory into a closer relationship with the Mandatory by the fact that the latter

applied its own laws to the territory in question; but this extension of the legislative powers of the Mandatory does not imply an act of sovereignty on its part, but simply the application of a prior authorization with regard to administration contained in the Mandate agreement, with a view to adapting the territory to the legislation of a more advanced country.

6. The tutelary organization's right of supervision over the exercise of the Mandate is an institutional rule in the Mandates System, expressly provided for by Article 22 of the Covenant (paragraphs 7, 8 and 9). This right is not just an adjectival or procedural formality, but an essential element on which adherence to the purposes of the system and the efficiency of its application depend. It should not be forgotten that in the Mandate agreements one of the parties, the beneficiary under tutelage, has no possibility of entering into discussion with the other party, the Mandatory, on an equal footing, having regard to its lack of legal capacity. Thus, the only way of safeguarding the rights of the people under Mandate is to entrust the supervision of the Mandatory's acts to the Mandator or tutelary organization which, on the one hand, represents the ward and, on the other, personifies the interest of the States of the world assembled in an association. Absence of a supervisory organ would be tantamount to unilateral and arbitrary exercise of the Mandate and would inevitably lead to annexation. A Mandate so mutilated would be of an essentially different nature from that provided for in Article 22 of the Covenant.

7. Another special feature of the Mandates System is that its effects extend to all the States Members of the League of Nations as a consequence of the "sacred trust of civilization" conferred on them by Article 22 of the Covenant. This extension is reflected in responsibilities and obligations with a view to the protection of the peoples under Mandate, either in the internal or administrative activities of the League, or on the judicial plane when the Mandate agreements contain a compromissory clause.

The Mandate Agreements

In seeking to establish the nature of the Mandate agreements there should be no hesitation over the fact that they are instruments in which a contractual element is present. There is a combination of intentions. I shall not deal with the "pre-agreement" by which one or more Powers allocated the Mandate for a particular territory to another State: this is a matter outside the League of Nations. But once this "pre-agreement" came into the hands of the League of Nations, the formulation of the agreement began: the Mandatory's acceptance is *a priori* presupposed because it had already expressed that acceptance directly to the Power concerned. If that Power had also defined the conditions of the Mandate, there

remained only to obtain the confirmation of the Council of the League and to specify that the Mandate would be exercised by the Mandatory *on behalf of* the League of Nations. The agreement was then concluded. But if the degree of authority, control or administration to be exercised by the Mandatory had not been the subject of direct agreement between the Power and the State Member appointed as Mandatory, the Council was to *define* such matters explicitly (Article 22, paragraph 8, of the Covenant). This was the "Mandate Declaration", which has currently always and everywhere been known as the "Mandate agreement". Acceptance of this Declaration by the Mandatory might certainly be explicit, but it was always implied, not only because the Declaration was transmitted or notified to all the States Members—including the Mandatory and without objection on its part—but, above all, because in fact the very exercise of the Mandate was objective evidence of the agreement of the Mandatory. It may be added that this almost unilateral appearance of the Council's "Declaration" is not in any way surprising, having regard to the nature—explained above—of the international Mandate institution. More than a contract, it is a statute the basic conditions of which are laid down in advance by Article 22 of the Covenant; in regard to these, the Mandatory has only the alternatives of acceptance or refusal. The strictly contractual part of the "Mandate agreement" is represented only by the practical details in each case relating to the Mandatory's degree of authority and the conditions with which its administration must comply. But it is self-evident that in this case the "Declaration" is but the result of a prior understanding between the Council and the Mandatory. It should be added that as regards these details, the Council does not negotiate with the Mandatory: under paragraph 8 of Article 22 of the Covenant, the Council "defines" and it is for the Mandatory to accept the responsibility or not. It must be reiterated that an international Mandate is first and foremost a responsibility and not an exchange of balancing services as in ordinary bilateral contracts.

There is no indication in paragraph 8 of Article 22 of the Covenant from which it may be inferred that the rules defined by the Council to establish the conditions of each Mandate were to take the form of a solemn treaty. In fact, the customary rule adopted in the case of South West Africa, and in other cases, was that it took the form of a Declaration by the Council, as referred to above. Moreover, the final terms of the text of this kind of declaration by the Council provides for deposit of the original in the archives of the League of Nations, after forwarding of certified copies to the secretariat and to the Powers Signatories of the Treaty of Versailles. Considering that the "Declaration" by the Council is an official public instrument of the League of Nations, in my view that instrument implies or contains of itself the formal registration of the Mandate to which it refers, without need of any other formality. This

form of registration of and publicity for the declaratory instruments of the Council in respect of the Mandate agreements constitutes a special procedure somewhat different from but just as effective as that prescribed in Article 18 of the Covenant for treaties. Moreover, as the International Mandates system is an institution related to the *internal* administration of the League of Nations, it is not at all odd that solemn forms should not have been used.

The Compromissory Clause

The texts of the "Declarations" or "Mandate agreements" which were issued immediately after the establishment of the League of Nations contain a clause which does not appear in the text of Article 22 of the Covenant, although it must in the spirit of the Covenant be regarded as a necessary security for the system. This is the "compromissory clause" under which 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". (See for example Article 7 of the Mandate for German South West Africa, dated 17 December 1920, Memorial submitted by Liberia, annex B, page 172.) Having regard to its content, Article 7 of the Mandate of 17 December 1920 was but a provision equivalent to the "optional clause" in Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice, this Statute having been ratified by the Union of South Africa nine months later, on 4 August 1921[1].

Moreover this provision of Article 7 is but the implementation of Article 14 of the Covenant of the League of Nations which established recourse to the Permanent Court as the final, although voluntary, means of settling international disputes between States. In this case, recourse to judicial jurisdiction was desirable and even urgent, having regard to possible frictions which might arise between the tutelary body or its members and the Mandatory. A supervisory regime, like that of the Mandate System where the supervised entity is a sovereign State, can create situations and cause controversies of an extremely delicate nature, settlement by law being the only appropriate form. Moreover, the insertion of this clause in the Mandate agreement merely satisfied the wishes expres-

[1] Fifth Annual Report of the Permanent Court of International Justice (1928-1929), page 390. Collection of texts governing the jurisdiction of the Court, P.C.I.J., Series D, No. 6, page 18.

sed in Article 14 of the Covenant in favour of the jurisdiction of the Permanent Court of International Justice. Again, this safeguard of recourse to judicial jurisdiction is universally accepted for the settlement of all sorts of litigious situations or situations subject to legal interpretation, so that its inclusion in a Mandate agreement does not involve any anomaly.

From the foregoing considerations it may be concluded that the compromissory clause, just as much as the rest of the agreement, is one of the major provisions of the Mandate system.

During the proceedings there has been discussion as to whether, in the Mandate regime, the jurisdiction of the International Court constitutes a form of supervision over the Mandatory's exercise of its functions or, more correctly, an integral part of the Mandate supervision machinery, another phase of which is the administrative supervision for which the Council of the League of Nations was made responsible.

It is clear that a decision by the Court in a case of this kind implies, *in fact*, a form of supervision over the acts of the Mandatory, in the sense that it acts as a regulator to define the true meaning and scope of the Mandate as a legal institution and to correct possible deviations by any party in its application. But it cannot be said that the Court is a supervisory organ with regard to the exercise of the Mandates, because its function is strictly legal and not administrative or political, and because a Court cannot on its own initiative institute supervisory measures, its functions being exercised only at the request of the parties, which virtually negatives the effectiveness of the supervision. In my view, the true significance of the clause providing for recourse to the Court is that of a *security* for *both parties* as to the proper application of the Mandate and the proper exercise of supervision.

