

## SEPARATE OPINION OF JUDGE JESSUP

I agree with the decision of the Court that it has jurisdiction to hear the present cases on the merits and that the four preliminary objections are not well founded and should be dismissed. Since, however, the Opinion of the Court does not embrace all the questions of fact and of law which I find essential to reaching the decision, I find it my duty to deliver this separate Opinion.

The nature of the international obligations assumed by a Mandatory in accepting a Mandate, and specifically, the nature of those obligations assumed by the Respondent in accepting the Mandate for South West Africa, is a focal point in the decision of the jurisdictional issues in these cases. In my view, it is not possible to understand the nature of those obligations without a thorough appreciation of the principal facts prefacing and attending the finalization of the Mandate. These facts, as now available in published official records, have hitherto not been adequately presented. Accordingly, without repeating much that is familiar in the history of the Mandates, I shall summarize and comment on those facts which seem to me to be essential to an analysis of the obligations of the Mandatory for South West Africa.

On 7 May 1919, at a meeting of the Council of Four (President Wilson, Mr. Lloyd George, M. Clemenceau and Sr. Orlando), Mr. Lloyd George submitted a proposal for the allocation of the Mandates, including the allocation of the Mandate for South West Africa to Great Britain acting on behalf of the Union of South Africa. At the afternoon meeting on the same day, a "decision" was taken approving these proposals and the decision was published.

On 27 June the Council of Four, with Japan also represented, had before it "forms" of the Mandates which had been prepared by Lord Milner and submitted by Mr. Lloyd George. The details were not discussed and after some general observations the Council decided to set up a Commission under Lord Milner to prepare drafts of the Mandates.

On the following day the Milner Commission met in Paris and Lord Milner submitted a draft to serve as a pattern for the C Mandates. This draft contained no provision for reference to the Permanent Court of International Justice.

On 5 July a joint British-French draft to serve as a pattern for B Mandates was laid before the Milner Commission. This draft also contained no provision for reference to the International Court.

On 8 July the British-French draft was taken as a basis for discussion but the United States representative submitted an

alternative draft for B Mandates. This draft contained two paragraphs concerning references to the Permanent Court of International Justice. These provisions read as follows (*translation*):

“Article 15

If a dispute should arise *between the Members of the League of Nations* relating to the interpretation or the application of the present Convention and if this dispute cannot be settled by negotiation, it will be referred to the Permanent Court of International Justice which is to be established by the League of Nations.

The subjects or citizens of States Members of the League of Nations may likewise bring claims concerning infractions of the rights conferred on them by Articles 5, 6, 7, 7a and 7b of this Mandate before the said Court for decision. The judgment rendered by this Court will be without appeal in both the preceding cases and will have the same effect as an arbitral decision rendered according to Article 13 of the Covenant.”

It will be noted that the italicized words in the first paragraph indicate that either the Mandatory or another Member of the League, could invoke the jurisdiction of the Court. This provision was subsequently altered.

The representative of France and Lord Milner both said that they had no objection to the principle of recourse to the international Court but they both objected to the provision in the second paragraph which would allow individuals to invoke the jurisdiction of the Court. The representative of the United States then agreed to a modification suggested by Lord Robert Cecil by which the second paragraph would read as follows:

“The Members of the League of Nations may likewise, on behalf of their subjects or citizens, bring claims for infractions of their rights...”

It was also agreed to delete the references to the specific Articles in this same second paragraph. These amendments were agreed to in the meeting of 9 July.

On the following day, 10 July, a draft to serve as a pattern for C Mandates was approved with a paragraph concerning reference to the Court which was identical with the *first* paragraph of the United States draft which has just been discussed. At the same meeting the Commission also approved a draft to serve as a pattern for B Mandates and this draft contained the *two* paragraphs as proposed by the United States but with the amendments which have been indicated.

On 15 July Lord Milner sent these drafts for B and C Mandates to the Secretary-General of the Peace Conference in Paris and on 5 August he and Colonel House announced at a session of the Commission in London that President Wilson and Mr. Lloyd George had approved both drafts. In the Commission, the French re-

presentative then made a reservation concerning the recruitment of troops in B Mandates and the Japanese representative made a reservation concerning the Open Door in C Mandates. The Commission decided to send the drafts formally to the Council of the Principal Allied and Associated Powers in Paris. The Commission on Mandates did not meet again after this date but the texts of the drafts for B and C Mandates which they had approved were sent to the legal experts of the Drafting Committee of the Peace Conference, who, without discussing the substance of the drafts, put them into the form of formal conventions.

On 24 December 1919, the Council of Heads of Delegations in Paris considered the "drafts of Conventions relative to Mandates" including one concerning the allocation to the British Empire (Union of South Africa) for German South West Africa.