The Mandate agreements which contain the compromissory clause introduce a new personal element into the convention: that of "another Member of the League of Nations". It is for the other Members of the League of Nations to act as a party in the judicial controversy, against the Mandatory State. Since this provision has given rise to discussion and to doubt as to its interpretation, it seems to me necessary to go into the point.

I have already said that the new international Mandate institution, incorporated into the Covenant as a legal advance and based on the concept of tutelage, was one in which, by reason of its human rights objectives, each of the Members of the League of Nations and, in general, the entire international community of which the League was probably the first organized expression, had an interest. Should a dispute arise between the League and a Mandatory, all the States Members would have the same legal interest as the League in the dispute, and would be affected to the same extent by violations of the agreements, one or more of those States having the

right to appear before the Court to defend the common cause. But there is a further reason which obviously the Council of the League of Nations took care to provide for in the compromissory clause. Under Articles 34 and 35 of the Statute of the Permanent Court, only States and the States Members of the League could be parties in cases before the Court in contentious proceedings. The League, which was not a State, could only request "advisory opinions" (Article 14 of the Covenant); thus should an insoluble difference of view with the Mandatory arise, the intervention of the States Members, the jointly responsible constituent elements of the League, became indispensable as parties to the proceedings.

The dissolution of the League of Nations and the new Trusteeship System of the San Francisco Charter

Obviously the provisions of the Covenant which had instituted the international Mandates System did not envisage the possibility of the dissolution of the League of Nations and did not foresee its possible effects on the Mandate agreements in force. In fact, however, the dissolution occurred in April 1946 and the question arises whether that event had as a consequence the total or partial lapsing of the Mandates instituted in accordance with the Covenant of 1919.

In connection with this question, it is desirable, once more, to recall the nature of the Mandates system and the role of the parties to the separate agreements concluded in each case.

In the Mandate agreements, the peoples under tutelage, lacking a full capacity, were represented by the League of Nations which was to assume the protection of their interests. The question therefore is whether the disappearance of a guardian on the international plane is sufficient to alter or to cause to lapse agreements which it had concluded in favour of the country under Mandate with third States acting as Mandatories.

I can find no justification for this argument concerning lapse. After the dissolution, the two parties principally concerned—the country under tutelage and the Mandatory—remained the same; and the purposes of the Mandate had to continue to be implemented, for the peoples under tutelage still had an urgent need of assistance and guidance. If, therefore, the two parties survived as such and if the purposes of the agreement were still in course of implementation when the League was dissolved, the continuance of the Mandate would appear to be beyond question. It has to be stressed that in principle the duration of an international Mandate extends over an indefinite and frequently long period, up to the moment when the full capacity—moral, civic and political—of the subject under tutelage is achieved. The question whether the disappearance of

the League of Nations, as the tutelary body, raises an insurmountable obstacle to the survival of the Mandate remains to be considered.

This contention is based on the premise that the League being a principal or direct party to the Mandate agreement, the disappearance of that party causes the Mandate to lapse. But the view has already been advanced that the intervention of the League, apart from its quality as a high international authority, was no more than that of a representative, in the role of a protecting or tutelary body, of the party really concerned, which is the country under tutelage. In such circumstances, the disappearance of a guardian in the realm of municipal private law would raise no difficulty since the legal systems of States have provided means of replacing a guardian who has died or is prevented from or unwilling to continue as guardian, without any disturbance or interruption of the guardianship. There can be no perfect analogy on the international plane, but I think that just because there is an absence of legislative rules on the subject the system is a great deal more flexible, having regard to the element of the sovereign power of States which create their law as and when the need arises. What is of principal importance in the present case is to maintain in action the machinery of the Mandate in order to render assistance to peoples under tutelage. In fact, the situation would be one where the only element lacking for the entire working of the system would be the body entrusted with supervisory power by the League of Nations. But a number of events occurred immediately before or simultaneously with the dissolution of the League which opened the way to filling that gap and providing that element.

The situation created in the world by the war made it impossible for the old League of Nations to survive. In these circumstances, a considerable number of States, which included the Principal Allied and Associated Powers and the majority of the States which in 1919 had participated in the foundation of the League of Nations, met at San Francisco in April 1945, immediately after the Second World War, to create the United Nations, the Charter of which is dated 26 June 1945. The principles and essential purposes of this new body coincided, in the main, with those of the League of Nations. So far as the institution of Mandates was concerned, the Charter of the United Nations maintained, in principle, the concept of tutelage as it had appeared in the Covenant of 1919, although in a much more developed form in the new instrument in which the expression "International Trusteeship System" replaced the name "Mandate" (Articles 75 *et seq.*). The Charter expressly provided for the transformation of the old "Mandates" of the League of Nations into "Trusteeship Agreements" subject to the new system, in accordance with the rules and conditions, indicated in Articles 76, 77, paragraph 1 *(a)*, 79, 80, 81 and 85. These Articles will be analysed hereafter; what is relevant to my reasoning is

the noting of the following facts: *(a)* that the Charter of the United Nations made provision for the maintenance of the old Mandates and provided means for their transformation into "Trusteeship Agreements" in conformity with the new system; *(b)* that consequently, according to the opinion of the founders of the United Nations, the dissolution of the League was not to affect the normal functioning of the Mandates in essence but only in form.

Moreover, the Assembly of the League of Nations expressed a similar criterion in one of its final resolutions, the resolution dated 18 April 1946, on the eve of its dissolution. That resolution read as follows:

> "The Assembly ... 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.
> 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.*" (Italics added.) (L. of N., O. J., Spec. Sup. No. 194, pp. 58, 278-279.)

All this shows clearly that in the opinion of the founders of the United Nations and also according to the criterion of the Assembly of the League of Nations, the dissolution of that latter body was not intended to put an end to the continuity or the functioning of the Mandates instituted under Article 22 of the Treaty of Versailles. The "continued existence" of the Mandate, referred in the Applications, follows from the Charter itself and from the resolution of 18 April 1946.

The above findings do not in any way imply an intention to establish or to regard as established the principle of automatic or *ex officio* succession of the United Nations to the League of Nations. It has been sufficiently clearly shown, in the course of the written and oral proceedings in this case, that the theory of automatic succession is inconsistent with the historical background of the discussions and resolutions of the two great bodies during the transitional period in 1945-1946. What I wish to emphasize is that the San Francisco Charter provided for the necessary machinery to render viable the continuance of Mandates after compliance, in each particular case, with certain formalities.

The time has now come to consider specific provisions of the Charter of the United Nations regarding the Mandates instituted during the period of the League of Nations.

* * *

The San Francisco Charter reveals definite progress beyond the Covenant of the League of Nations in respect of the development of the institution for the protection of dependent, under-developed or former colonial countries. There is, in the first place, specific recognition of the principle that the interests of the inhabitants of these territories are paramount, and confirmation of the acceptance by the Member States of the United Nations of the "sacred trust" of assisting the peoples who have not yet attained a full measure of self-government (Article 73 of the Charter). To this end there was instituted an "international Trusteeship System" the basic objectives of which are laid down in Article 76: the promotion of social, economic and political advancement, preparation for independence, respect for fundamental human freedoms without distinction as to race, sex, language or religion.