It was explained to the Council that these drafts were the texts adopted by the Commission in London which had been put into treaty form by the legal experts of the Drafting Committee. In the draft Convention for South West Africa one finds in the listing of the High Contracting Parties that His Majesty the King of the United Kingdom, etc., is listed twice, the second time "for and on behalf of His Union of South Africa". Article 8 of this draft Convention reads as follows:

"The consent of the Council of the League of Nations is required for any modification of the terms of this Mandate. If any dispute whatever should arise between the Members of the League of Nations relating to the interpretation or the application of those provisions which cannot be settled by negotiation, this dispute shall be submitted to the Permanent Court of International Justice to be established by the League of Nations."

In this draft Convention, the provisions which later appear in the Preamble of the Mandate were stated somewhat differently. The first paragraph of the Preamble of the draft Convention contains a provision identical—except for a few stylistic differences—with the first paragraph of the final text of the Preamble. Paragraph 2 is a little different but refers to Article 22 of the Covenant and the desire of the Principal Allied and Associated Powers to confer a Mandate upon His Britannic Majesty "to be exercised on His behalf by the Government of the Union of South Africa", and then recites that they have decided to conclude a Convention. Article 1 of the draft Convention then says the Powers "confer" the Mandate and says that the Mandate will be exercised by the Union of South Africa in conformity with Article 22 of the Covenant. By Article 2, His Britannic Majesty accepts the Mandate "and will execute the same on behalf of the League of Nations, and in accordance with the following provisions". This is the basis for paragraph 3 of the Preamble of the final text.

At the end of the draft Convention is a sentence:

“Confirmed by the Council of the League of Nations the... day of...”

At this time the United States Commission to the Peace Conference had already returned to the United States but the United States was represented in the Council of Heads of Delegations. With reference to the drafts of the “C” Mandates, it was decided that discussion would be resumed after the Japanese delegate had received instructions from his government concerning the “Open Door” reservation. Japan did not disagree with the provision for recourse to the Court.

The foregoing events all took place before the Treaty of Versailles, of which the Covenant of the League of Nations was a part, entered into force on 10 January 1920. On that date, the Mandate for South West Africa had not been perfected. The allocation of the Mandate to the Union of South Africa (represented by Great Britain) had been agreed. Final agreement on the terms of the Mandate awaited the final approval of Japan, but they had been drawn up with Article 22 of the Covenant in mind. The Mandatory was party to these agreements. The draft Convention contemplated confirmation by the Council of the League of Nations as the final link and it is with the Council of the League that the final stages of perfecting the Mandate are connected.

At this point the Mandatory was bound by an international obligation to France, Great Britain, Italy and Japan, to accept the Mandate for South West Africa, to exercise it according to the agreed terms, and to submit to the jurisdiction of the Permanent Court disputes with other Members of the League concerning the interpretation or application of the Mandate. This agreement was subject to two conditions subsequent: (1) approval by Japan; (2) confirmation by the Council of the League. Both of these conditions were subsequently fulfilled and the international agreement, with certain agreed amendments, was then perfected.

The Council of the League of Nations on 5 August 1920 adopted the report prepared by M. Hymans of Belgium on “The Obligations of the League of Nations under Article 22 of the Covenant (Mandates)”. This report was designed in part to clarify the respective roles of the Council and the Assembly of the League in regard to Mandates, but it constitutes the basic document concerning the respective roles of the Council of the League on the one hand and the Principal Allied Powers on the other. It will be recalled that France, Great Britain, Japan and Belgium, namely the four States which accepted Mandates—Great Britain acting in several capacities—were at this time Members of the Council of the League. In

adopting the Hymans Report, the Council of the League approved, *inter alia*, the following conclusions:

1. There was no disagreement that the right to allocate the Mandates belonged to the Principal Allied and Associated Powers in whose favour Germany had renounced its rights in its overseas possessions.

2. Although the Mandatory was thus appointed by the Principal Powers it was to govern in the name of the League. "It logically follows that the legal title held by the Mandatory Power must be a double one: one conferred by the Principal Powers and the other conferred by the League of Nations."

3. On the question "By whom shall the terms of the Mandates be determined?" the report said:

"It has not been sufficiently noted that the question is only partially solved by paragraph 8 of Article 22, according to which the degree of authority, control or administration to be exercised by the Mandatory, if not defined by a previous convention, shall be explicitly defined by the Council."

The report continued that most Mandates would contain many provisions other than those relating to the degree of authority. It said that the B and C Mandates must be submitted "for the approval of the Council". In the light of paragraph 6 of Article 22 of the Covenant, it concluded that "it is not indispensable that C Mandates should contain any stipulation whatever regarding the degree of authority or administration".

4. The report discussed the meaning of "Members of the League" as used in paragraph 8 of Article 22. It concluded that this term could not be taken literally because if it were it would mean that the Assembly of the League would have to determine the terms of the Mandates since only the Assembly brought all the Members together; if the drafters had meant to refer to the Assembly, they "would have mentioned it by name, rather than used an obscure periphrasis". The report concluded that when the Article was drafted it was supposed that conventions dealing with Mandates would be included in the Peace Treaty and that only the Allied and Associated Powers would be original Members of the League. The term "Members of the League" in paragraph 8 of Article 22 was thus intended to refer to all the signatories, except Germany, of the Treaty of Versailles. Practically, the report recommended that the Council ask the Powers to inform the Council of the terms they proposed for the Mandates.

On 26 October the Council adopted a second report by M. Hymans on the question of Mandates.

This Report stated:

"With regard to Mandates B and C, it appears that the Principal Powers are in agreement on many points, but that there are differences of opinion as to the interpretation of certain of the provisions of Article 22, and that the negotiations have not yet been concluded.

Beyond doubt, *it is in every way desirable that the Principal Powers should be able to arrive at a complete understanding and to submit agreements to the League. Failing this very desirable agreement* however, the Covenant provides for the intervention of the Council with a view to determining the degree of authority, of control or of administration to be exercised by the Mandatories."

... "We sincerely hope therefore that before the end of the Assembly *the Principal Powers will have succeeded in settling by common agreement the terms of the Mandates* which they wish to submit to the Council." (Italics supplied.)

The difference of opinion to which the Report referred, in the case of the C Mandates, was the Japanese reservation on the Open Door.

There is further evidence of the contemporary understanding of the respective roles of the Principal Powers and of the League Council in establishing the Mandates. The Prime Minister of Great Britain said in the House of Commons on 26 July 1920 (when asked "Do the Great Powers submit Mandates to the League of Nations? Is submission the real attitude?"): "The Great Powers are on the League of Nations, and they are only submitting to themselves." Again, on 8 November 1920 when asked whether "the right to determine the terms of the Mandate reposes in the Members of the League", the Prime Minister answered in the negative and later stated: "The Great Powers are represented, of course, on the Council of the League, and these Mandates have to be submitted to the Council of the League. It will require the unanimous consent of the Council of the League to reject them ... Nothing can be done except by a unanimous decision of the Council. That means that nothing can be done without the consent of the Powers concerned." The question was then put: "Is it not definitely laid down by the Treaty of Versailles that the degree of authority and control to be exercised by any Mandatory in a mandatory area is a matter for the League of Nations, Council or Assembly, to decide?" The Prime Minister replied: "Yes, *subject to the conditions which I have already indicated.*" (Italics supplied.)

At the private session of the Council on 4 August 1920, M. Bourgeois (France) pointed out that:

"the Principal Allied and Associated Powers, at the moment when the Covenant was drafted, had, in using the phrase 'Members of the League', in effect intended to refer to themselves."

In a discussion on the Mandate drafts in the Council of the League on 10 December 1920, the Representative of Italy said that, strictly speaking, by the terms of Article 22 (8) of the Covenant, no drafts of A Mandates had been brought to the notice of the Council since they had not yet been communicated to Italy "and, consequently, there was, as yet, no agreement in regard to the matter between the Principal Allied Powers". He referred to the "necessity of an agreement *between the Principal Allied Powers, as provided for by Article 22*". (Italics supplied.)

On 10 December 1920 the Council of the League "declared afresh that it was its duty to see that the rules laid down in Article 22 were carried out and especially that it was competent to approve the terms of the Mandates and, in the last resort, if need be, to draw up the terms".

These salient facts, against the familiar background of the origins of the Mandate System, lead to the following conclusions:

1. The decision of the Council of Four on 7 May, 1919, allocating the Mandate for South West Africa to the Union of South Africa, constituted the first link in what may be called the chain of title. This "decision" was an international agreement between France, Great Britain, Italy, the United States and the Union of South Africa (represented by Great Britain) which had dispositive effect. Japan subsequently concurred in or adhered to this agreement.

2. Since the allocation of a Mandate was not equivalent to a cession of territory and did not transfer sovereignty to the Mandatory, it remained to determine what would be the rights and duties of the Mandatory in its capacity as such. Article 22 of the Covenant, by which all the States concerned were soon to be bound, indicated the general nature of these rights and duties.

3. By 24 December 1919 agreement had been reached among France, Great Britain, Italy and Japan, on the one hand, and the Union of South Africa represented by Great Britain, on the other hand, on the terms of the Mandate, except for one unsettled reservation of Japan. The agreed terms which were unaffected by the Japanese reservation included a provision for the compulsory jurisdiction of the Permanent Court of International Justice.