As to the position of old Mandates in relation to the new Trusteeship System under the Charter, Article 77, paragraph 1, subparagraph *(a)*, provided in a mandatory manner ("shall apply") for the application of the new Trusteeship System to territories now held under Mandate, although the second paragraph of the same Article, as well as Article 79, refer to subsequent agreements for the determination of the terms and conditions in which trusteeship shall be established. In the interval, that is to say between the promulgation of the Charter and the entry into force of an agreement, nothing in the new provisions of the Charter shall be construed "in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties" (Article 80, paragraph 1, of the Charter). But, immediately thereafter, paragraph 2 of the same Article provides that paragraph 1 "*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..."

In my opinion, this wording of paragraph 2, which is connected with that of Articles 77 (para. 1 *(a)*) and 81, clearly defines the obligation—the urgent obligation it might be said—of Mandatory States without delay to put into force a new Mandate agreement. This interpretation is fully warranted by a logical reasoning since the intention of the authors of the Charter cannot have been to leave the mandated territories indefinitely to the unfettered discretion of the Mandatory alone. To have done so would have been to distort the character of this legal system as well as the intentions of its founders. It would have amounted to what has been called the "freezing" of the Mandate, which would practically be equivalent to annexation. The best proof that this interpretation is correct, is that all the Mandatory States which held Mandates

before the drawing up of the Charter—except the Republic of South Africa—ratified new agreements with the approval of the United Nations. The General Assembly, which in this case is the official body for authoritative interpretation, has invariably considered that an obligation exists for those States to adapt their Mandates to the new Trusteeship System, and for their part the Mandatory States have subscribed to this view. There is thus a very clear concurrence of interpretation to which no reasonable objection can be raised.

The objection has been raised that if Article 81 of the Charter is to be interpreted—in the light of Articles 77 (para. 1, sub-para. *(a)*) and 80 (para. 2) as a *mandatory* provision imposing upon Mandatory States an obligation to conclude Trusteeship agreements, this would involve the legal absurdity of *compulsion* to conclude a contract the characteristic feature of which is "*voluntariedad*", that is a freedom of decision to accept or reject. No legislative or judicial power could, in principle, legally require such an aberration. But that reasoning has no relevance to the point under discussion: the true legal concept which arises, in connection with the articles of the Charter to which reference has been made, is quite different. Each of the States which became Members of the United Nations, by virtue of their voluntary acceptance and signature of the Charter, assumed all the obligations flowing therefrom, and, consequently, if one of those Member States is a Mandatory, it at the same time freely accepted the obligation to renew or to transform the Mandate into a Trusteeship agreement. The negotiation of a new agreement is in no sense an act imposed by force: it is a *pact* which was concluded at the time when the Charter was signed by the Mandatory.

It has been maintained that after the dissolution of the League of Nations it was not indispensable—as being the only solution—to effect the transformation of the Mandate Agreements into Trusteeship Agreements in accordance with Chapters XII and XIII of the Charter, since Chapter XI and, in particular, Article 73, indicates the normal course for the functioning of League of Nations Mandates without having to have recourse to the system of Trusteeship Agreements introduced by the United Nations. The only obstacle—it is said—to the continuance of the normal exercise of the Mandate, after the dissolution of the League, is the absence of the supervisory power entrusted to the Council under Article 22, paragraph 8, of the Covenant and Article 6 of the Agreement of 17 December 1920. The Council having disappeared, the machinery for supervision comes to a stop. But this gap is filled, so far as the new situation is concerned, by Article 73, paragraph *(e)*, which lays down a new and less demanding form of supervision—but still a form of supervision—and again completes the institutional framework of the system in both its aspects: obligations of the Mandatory (Preamble and paragraphs *(a)* to *(d)*) and supervision of its action (paragraph *(e)*).

I am unable to agree with this view because it is not in conformity with either the wording or the system of the Charter. Chapter XI constitutes a broad and general statement of principles, duties and policies which, in reality, cover all categories of non-self-governing territories (the old Protectorates and Colonies of the Powers which had just been victorious in the Second World War, the detached Colonies of the defeated States, the Mandated territories born of the First War and territories which will voluntarily be placed under trusteeship in the future). But it is Chapters XII and XIII which govern in a concrete way the new Trusteeship System the basic objectives of which are described in Article 76 and of which the transformation of Mandates into Trusteeship Agreements is specified in Articles 77, paragraph 1, sub-paragraph *(a)*, 79, 80 and 81. These are, consequently, the relevant Articles of the Charter relating to Mandates and not Articles 73 and 74 of Chapter XI. As was so well said by a Member of the Court, that latter Chapter was designed to incorporate to some extent in the new general protective regime established by the Charter those territories which the victorious Powers held under their sovereignty before the conflict and to guarantee to those territories some international supervision, though one exercised with great flexibility.

The Jurisdiction of the Court in the Case, according to the Applications

The Applications submitted by the Governments of Liberia and Ethiopia found the jurisdiction of the Court on Article 7 of the Mandate for German South West Africa and Article 37 of the Statute of the International Court of Justice, having regard to Article 80, paragraph 1, of the United Nations Charter.

The second paragraph of Article 7 of the Mandate agreement of 17 December 1920 accepted by the Union of South Africa as Mandatory, provides as follows:

> "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."

The Statute of the International Court of Justice, of which the Applicants and the Respondent are signatories, provides in Article 37 that:

> "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."

Paragraph 1 of Article 80 of the Charter provides:

> "Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

On the basis of these provisions, the reasoning of the Applicants may be expressed as follows: the Mandate for South West Africa, including Article 7 which contains the compromissory clause, is a convention in force. Since a dispute which cannot be settled by direct means has arisen between Liberia and Ethiopia on the one hand and the Republic of South Africa as Mandatory for South West Africa on the other, the solution must be sought by recourse to international justice. The Permanent Court of International Justice having disappeared, there remains only to apply Article 37 of the Statute of the International Court of Justice which specifically provides for the jurisdiction of the Court in this kind of circumstance.

From an examination of the content of the Applications, it may be seen that the questions requiring definition are as follows:

1. Is the Mandate a *convention* or not?
2. If yes, is it a convention *in force?*
3. If so, is Article 37 of the Statute of the Court applicable?

The reply to these questions will follow from the critical analysis which I shall make of the Preliminary Objections presented by the Agent for the Republic of South Africa.

The Preliminary Objections

Succinctly the content of the objections can be summarized as follows:

1. The Mandate is not a convention *in force.*

2. The Mandate agreement, or Declaration by the Council of the League of Nations dated 17 December 1920, is not even a convention, but simply a preparatory document or outline of what should have been the true Mandate agreement (amended Submission by the Respondent read at the last public hearing).

3. The compromissory clause contained in the Mandate agreement (Article 7) does not fulfil the conditions required for validity by the special nature of this clause.

4. The dispute which is the subject of the controversy does not fulfil the conditions laid down in Article 7 of the Mandate agreement.

5. Consequently, Article 37 of the Statute of the Court is not applicable. The Court has no jurisdiction in this case.

First Preliminary Objection

The Government of the Republic of South Africa denies the jurisdiction of the Court to hear and to determine this case, alleging that "the Mandate for German South West Africa, upon Article 7 of which the Applicants' claim to jurisdiction is founded, has lapsed, in the sense ... that it is no longer a treaty or convention in force within the meaning of Article 37 of the Statute of the Court".

The grounds supporting this objection may be put as follows:

(a) The Mandate agreement for South West Africa was a convention between the League of Nations and the Union of South Africa as Mandatory. But the League of Nations having been dissolved in April 1946, one of the contracting parties disappeared and, therefore, the convention as such lapsed. All that remained in force was the objective or real *fact* of the existence of a territory and a population which, since 1920, had been held by the Respondent State under a special Mandate status. With the disappearance of the League of Nations, the former contractual provision assigning supervision over the Mandate to the Council of the extinct League (Article 6 of the Mandate Agreement) became impossible of implementation and it remained for the Mandatory only to perform unilaterally the institutional obligations of a general nature provided in Article 22, paragraphs 1, 2, 3 and 6, of the Covenant of 1919 and reproduced in Articles 1 to 5 of the Council's "Declaration" of 17 December 1920. To sum up, the Respondent maintains that it continues to exercise the Mandate as an objective institution subject to the basic rules of Article 22 of the Covenant, but that it is exempt from the supervision provided for as a non-essential or merely procedural contractual obligation in paragraphs 7 and 9 of Article 22 (Article 6 of the Mandate agreement) since the supervisory organ—the Council of the League of Nations—had ceased to exist. The Mandate, in the sense of a convention, had lapsed.

But I think I have shown in the foregoing paragraphs that the dissolution of the League of Nations does not in itself constitute, according to my view, a sufficient reason for declaring the Mandate agreement to have lapsed, since the real parties to the agreement, namely the population under Mandate and the Mandatory, remain unchanged. The League of Nations, as tutelary representative of that population, could be replaced in that function; and it has been in fact by the United Nations in every case where the Mandatory became a Member of the new Organization by signing the San Francisco Charter. It was then for the competent organs of the United Nations to take over the supervisory authority which the

Covenant assigned to the Council of the League of Nations: all that was required was the prior conclusion of a new Mandate agreement with the Mandatory as provided for in Article 79 of the Charter.

Moreover the League of Nations in its resolution of 18 April 1946, and the United Nations in the Charter, recognized the survival of the Mandates after the dissolution of the League. After that dissolution, the former Mandates maintained their "*continued existence*", that is to say, their quality of "international conventions in force".

In this preliminary phase of the proceedings the Court has to decide on the following vital matter: the present force of the Mandate Agreement for South West Africa; for whether it has or has not jurisdiction to hear the present case depends on whether or not that Agreement is in force within the meaning of Articles 36 and 37 of the Statute. In the light of all of the foregoing considerations there can in my view be no doubt that the answer is in the affirmative: the Mandate Agreement continues and is in full force.

The Respondent has contended that the Republic of South Africa's title as Mandatory was received under the former League of Nations Mandate regime and that, therefore, the Mandatory had no obligation to submit to the new United Nations regime, since there is no legal link of automatic succession between the two world organizations. If the Republic of South Africa had remained outside the United Nations and not become a Member of it, the argument might probably have seemed to be well founded. But the Union of South Africa was one of the Founder Members of the United Nations; it took part in all the proceedings for the dissolution of the League of Nations and in the discussion of the San Francisco Charter; it subscribed to the Charter without making any reservation at the time of signing it (which would moreover have been unusual and unacceptable); therefore it accepted that instrument in its entirety with its principles and obligations, among which were the inclusion of the former Mandates in the new trusteeship regime (Article 80, paragraph 2, of the Charter taken in conjunction with Articles 77, paragraph 1 *(a)*, 79 and 81). These Articles taken together obliged the Mandatory State to negotiate and conclude as soon as possible a trusteeship agreement in replacement of the former Mandate agreement. To sum up, the fact of the Republic of South Africa becoming a Member of the United Nations was the *legal link* which as far as it was concerned established continuity between the two world organizations and between the two systems for the protection of the former German colonies.

It has also been argued that the supervisory system of the Charter is different from and more exigent than that of the Covenant of the League; that the supervisory organs under the Charter are composed and operate differently from those of the dissolved League, and that the Mandatory State cannot be compelled to sign a contractual instrument which would render its obligations to the supervisory

organ more burdensome and onerous. The contention is arguable in principle or on speculative grounds, since as supervision—as has been said—was an essential part of the Mandate system, there are good reasons for believing that such supervision would the better fulfil its role and objectives to the extent that it became severer and more perfected, despite the reticence of the Mandatory. But leaving aside this aspect, the certain fact is, as has been said in the preceding paragraph, that the Republic of South Africa, as a Member of the United Nations, had accepted as a new norm the supervisory regime of the Charter. The only way of obtaining mitigation of that regime or the maintenance of the supervisory machinery established by the former Mandates would be to negotiate a new trusteeship agreement with the competent organ of the United Nations as provided for in Article 79 of the Charter. If this had been the first step taken by the Union of South Africa in 1945, the problem would long ago have been settled on equitable terms. Unfortunately the record shows that the Republic of South Africa has consistently declined to entertain such a solution.

In the meantime, the Respondent State has chosen a more liberal position: that of exercising a Mandate without supervision on the basis of the assertion that supervision is merely a "procedural condition" and not essential to the Mandate regime. In my view this assertion is incorrect and even arbitrary, because it is contradicted by the substantive or institutional character assigned by the Covenant to the Council's right of supervision (Article 22, paragraphs 7, 8 and 9). I must underline what I have already said elsewhere: a Mandate without supervision is no longer a Mandate because such mutilation would signify the unilateral exercise of the Mandatory function, which at base greatly resembles disguised annexation. It is not possible to attribute such an intention to the authors of the Covenant or even less to those of the Charter. Apart from the need for supervision of the whole process of the exercise of the Mandate, it is essential that there should be some body which, if necessary, can act as impartial judge of whether the degree of development acquired by the Mandated population is such that there should be a declaration of independence; some body possessed of sufficient authority to request that the Mandatory cease its functions. It may be added that from the beginning this condition of supervision was accepted by the Mandatory, as it figured at the time of the foundation of the League of Nations in the Balfour draft Mandate presented to the Council of the League by the British Government representing the Union of South Africa.

(b) Another reason by which the Respondent supports its first preliminary objection is that the Mandate agreement did not take the form of a treaty as provided for in Article 18 of the Covenant of the League of Nations. The agreement is indeed simply contained in the Council's Declaration of 17 December 1920. But I have already explained earlier that the Mandate agreements are conventions *sui*

generis, a chain of intentions expressed in successive acts in which the conditions originally proposed by the Powers, with the consent of the Mandatory, are finally defined by the Council of the League of Nations. There is no indication in Article 22 of the Covenant as to the instrumental form of the Mandate agreements, although a general practice existed, in view of the very special nature of the Mandates System, of including these agreements in "Declarations" of the same kind as that of 17 December 1920 for the Mandate for South West Africa. I have already said that in my view the official instrument in which the Council's "Declaration" is contained includes of itself an act of registration of the Mandate without any other form of registration being necessary. The Respondent does not deny having always regarded this declaration as the real Mandate convention. The pleadings in the first part of the proceedings confirm this consensus. Moreover, the form of publicity given to and registration of these "declarations" or "agreements" laid down in the final paragraph of the Mandate agreement for South West Africa (Annex B) and in other similar agreements, is somewhat different from but very similar to that provided for by Article 18 of the Covenant in the case of treaties. I am convinced that this divergence from the solemn forms provided for in Article 18 of the Covenant does not affect the validity of the Mandate agreements or conventions for the following reasons:

1. Because Article 18 refers to "treaty or *international* engagement" and the Mandate agreements, although included among such treaties or international engagements, have a special characteristic in that they are not covenants between States but between a State and an international organization.

2. Because the Mandate agreements are internal administrative instruments of the League of Nations.

3. Because the form of publication and registration of the Mandate agreements is entirely similar to that laid down by Article 18 of the Covenant in the case of treaties.