4. By December 1920 it had become clear that the United States had disassociated itself from the Peace Treaty settlements and from the League of Nations, which fact altered the form, but not the fact of agreement on the terms of the Mandate for South West Africa.

This was the situation when on 14 December 1920, Mr. Balfour handed in to the Council of the League, drafts of the C Mandates. Among them, the draft entitled

"MANDATE FOR GERMAN SOUTH WEST AFRICASubmitted for Approval'

was no longer cast in the form of a formal convention such as had been discussed by the Council of Heads of Delegations at Paris, but in the form of a resolution of the Council of the League of Nations. This draft began with a preamble of three paragraphs substantially identical with the first three paragraphs of the Mandate as ultimately in force. These three paragraphs are then followed by one line which reads:

"Hereby [the Council] approves the terms of the Mandate as follows:"

The text of Article 7 of this draft is:

"The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate, provided that in the case of any modification proposed by the Mandatory such consent may be given by a majority.

If any dispute whatever should arise between the Members of the League of Nations relating to the interpretation or the application of these provisions which cannot be settled by negotiation, this dispute shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

The Council immediately referred this draft to the Secretariat to be studied by the experts. As appears from subsequent reports by Viscount Ishii, the Secretariat was concerned to make sure that the proposed terms conformed to Article 22 of the Covenant and that the role of the Council of the League should be appropriately recognized. As stated by Viscount Ishii, what is now the fourth paragraph of the preamble was inserted

"to define clearly the relations which, under the terms of the Covenant, should exist between the League of Nations and the Council on the one hand, and the Mandatory Power on the other".

Along the same lines, the one line following the preamble in the Balfour draft was replaced by the phrase which appears in the final text, namely:

"Confirming the said Mandate, defines its terms as follows:"

The fourth paragraph of the preamble, as inserted by the League Secretariat, is capable of misconstruction. The English text, as it appears in the final version of the Mandate, reads as follows:

"Whereas, by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to



be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:"

It will be seen that this text slightly paraphrases the text of paragraph 8 of Article 22 of the Covenant. On the other hand, the French text follows the text of paragraph 8 of Article 22 more closely and, in doing so, brings out more clearly the condition subject to which the Council was authorized to act.

The French text reads as follows:

"Considérant que, aux termes de l'Article 22 ci-dessus mentionné, paragraphe 8, il est prévu que *si* le degré d'autorité, de contrôle ou d'administration à exercer par le Mandataire n'a pas fait l'objet d'une Convention antérieure entre les Membres de la Société, il sera expressément statué sur ces points par le Conseil:"

Moreover, in the English text of the Ishii report, the phrase "not having been previously agreed upon by Members of the League" is set off by commas, thus affording a construction which, in English, may also be conditional. The use of the comma after the word "Mandatory" is to be found in the Mandates for Syria, Lebanon, Palestine, Belgian East Africa, British East Africa, and the Pacific Islands north of the Equator, but it has dropped out in the texts of the Mandates for the Pacific Islands south of the Equator, for Samoa and for Nauru and for South West Africa.

If the fourth paragraph of the Preamble is read as an assertion that the Members of the League had not previously agreed upon the terms of the Mandate, given the interpretation which the Council and its Members were currently giving to the expression "Members of the League", the assertion would be not only contrary to the historical facts but to the recital of those facts in paragraphs two and three of the Preamble. Moreover, it is perfectly clear from the record that it was the Principal Powers and not the Council which "explicitly defined" the terms of the Mandate, including those terms which alone the Council, under stated conditions, was authorized by paragraph 8 of Article 22 to define.

This whole fourth paragraph of the Preamble is omitted entirely from the four Mandates for Togo and the Cameroons which had a different development. At the meeting of the Council of Four on 7 May 1919, when the decision was taken to allocate the Mandates, it was agreed that the British and French Governments would make a joint recommendation to the League as to the future of the former colonies of Togo and the Cameroons; at this point there was no decision to place these territories under Mandate. But the Joint Recommendation of the two Governments to the League on 17 December 1920 proposed a division of the two colonies between France and Great Britain and, in accordance with

the spirit of Article 22, that they be placed under Mandates. The two Governments accordingly sent to the Council four draft Mandates which are similar to the other B Mandates. The Joint Recommendation says that the two Governments "venture to hope that when the Council has taken note of them it will consider that the drafts have been prepared in conformity with the principles laid down in the said Article 22, and will approve them accordingly".

Appended to the drafts were signed agreements on the delimitation of the frontiers; the fact that these agreements were signed and that there was no explicit signed statement saying "The undersigned *agree to the terms* of the Mandates which we are jointly recommending", is of no juridical consequence. When the Council of the League approved these four drafts on 1 August 1922, it did not insert the new fourth paragraph of the Preamble although it did insert the final one-line phrase. If it had been the understanding that under Article 22 of the Covenant the Council actually had to define *all* the terms of the Mandates in the absence of prior agreement by *all* the Members of the League, and if the fourth paragraph of the Preamble as it appears, *inter alia*, in the Mandate for South West Africa, is to be so understood, it would be impossible to explain why these four Mandates were subject to a different rule. The second paragraph of the Preamble of these four Mandates recites that the Principal Allied and Associated Powers had "agreed" that France and Great Britain should make a joint recommendation concerning these former colonies and this was evidently treated as an agreement of the Powers in advance to accept whatever recommendation the two governments might make. This conclusion is borne out by the Treaties of 13 February 1923 between the United States and France concerning the rights of the former in French Cameroons and Togo; they refer to the agreement of the four Powers upon these Mandates, just as the Treaty of 11 February 1922 between the United States and Japan concerning rights in the islands under Japanese Mandate recites the prior agreement of the same four Powers on the allocation of the Mandate and on its terms.

So in dealing with A Mandates, the Council, at its Thirteenth Meeting on 24 July 1922 approved a frank declaration which says:

"In view of the declarations which have just been made, *and of the agreement reached by all the Members of the Council*, the articles of the Mandates for Palestine and Syria are approved."

The amendments made in Article 7 of the Balfour draft of the C Mandates are significant. As Viscount Ishii explained, the first paragraph of Article 7 was amended so as to eliminate the idea of a majority vote since the Council had in other connections decided that it should always act by unanimity.

The second paragraph of Article 7 was recast in what became its final form so that its opening phrases read:

“The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations...”

On the other hand, the text in the Balfour draft said: “If any dispute whatever should arise *between the Members* of the League of Nations...”, which was the language of the text approved in the Milner Commission in July, 1919.

Viscount Ishii explained that this change was inspired by the thought that the Members of the League, other than the Mandatory “could not be forced against their will to submit their difficulties to the Permanent Court”.

The various amendments thus suggested by the League Secretariat were accepted by the Council. The representative of Japan made a declaration that Japan had no objection to the C Mandates and the Council accordingly approved them. In so far as the Mandate for South West Africa is concerned, this approval is registered in the familiar resolution of 17 December 1920. This may be called the second link in the chain of title.

It may be remarked that this resolution was adopted by the Council on the day following that on which the Protocol of Signature of the Statute of the Permanent Court of International Justice was opened for signature and was then signed, *inter alia*, on behalf of all of the governments which subsequently became Mandatories, although the signature for the Union of South Africa was under reserve of the approval of the Government of that country.

It is apparent that the Council of the League did not “define” the terms of the Mandate in the sense of originating a definition or specification thereof; it “defined” them only in the sense of making them “definite” through the Council’s stamp of approval on the drafts which had been agreed upon by the Principal Powers.

The actual course of events was correctly summarized on 21 February 1927 by the Secretary of State for the Colonies, responding to a question in the House of Commons:

“Under Article 119 of the Treaty of Versailles the former German territories in Africa were surrendered to the Principal Allied and Associated Powers who, in accordance with Article 22 of the Treaty agreed that the Mandates to administer these territories should be conferred upon the Government concerned; and proposed the terms in which the Mandates should be formulated. Having arranged the allocation and delimitation of these territories as between themselves, the Governments concerned *agreed to accept their respective Mandates and to exercise them* on behalf of the League of Nations on

*the proposed terms, and the Mandates were then confirmed by the Council of the League...*" (Italics supplied.)

The Council, as is apparent from the fourth paragraph of the Preamble of its resolution of 17 December 1920, purported to take its action under the authority of paragraph 8 of Article 22 of the Covenant. But Article 7 of the Mandate, with its compromissory clause, was outside the scope of paragraph 8 which relates only to the "degree of authority, control, or administration to be exercised by the Mandatory". Indeed Article 22 of the Covenant contains no reference to the Permanent Court. Article 7 at least—whatever one may say of the other Articles—stems from the agreement of the Principal Powers and the Mandatory and the resolution of the Council of the League of 17 December 1920 records the agreement.