4. Because the exact meaning of Article 18 of the Covenant does not in my view extend to nullifying unregistered treaties *ipso jure*, but simply creates for one of the parties the right *if it wishes* of raising the objection of inadmissibility of the obligation to perform the treaty. Any other interpretation would tend to destroy the principle of *good faith* which governs, as a basic rule, the legal theory of conventional instruments and which has received explicit confirmation in international law in Article 2, paragraph 2, of the Charter of the United Nations. In the present case South Africa recognized and exercized the Mandate of 17 December 1920 for a number of years as a valid agreement or convention, and cannot by the principle of good faith be allowed to alter that course of conduct.

(c) The Agent for the Republic of South Africa, at the last public hearing, amended the first of the submissions read at the end of the oral arguments in a way which entirely alters the position taken up till then. The Respondent State has in fact always recognized the existence of the Mandate agreement constituted by the "Declaration" of 17 December 1920. It has moreover recognized that this agreement remained fully in force until the date of dissolution of the League of Nations, that is to say for more than 25 years (1920-1946), by admitting that after that date the Mandate, although in its view having lapsed as a convention, survives as a reality derived from the institution created by Article 22 of the Covenant. But at the last moment the Respondent asserts that there never was a true Mandate agreement because the "Declaration" of 17 December 1920 was only a unilateral document issued by the Council of the League of Nations and which, at the most, represents a preparatory outline of what was to have been the future Mandate agreement.

With the greatest moral and legal conviction I find that this submission is not well founded. In the first place, the Respondent has consistently regarded it as established *in good faith* that the Mandate agreement was identical with the Declaration. Secondly, I have shown in the foregoing pages that the contractual element of acceptance by the Mandatory is present in all the paragraphs of the preamble of that Declaration, where reference is made to the Government of the Union of South Africa having agreed to accept the exercise of the Mandate. Thirdly, the Declaration was forwarded to that Government and brought to its knowledge without it ever having raised in the Council any allegation or the slightest reservation with regard to the significance of the agreement. Fourthly, the Union of South Africa, now the Republic of South Africa, has exercized the Mandate for South West Africa for 42 years on the basis of the document of December 1920. Fifthly, during the early stages of these proceedings, the Republic of South Africa filed the Declaration as being the document constituting the agreement (Annex B to the Preliminary Objections).

In my view, therefore, this submission of the Respondent must be dismissed.

(d) As another ground for its first objection to the jurisdiction of the Court the Respondent contends that the compromissory clause inserted in Article 7 of the December 1920 Mandate agreement is a sort of bastard accretion, an anomaly introduced into the the document by the Council of the League of Nations. In doing so, it is argued, the Council exceeded its powers, since Article 22 of the Covenant did not include the compromissory clause among the conditions of the Mandate. Moreover, in respect of its external form, the compromissory clause in Article 7 of the Mandate does not constitute a true treaty within the meaning of Article 18 of the Covenant of the League of Nations.

I have already touched upon this subject in another section of this opinion.

While it is clear that recourse to the jurisdiction of the Permanent Court was not included in Article 22 of the Covenant as one of the original conditions of the Mandate agreements, it is also true that under paragraph 8 of Article 22 of the Covenant the Council of the League of Nations was empowered "to define" the conditions of administration and control of each Mandate. I have already set out the many reasons for which the Council had, as an act of good Mandate administration, to include the compromissory clause in the agreements with a number of Mandatory States for various territories. For their part the Mandatories, including the Republic of South Africa, far from refusing the insertion of this clause, accepted it explicitly or tacitly. Article 7 was never the subject of a denunciation by South Africa. On the contrary, South Africa expressly agreed with Great Britain concerning the compromissory clause when accepting the Mandate, according to the Balfour draft the text of which was the basis for the Council's Declaration of 17 December 1920.

Moreover, as I have already said, the compromissory clause is the legal means of providing a final settlement for disputes arising between the League of Nations or its Members and the Mandatory in the administrative or political field in connection with the exercise of the supervisory powers referred to in paragraph 9 of Article 22 of the Covenant and in Article 6 of the Mandate agreement. It must be noted that in international life sufficient powers are lacking in institutional or administrative procedures for a settlement of conflicts always to be possible by those means. In some cases it is necessary to have recourse to the authority of an impartial third Power which gives a final legal decision. The League of Nations as such had not the possibility of bringing contentious proceedings against a State, the concept of sovereignty forbidding such an approach. It was thus the States Members, possessed of the same legal interest as the League, which were endowed with that function by Article 7 of the Mandate.

If the compromissory clause could not be brought into operation at the request of "another Member", the whole international Mandate system might fail because there would be no decisive legal means of settling deadlocks between the Mandatory and the League of Nations with regard to administrative supervision. An example of this is afforded by the present case, the normal operation of the Mandate for South West Africa having been upset and supervision paralyzed for many years, owing to the powerlessness or ineffectiveness of an administrative or political solution to put an end to the existing dispute.

As regards the form of the instrument, I have already explained that because of the special nature of the Mandate agreements the solemn form of an international treaty was not workable because what was involved was not a convention between two States, but one between the League of Nations and the Mandatory State for the purpose of the internal administration of the League. However, the final article of the Agreement of 17 December 1920 provided for the publicity to be given to and the registration of the convention, including the compromissory clause, by prescribing that the "Mandate Declaration", an official document of the Council, should be deposited in the archives of the League of Nations and that certified copies should be sent to the Secretary-General and to all the signatoires of the Treaty of Versailles. This is much the same form of registration as is prescribed in Article 18 of the Covenant for international treaties. The necessary safeguards concerning the dissemination and authenticity of the agreements were provided for.

The compromissory clause contained in Article 7 of the Mandate instrument was not subject to the rules governing the optional clause laid down in Article 36 of the Statute of the Permanent Court of International Justice, since that Statute only came into force later. Indeed, the Statute, the Protocol of Signature of which is dated 16 December 1920, was signed only gradually during the following months by the States Members of the League of Nations. The Assembly's resolution of 13 December 1920, mentioned in the Protocol of Signature, provided that the Statute would come into force "as soon as this Protocol has been ratified by the majority of the Members of the League". The Union of South Africa ratified it only on 4 August 1921 [1]. The ratifications provided for in the resolution of 13 December 1920 not having reached the required majority immediately, the Statute entered into force only on 1 September 1921 [2], that is to say, more than eight months after the date of the Mandate for South West Africa containing the compromissory clause in Article 7. It was not until after 1 September 1921 that preparations were set on foot for the first election of judges [3]. Thus, at the date of the approval of the Mandate for South West Africa, Article 36 of the Statute had not yet acquired binding force and, subsequently, no formal defect could be imputed to the compromissory clause of the Mandate instrument.

But there are other very important aspects of the subject.

1. The Union of South Africa ratified, on 4 August 1921, the Protocol of 16 December 1920 which opened the Statute of the Permanent Court of International Justice for signature by States Members of the League of Nations [4].

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[1] League of Nations, *Official Journal*, Special Supplement No. 193, Twenty-first List, Geneva, 1944.

[2] Manley O. Hudson, *Permanent Court of International Justice*, New York, 1934, pp. 134-138.

[3] Hudson, *op. cit.*, pp. 116-120.

[4] The Permanent Court of International Justice, 5th Annual Report (1928-1929), page 390. Collection of Texts governing the jurisdiction of the Court, Series D, No. 6, page 18.

2. On 19 September 1929 the Union of South-Africa subscribed for 10 years (susceptible of prolongation) to the optional clause in Article 36, paragraph 2, of the Statute of the Permanent Court, and ratified the declaration on 7 April 1930[1]. This acceptance of the optional clause was renewed on 7 April 1940 "until such time as notice may be given to terminate the acceptance"[2].