The Mandate, as an international institution of the type contemplated in Article 22 of the Covenant, was a novelty in international law and it is not surprising that the agreements which were framed to give life to the institution present complex aspects. It is the task of the Court, not to construct some ideal legal pattern which might have been followed, but to appreciate the facts. *Ex factis ius oritur*. It is not irrelevant to recall that legal difficulties were encountered also in the establishment of the Trusteeship System, which, under Chapter XII of the Charter of the United Nations, was designed to supersede the Mandates System under the League of Nations. Just as the text of Article 22 of the Covenant seemed on its face to envisage an agreement by all Members of the League, so Article 79 of the Charter provides that "The terms of trusteeship for each territory ... shall be agreed upon by the States directly concerned ...". The fact that it was impossible to reach agreement on the identification of "States directly concerned" is part of a familiar story. The General Assembly accordingly approved by resolution the terms of trusteeships without there having been strict compliance with this requirement of Article 79 of the Charter. The reality of the existence of "trusteeship agreements", however, can scarcely be questioned.

In the light of this record, it is possible to describe the multifarious international obligations assumed by the Respondent as Mandatory for South West Africa.

1. The Mandatory had obligations under the Covenant of the League of Nations. As a Member of the League, the Mandatory, as soon as it accepted a Mandate, became bound by those provisions of Article 22 of the Covenant which specify or indicate the nature of a Mandatory's obligation. Paragraph 7 of Article 22, for example, imposed the specific obligation to render an annual report; it is possible to consider Article 6 of the Council's resolution of December 17, 1920, as merely giving specificity to this obligation. Paragraphs 1 and 2 of Article 22, supplemented by the general obligations under Article 23, indicate the general nature of the obligations flowing from the "sacred trust", and again it is possible to consider Articles 2

through 5 of the resolution of 17 December 1920 as filling in the precise details of these obligations. But in both these instances, the "details" were subjects of further agreement outside the Covenant.

The obligations owed by a Mandatory under Article 22 of the Covenant, like those obligations owed by all Members of the League under such Articles as 10 and 16 of the Covenant, were owed to the co-contractors, that is to all other Members of the League. I do not find it necessary to consider at this point whether these particular obligations, *under the Covenant*, were owed also to the collectivity, that is to the League of Nations itself. I shall discuss later the position of the inhabitants of the Mandated territory.

2. The Mandatory had obligations under the agreements which it made with the Principal Powers, namely, France, Great Britain, Italy and Japan. These agreements are recorded in the resolution of the Council of the League of 17 December 1920.

The *first agreement* recorded in the second paragraph of the Preamble of the resolution must be recalled, although the Mandatory may not be considered an original party to it. It reads:

"Whereas the Principal Allied and Associated Powers agreed that, in accordance with Article 22, Part I (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory aforementioned..."

This agreement was the decision of the Council of Four of 7 May 1919. The Preamble is here accurate in referring to the "Principal Allied *and Associated* Powers" since the United States, through President Wilson, participated in making this basic agreement. But, as the United States subsequently pointed out, it was incorrect to use this term in regard to further agreements in which the United States did not officially participate. I shall hereafter refer to the "Principal Powers" as including France, Great Britain, Italy and Japan. The Union of South Africa became a party to this agreement by the acceptance to be noted in a moment.

The *second agreement* recorded in the same paragraph is recorded in these words:

"... and have proposed that the Mandate should be formulated in the following terms;"

Subject to the correction just noted concerning the United States which was the "Associated" Power, this means that the Principal Powers had "proposed" the "following terms" for the Mandate.

Obviously four Powers could not make a proposal jointly without having agreed upon it, and we know from the historical record that they had agreed. Again, it may be said that the Union of South Africa became a party to this agreement by the acceptance which can now be noted.

The *third agreement* is recorded in the third paragraph of the Preamble of the resolution of 17 December 1920, as follows:

“Whereas His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions;”

This is really a double agreement since it first records the acceptance by the Mandatory of the Mandate as allocated in the first agreement of the Principal Allied and Associated Powers, and then records the acceptance of the second agreement of the Principal Powers by which the terms of the Mandate were formulated. It is clear that the words “following provisions” in this paragraph of the Preamble are identical in meaning with the words “following terms” in the preceding paragraph. As already stated, these two acceptances may be considered as equivalent to accessions by the Union of South Africa to two agreements of the Principal Powers, that is to the agreement to allocate to the Union (through His Britannic Majesty) the Mandate for South West Africa, *and* to the agreement upon the terms according to which the Mandate was to be exercised.

It may be noted that the term “acceptance”, in accordance with familiar modern practice, is used here in the sense in which the term is explained along with “accession”, “approval” and other terms in the 1962 Report of the United Nations International Law Commission; according to Article 1 (*d*) of the Draft Articles on the Law of Treaties, these terms “mean in each case the act so named whereby a State establishes on the international plane its consent to be bound by a treaty”. The use of the term “treaty” is considered hereinafter.