3. Under Article 93, paragraph 1, of the Charter of the United Nations, the States participating in the present controversy are, by reason of the fact that they are States Members of the Organization, also parties to the Statute of the International Court of Justice. Acceptance of the Statute in 1945 consequently involved acceptance of its Article 37 which provides for the transfer to the International Court of Justice of the jurisdiction of the Permanent Court in the cases covered by that Article. It may therefore be concluded that the Republic of South Africa has, since its acceptance of the Statute of the new Court, voluntarily accepted the replacement of the Permanent Court by the International Court of Justice in the concrete case provided for by Article 7 of the Mandate for South West Africa, which was for the Republic "a convention in force" within the meaning of Article 37 of the Statute. At no time, neither at the date of adherence to the Statute nor since that date, has the Republic of South Africa made any reservation or formulated any exception to exclude the case of Article 7 of the Mandate from its acceptance of Article 37 of the Statute of the International Court. It is therefore legitimate to conclude that its acceptance of Article 37 was simple, complete and unrestricted. The case of Article 7 of the Mandate is automatically included in the statutory provision of Article 37. Moreover, Article 35 of the Statute of the International Court provides that "the Court shall be open to the States parties to the present Statute". Liberia, Ethiopia and the Republic of South Africa have, in their capactiy as such, the benefit of that provision.

4. On 12 September 1955 the Union of South Africa recognized the jurisdiction of the International Court of Justice, by accepting the optional clause in paragraph 2 of Article 36 of the Statute[3]. It seems to me to be beyond doubt that on the basis of that attitude the chronologically earlier provision of Article 7 in the Mandate for South West Africa was confirmed as being within the domain of the jurisdiction of the International Court of Justice.

There were then two voluntary acts by which the Republic of South Africa accepted the transfer of jurisdiction from the

[1] First addendum to the fourth edition of the Collection of Texts governing the jurisdiction of the Court. Leiden, 1932, page 7. Eigth Annual Report of the Permanent Court of International Justice, 1932.

[2] Sixteenth Report of the Permanent Court of International Justice, p. 334. Yearbook of the International Court of Justice, 1946-1947, p. 215.

[3] International Court of Justice, *Yearbook* 1955-1956, page 184; 1959-1960, page 253; 1960-1961, page 215.

Permanent Court to the International Court: in the first place, the subscribing to Article 37 of the Statute; and secondly, adherence to the optional clause in 1955. These acts, undertaken at a time when the Mandate Agreement of 17 December 1920 was in force, reinforce, confirm and render irremovable Article 7 of that Agreement which contains the compromissory clause.

(e) There is another defect vitiating its validity which the Respondent attributes to the compromissory clause in Article 7 of the Mandate agreement, which is that that clause refers to "another Member of the League of Nations" as the definition of the parties with capacity to invoke the jurisdiction of the Court, notwithstanding the fact that the parties to the agreement are only the League of Nations and the Mandatory. In the Respondent's view, such "another Member" is a third legal person improperly invited to be a party to judicial questions deriving from the Mandates. Furthermore, there are not now any more Members of the League of Nations, which was dissolved sixteen years ago, therefore the compromissory clause cannot be implemented. It is no longer in force.

In fact, this observation relates to the subject-matter of the Second Preliminary Objection, and that is why I shall deal with it in my consideration of that Objection. I can say in advance that in my view the observation is not well founded.

* * *

It follows from the foregoing that the Mandate Agreement for South West Africa is a convention in force, and that by virtue of the provision contained in Article 7 of that Agreement, Article 37 of the Statute of the International Court of Justice is applicable to the present controversy. In my view the First Preliminary Objection is not well founded.

Second Preliminary Objection

The Second Preliminary Objection is formulated by the Respondent more or less as follows: according to Article 7 of the Mandate Agreement, a dispute to be heard and determined by the Permanent Court of International Justice would be one arising between the Mandatory and "another Member of the League of Nations". But in the present dispute there is no "Member" of the League involved, the League having ceased to exist in April 1946. The States which are Applicants, Liberia and Ethiopia, are ex-Members of the dissolved League and have not therefore preserved the active membership required by Article 7. The Applicants have therefore no "*locus standi*" to appear before the Court. Moreover, it is incomprehensible that the Council of the League of Nations should have brought in as a party to the Mandate Agreement "another

Member of the League of Nations", such a State being a third person without any direct legal interest in the implementation of the Mandate (Preliminary Objections, p. 149).

To judge whether this Objection is well founded or not, it is necessary once again to have regard to the nature of the international Mandate institution created by Article 22 of the Covenant of 1919. I refer in particular to the sections headed "The elements of the international Mandate" and "Characteristic features of the international Mandate", paragraph 7 of the present Opinion.

In summary form, the doctrinal interpretation of the Mandates System instituted by the Covenant may be stated as follows: a "sacred trust" for the benefit of the under-developed peoples of the former colonies was entrusted to the Members of the League of Nations, which represented the international community. Each of those States Members is bound, jointly and severally with the League, by the obligation and by the responsibility to promote the purposes envisaged in Article 22 of the Covenant, namely, to assist, advance and protect the peoples concerned. In consequence, each State Member has an individual legal interest in seeing that the Mandates entrusted by the League of Nations to the various Mandatories are properly performed and fulfilled. In the Mandate agreements the States Members are thus not alien elements or "third persons" having no connection with the contractual relationship, but joint parties with the League of Nations for the achievement of its objectives.

This is the explanation of the participation of the States Members, alongside the League, in the compromissory clause of the Mandate agreements. Each of these States acquires a right of legal intervention to protect the interests of the mandated population; and this right—which is at the same time a responsibility—extends to *the whole duration of the Mandate*. From the entry into force of the agreement with the Mandatory, this right of intervention of other States Members becomes *part of the legal heritage of each one of them*, not for the duration of the League of Nations, *but for the duration of the Mandate itself*. Possession of this right by the States which acquired it thus extends beyond the life of the League of Nations, even if the League is dissolved before the expiry of the Mandate.

The Council of the League of Nations was therefore certainly not acting *ultra vires* when—in Article 7 of the Mandate—it granted to States Members of the League of Nations the right to participate in cases relating to the exercise of the Mandate. The whole of Article 22 of the Covenant, considered in the light of the historical background, previously referred to, and in particular its paragraphs 1 and 2, makes it possible to see the aim pursued by the authors to enable all the States Members of the international community incorporated in the League to participate in the "sacred trust of

civilization" conceived and established for the well-being and development of peoples not yet able to stand by themselves. If paragraphs 7 and 8 of Article 22 confer upon the Council, representing the League of Nations, specific functions with regard to supervision of the Mandate, that does not deprive Member States of their legal interest in the performance of the conditions by means of which the Mandate is carried out. The Member States are, in this sense, inseparable collaborators in the action of the League.

All this leads to the conclusion that the reference to "another Member of the League of Nations" in Article 7 of the Mandate for South West Africa must be interpreted as referring to States which were Members of the League of Nations up to its dissolution. That membership gave them a power inherent in their status as States to act as parties in accordance with Article 7 of the Mandate during the whole of the time that the Mandate is exercized by the Mandatory. It is only in this way that the purposes of the institution can be served.

If this interpretation were not accepted, and since the League of Nations as such has been dissolved, the legally unacceptable conclusion would be reached that the mandated populations would not have had the possibility of recourse to international judicial authority in respect of possible abuses or deviations by the Mandatory. And it must be recalled that the right of defence before the law is expressly mentioned in the Declaration of Human Rights.