It has already been explained how the Council of the League proceeded by its resolution of 17 December 1920 to confirm and to make definite the terms of the Mandate which had already been agreed upon by the Mandatory and the Principal Powers. The various textual amendments included in the Council resolution being approved by the Council, acting by unanimity, were thereby approved by Great Britain speaking in its double capacity. It could be said, therefore, that the *fourth agreement* is the entire body of the Council’s resolution and it is in this sense that the resolution has generally been treated as being “the Mandate”, which has usually been considered—as it was considered by all parties to these cases—to be a treaty to which the Mandatory was a party. This point will be dealt with later.

But the amended text which was adopted for the second paragraph of Article 7 of the resolution is cast in such a form that it is justifiable to deal with it separately, perhaps as a *fifth agreement*. The paragraphs reads:

“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.”

In contrast to the paragraphs of the Preamble which used the past tense to refer to agreements already concluded, this second paragraph of Article 7 is cast in the present tense. Its general form is in the style of declarations to be made under Article 36 (2) of the Statute of the Permanent Court of International Justice, by which States agree to accept the compulsory jurisdiction of the Court; the provision for reciprocity, while usual, is neither obligatory nor universal. But it is also similar to a compromissory clause of the type frequently found in multilateral conventions.

The change in the compromissory clause of Article 7, which was agreed to by the Powers and the Mandatory, did not modify the obligation of the Mandatory to submit to the jurisdiction of the Court, an obligation to which the Mandatory had agreed throughout the drafting stages from the mid-summer of 1919, and which was included in the third and fifth agreements recorded in the Council's resolution of 17 December 1920. The change in this clause merely altered the legal situation relative to obligations of other Members of the League, on whom (as it was thought) the earlier drafts would have imposed an obligation to submit to the jurisdiction of the Court without their even having an opportunity to accept or refuse.

\* \* \*

The word “mandate” has been used in many different senses—to indicate an institution, an instrument, a treaty or agreement, a grant of authority and a territory. In whatever way one identifies the “mandate”, it can scarcely be doubted that in accepting the mandate, the Mandatory incurred international obligations of a legal character and that it voluntarily agreed to incur those obligations; the obligations were certainly not imposed upon the Mandatory, which, under Article 22 (2) of the Covenant, was a State “willing to accept” them. This being the case, the next point to consider is whether the agreement to incur these international obligations of a legal character is to be characterized as a “treaty or convention”. The term “treaty or convention” is used in Articles 36 and 37 of the Statute, but since in recent times there has

been no justification for distinguishing in law between a *treaty* and a *convention*, only the term "treaty" need be used here for purposes of analysis.

Here again semantic difficulties are encountered, since, as a Rapporteur of the International Law Commission has pointed out, in all discussions in the law of treaties there is apt to be confusion between the instrument in which an agreement is embodied and the agreement itself. As far back as 1925, a sub-committee of the League of Nations Committee on the Codification of International Law, referred to "the prevailing anarchy as regards terminology" in the law of treaties. The notion that there is a clear and ordinary meaning of the word "treaty" is a mirage. The fundamental question is whether a State has given a promise or undertaking from which flow international legal rights and duties. This point of view has been generally accepted in modern codifications of the law of treaties, such as those of the United Nations International Law Commission, the Harvard Research in International Law and the American Law Institute.

In view of what the International Law Commission in its 1962 Report calls the "extraordinarily rich and varied nomenclature", it is common ground that the label attached to a treaty is of no legal significance and that the legal consequences of informal agreements expressed in a variety of forms may be identical with those resulting from the most formal instruments. (Cf. Lissitzyn, "Efforts to Codify or Restate the Law of Treaties", 62 *Columbia Law Review* 1166 (1962).) In preparing draft codes on the law of treaties, rapporteurs have at times pointed out that the draft has for convenience, been limited to apply, for example, only to treaties embodied in written instruments. But the 1962 Report of the International Law Commission, like that of 1959, emphasizes that the fact that the articles do not apply to international agreements not in written form "is not to deny the legal force of oral agreements under international law". The 1959 Report explained: "There may be an international agreement, but there may be no instrument embodying it—i.e., it is an oral agreement, made for example, between heads of States or Governments..." (1959 Yearbook of the International Law Commission, Vol. II, p. 94.)

The recent (1962) draft of the American Law Institute uses the expression "international agreement" in place of "treaty" and defines it as "an agreement between states or international organizations by which there is manifested an intention to create, change or define relationships under international law". The comment says "there is no rule of international law which prevents an oral agreement from constituting a binding international agreement".

It is also generally recognized that there may be unilateral agreements, meaning agreements arising out of unilateral acts in which only one party is promisor and may well be the only party bound.