Since Liberia and Ethiopia were Members of the League of Nations up to its dissolution, those two States have, in my view, the right to invoke the jurisdiction of the Court in accordance with Article 7 of the Mandate for South West Africa and Article 37 of the Statute of the International Court of Justice.

Third Objection

In the opinion of the Respondent, "the disagreement between the Applicants and the Republic of South Africa is not a 'dispute' as envisaged in Article 7 of the Mandate". In view of the provisions of that Article disputes capable of being referred to the Court must satisfy certain conditions, or be of certain kinds, which is not so in the present case. The Applications of the Applicants are therefore said to be inadmissible.

Pursuing its reasoning, the Respondent points out that according to the Memorials of the Applicants, the subject of the controversy is concerned with whether there was a violation of the obligations imposed on the Mandatory by Articles 2-6 of the Mandate for the benefit of the peoples of the Mandated Territory. But, in the submission of the Respondent, the action of the Applicants does not comply with the principle that a legal remedy is only available

where a direct legal right or interest on the part of the Applicant is in issue. The defence of the peoples under tutelage is not within the individual competence of Member States since it is a function of the Council of the League of Nations as supervisory organ under the Mandate. The Court therefore cannot deal with an application such as those of Liberia and Ethiopia, where no direct rights and interests of the two States are involved. States Members of the League of Nations might no doubt have certain interests of their own with regard to Mandated territories, such as in the case of the economic principle of the "open door", or the defence of their nationals against acts which constituted an abuse of the Mandate; but no direct legal interest can be attributed to the Applicants in respect of the defence of the rights or interests of third parties, in other words, the peoples of the Mandated territories. In this domain, the Applicants have no *locus standi* before the Court.

This contention of the Respondent has already been refuted by the argument based on the nature and purposes of the institution of Mandates. Since the Treaty of Versailles, Mandates have introduced a new principle into international law, one which reflects a need of the international conscience: that of legal tutelage for the well-being and development of former colonial peoples. The human, civic, cultural and economic rights of these peoples, and the prohibition of abuses which might be committed to their prejudice, are expressly laid down in Article 22 of the Covenant of the League of Nations which in its spirit is in harmony with the Preamble of that instrument. From that moment, the "sacred trust" conferred on the League and consequently on each and every one of its Members, was no longer a "moral" or "humanitarian" trust, but clearly one of an undeniably legal scope, laid down by international law. Since that time, Member States, as integral parts of the League itself, have possessed a direct legal interest in the protection of underdeveloped peoples. It is no doubt on the basis of these principles that the Mandate Agreement, in its Article 7, conferred upon Member States, in their individual capacity, the right to invoke the compromissory clause to require of the Mandatory a correct application of the Mandate. The Council of the League of Nations was authorized to include this right because it is one which flows naturally from the "sacred trust" instituted in the Covenant and because paragraph 8 of Article 22 of that instrument gives the Council the right to "define" the conditions of the Mandate. The provision in question is indeed very easy to understand since Articles 34 and 35 of the Statute of the Permanent Court did not make it possible for the League of Nations itself to have recourse, as a body, to the Court which was open only to Member States and States in general. All this reasoning is confirmed by the Preamble and by Articles 1 (paras. 2 and 3) and 2 (para. 5) of the Charter of the United Nations.

Looking at the matter from another aspect, the literal text of Article 7 of the Mandate provides, in my opinion, the best guide to a correct interpretation. According to its wording, the Mandatory agrees that (any) other Member of the League of Nations may submit to the Permanent Court any dispute whatever relating to the interpretation or the application of the provisions of the Mandate. This text contains no limitations as regards the kind of legal interest in issue, be it particular or general, whether it directly relates to the Applicant State or whether it is concerned with other persons legally close to the latter. In the present case, I have already explained that, in my opinion, one cannot describe—as the Respondent has done—the peoples of the Mandated territory as "third parties" not parties to the Mandate convention since these peoples are one of the parties under the convention, the benefitting party whose interests are, to a certain extent, joint interests with those of Member States, in view of the principles and purposes of the Mandate institution. That being so, nobody can rely on the wording of Article 7 to contend that it was intended to provide exclusively for recourse to the Court by States seeking the exercise of the Court's jurisdiction in defence of their direct private interests (for instance, the right to the open door or complaints of their nationals), and that the Article cannot cover applications by any State in defence of the general interests of the peoples of the Mandated territory. Regard must be had to the fact that the wording of Article 7 of the Mandate is broad, clear and precise: it gives rise to no ambiguity, it refers to no exception. It is therefore not possible to exclude from its content legal action concerned with what indeed constitute the principal problems of the Mandate, that is to say questions of interpretation with regard to the scope of the Mandatory's rights and the practical application of those rights to the peoples placed under tutelage. Having regard to the importance of these problems, a restrictive interpretation which would include only the material and individual interests of a State Member must take a secondary and indeed insignificant place.

As to the actual existence of a dispute in the present cases between the Applicants and the Mandatory, this has, in my opinion, been clearly established by the record and particularly by the official documents of the League of Nations and the United Nations which appear among the annexes. From these it can be seen that for several years the two Applicant States, in their capacity as members of certain organs and committees of the United Nations, have maintained points of view fundamentally opposed to those of the Mandatory with regard to the interpretation of various provisions of the Mandate and with regard to the application of the Mandate by the Mandatory in a series of concrete cases. A dispute could not have been more clearly established.

Since the members of delegations accredited to the United Nations are the official representatives of their respective governments, no

doubt can remain as to the fact that these differences of opinion with regard to law and fact have arisen between the Governments of Liberia and Ethiopia on the one hand, and the Government of the Republic of South Africa on the other. It follows that the dispute submitted to the Court satisfies the conditions of substance and of form referred to in Article 7 of the Mandate agreement.

There remains a further objection to be answered: "It could not be said that the dispute—even if one should be admitted to exist—is one which has arisen between the Mandatory and two 'other Members of the League of Nations' since, after the dissolution of the League, the Applicants lost their status as *present* Members and are merely two former Members of that Organization. They are consequently not within the framework provided for by Article 7."

This objection has already been met in the consideration of the Second Preliminary Objection. Following the scheme of all conventions, in the Mandate agreements provision is made in such a way as to guarantee the functioning of the system *during the whole period of its duration*. The right to take legal action conferred, by Article 7, on other States Members, is *inherent* in the Mandate itself and inseparable from its exercise, so long as it lasts. The right is *incorporated*—I must repeat it— in the juridical heritage of Member States and there it remains latent and alive with no limits upon its duration until the expiry of the Mandate, in the absence of any conventional modification of the agreement.

When the text of Article 7 refers to the States enjoying the benefit of the compromissory clause, the reference to the status of States Members of the League of Nations must be interpreted *as a means for the individual identification of those States* and not as *a permanent condition required for the role of applicant in legal proceedings*. In other words, Article 7 means, in my opinion: "States belonging to the League of Nations and identified with the purposes of the League shall individually have the right to require before the Permanent Court the faithful execution of the Mandate during its entire duration." But the intention of the Article was not to say that: "The States Members of the League, so long as it continues to exist, shall individually have the rights...", etc. That latter interpretation would render ineffective the judicial security in the Mandate in the event of the disappearance of the League of Nations; and that cannot have been the intention of the authors of the agreement because the effect would be to prejudice the peoples under tutelage.

The interpretation which I prefer raises the question whether a State which has lost the status of a Member of the League of Nations, either by resigning or as the result of a disciplinary measure, would have the right to invoke Article 7 of the Mandate after the dissolution of the League in order to *institute* legal proceedings. In my opinion there can be no doubt that the answer must be in

the negative; for the voluntary or disciplinary separation from a body or institution implies renunciation or loss of all those rights which the former State Member had individually acquired by virtue of its status as a Member.

This reasoning has given rise to an argument intended to destroy the possibility of applying Article 7. All the States Members of the League of Nations voluntarily agreed—it is said—to dissolve that body (Resolution of 18 April 1946). After that voluntary dissolution none of the former Members retained the right to invoke Article 7, for all of them renounced the rights and prerogatives which were the consequences of their status as Members. It is not possible, however, to ignore the historical facts which determined the disappearance of the League of Nations. That Organization—already greatly weakened before the Second World War—remained paralyzed for the whole period of the War and the results of the conflict completely upset international realities by profoundly modifying the former conformation and distribution of States on which the League of Nations had been based. In fact, the League was already dead, despite the wishes of its Members, when its Assembly adopted the Resolution of April 1946 to place its disappearance on record. At the same time its Members, in agreement with the majority of the other States of the international community, were greatly concerned that certain principles and certain institutions which were conspicuous by their social and humane progress and which had been put into effect by the League which had disappeared, should remain unaffected by the world crisis. It was then that they founded the United Nations, the regulations of which devoted special emphasis to the institution of trusteeship and provide means for transforming the former "Mandates" into modernised tutelary systems. Article 77 (paragraph 1, subparagraph *(a)*), 79 and 80 of the Charter established the compulsory character of that transformation where the Mandatory is a Member of the United Nations. The wording of Article 79 appears to me to be eloquent:

> "The terms of [the new] trusteeship ... shall [in the imperative] be agreed upon by the States directly concerned, *including the mandatory power in the case of territories held under mandate by a Member of the United Nations...*" (Italics added.)

The philosophy of this provision is that the Mandatory State which accepted and signed the Charter of the United Nations accepted the new trusteeship system and must incorporate itself in it compulsorily.

The corollary is that the Republic of South Africa, a Member of the United Nations, which has not concluded a new trusteeship agreement with that Organization, is in the transitional situation provided for by Article 80, paragraph 1, of the Charter, which must

be strictly applied; consequently, the former Mandate convention of 17 December 1920 must remain unchanged and its Article 7 must necessarily be applied. The "other States Members" of the former League of Nations are thus fully entitled to invoke the jurisdiction of the Court (Article 37 of the Statute).

Fourth Objection

In its Fourth and final Preliminary Objection—which is closely linked with the Third Objection—the Respondent asserts that the conflict or disagreement—the existence of which is alleged by the Applicants—is not a dispute which "cannot be settled by negotiation" in the sense of Article 7 of the Mandate.

In the development of its argument, the Respondent has contended:

(1) that there has been no exchange of views or direct discussion between the Parties through the diplomatic channel on the points which constitute the subject of the dispute;

(2) that account cannot be taken of administrative discussion or negotiation within the United Nations because these took place between the Organization itself and the Mandatory and not between the latter and the Applicant States individually;

(3) that the administrative negotiation in the various organs of the United Nations took place in circumstances not conducive to arriving at an agreement since the General Assembly conferred restricted powers on those organs, which constituted an element limiting the free exchange of views between the negotiators. On the other hand, the presence of plenipotentiaries in direct diplomatic negotiations would, in principle, allow of greater flexibility in seeking points of agreement in a wider field of discussion.

It is true that the record contains no reference to direct diplomatic negotiations between the Parties, that is to say, negotiations carried out in the traditional way of Ministries for Foreign Affairs and reciprocally accredited representatives. But the wording of Article 7 of the Mandate in no way indicates that negotiations must take any particular external form. Any negotiation is adequate if not in conflict with international custom.

A Member of the Court has wisely said that the field of diplomatic activity is now much wider than formerly, and that negotiations between Member States within the organs of the United Nations also undoubtedly constitute diplomatic negotiations. The delegations of States accredited to the Organization possess a diplomatic status and act as representatives of their respective governments. It might further be added that no better place could have been

chosen in this case for negotiations than the United Nations since that Organization has the best specialists in the field and possesses in its archives all the necessary historical and legal information for the necessary documentation of the discussions.

In the present case, the voluminous documentation put in by the Parties and especially the annexes relating to the activities of the United Nations in this case constitute, in my opinion, overwhelming proof not only of the fact that repeated and reiterated negotiations took place, in which the Applicants and the Respondent participated, but also that all the efforts made to find a conciliatory solution resulted in failure. The problems of the Mandate for South West Africa were dealt with by the Fourth Committee, by the *Ad Hoc* Committee, by the Good Offices Committee, by the Committee on South West Africa and finally by the General Assembly. Each of the Applicants took part, on a number of occasions, in the discussion which took place with the Mandatory in these organs on the legal aspects of the exercise of the Mandate. Furthermore, the documents show that on a number of occasions it was pointed out to the Mandatory that it was necessary for it to amend its contentions or modify its activities in relation to the peoples under tutelage. For fifteen consecutive years this fundamental opposition of points of view, this unyielding opposition of the Mandatory in the face of the virtual unanimity of Member States as to the limits and obligations flowing from the Mandate, have maintained a situation of permanent deadlock. The votes of the Applicants, in their capacity as States, against the administrative policy of South Africa are to be found in the documents and minutes of these meetings. In short: the most categoric legal and moral conviction emerges from this examination to the effect that no negotiation is possible and that any further negotiation based on the rules of the Mandates System would be ineffective to settle the dispute.

The administrative or political course having been exhausted, the Applicants have had resort to the second course provided for—by way of a wise reserve—by Article 7 of the Mandate: the course of resort to international justice. If the Mandate Agreement is carefully read, it is easy to see that Articles 6 and 7 relate to two different and successive aspects or stages in the exercise of the Mandate, which, far from being incompatible, are natural complements to each other. Mutual understanding between the League and the Mandatory is presumed as to the way in which the trust of the Mandate is to be performed (Articles 2-6), but in the event of a disagreement arising between the States Members which offers no prospect of settlement, resort to judicial decision will re-establish the harmonious functionning of the sytsem. There is nothing strange

in the abandonment of administrative negotiations when the nature of the dispute makes the intervention of a tribunal preferable.

The Respondent has contended that the failure of the administrative negotiation carried out within the United Nations was caused by the restrictions placed upon the powers granted to the negotiating organs by the General Assembly. These organs—says the Respondent—did not enjoy the freedom of action necessary to decide upon the various formulae put forward in the debates by seeking approximations in a flexible way or by possibly agreeing to partial concessions. It seems to me, however, that this restriction of powers was inevitable and still more necessary. The General Assembly could only delegate its powers on the condition that it indicated as bases for negotiation the fundamental rules of the Mandate institution and of the Mandate Agreement for South West Africa. Anything beyond this compass would have been contrary to the spirit of the Charter and would have exceeded the powers of the Assembly. That was the very reason why the negotiations by the Good Offices Committee were not successful when the General Assembly rejected the partition formula which it had proposed.

These reasons, in my opinion, justify the overruling of the Fourth Preliminary Objection.

Conclusion

For the reasons expressed above and also on the relevant grounds referred to in that part of the Advisory Opinion of 11 July 1950 which coincides with the reasoning which I have just set out, I come to the conclusion:

That the two Preliminary Objections (First and Second) raised by the Respondent to the jurisdiction of the Court are not well-founded in law;

That the two other Objections (Third and Fourth) which relate to the admissibility of the Applications of Liberia and Ethiopia, must likewise be held to be ill-founded;

That, consequently, the Court has jurisdiction to proceed to adjudication upon the merits of the applications.

(Signed) J. L. BUSTAMANTE R.