Unilateral contracts of the same character are recognized in some municipal legal systems. In the United States, for instance: "In the case of a unilateral contract, there is only one promisor; and the legal result is that he is the only party who is under an enforceable legal duty. The other party to this contract is the one to whom the promise is made, and he is the only one in whom the contract creates an enforceable legal right." The assent of the promisee is not always required. (*Corbin on Contracts* (1950), Vol. I, sec. 21.) The doctrine of "consideration", which plays so large a part in Anglo-American contract law, has not been taken over into the international law of treaties.

Professor Brierly, as Rapporteur on the Law of Treaties for the International Law Commission, declared:

"International legal rights and obligations may of course arise otherwise than by agreement between a plurality of persons. They may thus arise by unilateral act, or as a result of an act to which the beneficiary of rights created by such act is a stranger... A possible explanation of the binding force of so-called unilateral declarations creative of rights against the declarant is to be found in the theory of presumed consent of the beneficiary." (1950 *Yearbook of the International Law Commission*, Vol. II, p. 227. See also the report by Lauterpacht as Rapporteur in 1953, *ibid.*, Vol. II, pp. 101 ff.)

The points of view just summarized are soundly based on international practice and on the jurisprudence of the international courts. A few examples of unilateral and informal agreements may be cited.

In the *Free Zones* case the Permanent Court of International Justice considered that a unilateral manifesto issued by a domestic Sardinian organ had the character of a treaty stipulation (A/B No. 46 (1932), p. 145).

In *Interpretation of the Statute of the Memel Territory* (A/B No. 49), Lithuania claimed that the Statute of the Memel Territory was a Lithuanian enactment—but it was annexed to the Convention. Sir William Malkin, arguing for the United Kingdom (Series C No. 59, pp. 176-178), stated that, "whatever the form of the Statute might be, its true juridical nature was that of a treaty and 'that any question of interpretation which may arise on the terms of those instruments [the Convention and the Statute] is to be determined, not by analogies drawn from other constitutions or constitutional laws, but by applying the ordinary methods of treaty interpretation', a view which the court accepted". (As summarized, apparently in agreement, by McNair, *Law of Treaties* (1961), p. 12.)

In the case of *Railway Traffic, Lithuania and Poland*, the Permanent Court of International Justice held that the participation of

the two States in the adoption of a resolution of the Council of the League of Nations constituted an "engagement" (A/B No. 42 (1931), p. 116).

The Albanian Declaration to the Council of the League of Nations on October 2, 1921, which was registered with the League and published in IX League of Nations *Treaty Series*, page 173, was dealt with by the Permanent Court of International Justice as a treaty in the matter of *Minority Schools in Albania* (A/B No. 64 (1935)). There were other similar "declarations", e.g. that of Lithuania which entered into force without any "ratification" on 11 December 1923 and was registered by the Secretariat of the League (22 League of Nations, *Treaty Series*, 393). Like the Minorities Treaties, these declarations contained clauses accepting the jurisdiction of the Permanent Court in case of "any difference of opinion as to questions of law or fact arising out of these articles". On the conclusion that many such unilateral declarations have the force of treaties, see 1953 *Yearbook of the International Law Commission*, Vol. II, pp. 98 ff.

An unusual item is No. 319 in Vol. 20 of the United Nations *Treaty Series* entitled "Communiqué on the Moscow Conference of the three Foreign Ministers signed at Moscow on 27 December 1945, and Report of the Meeting of the Ministers of Foreign Affairs of the Union of Soviet Socialist Republics, the United States of America and the United Kingdom, dated 26 December 1945, together constituting an Agreement relating to the preparation of peace treaties and to certain other problems". [Italics supplied.] The communiqué recites: "At the meeting of the three Foreign Ministers, discussions took place on an informal and exploratory basis and agreement was reached on the following questions..." The communiqué is signed by Messrs. Byrnes, Bevin and Molotov. The agreement covered such matters as the decision concerning the participants in signing certain peace treaties, the establishment of the Far Eastern Commission, of the Allied Council for Japan, and of the Commission for Korea, as well as other matters. It is interesting to compare this type of "agreement" which was registered in the United Nations Treaty Series, with the "agreements" recorded in the League Council's resolution of December 17, 1920. The question of registration will be considered later, but it may be noted that:

"The *procès-verbal*' of an international conference may form an adequate record of an informal engagement agreement. The United Kingdom has been advised in substantially the following terms:

There is no reason based on its informality why such a record should not constitute adequate evidence of an international engagement. International law prescribes no form for international

engagements. There is no legal distinction between formal and informal engagements. If an agreement is intended by the parties to be binding, to affect their future relations, then the question of the form it takes is irrelevant to the question of its existence. What matters is the intention of the parties, and that intention may be embodied in a treaty or convention or protocol or even a declaration contained in the minutes of a conference." [Italics supplied.] (McNair, *Law of Treaties* (1961), pp. 14-15.)

It is of no juridical consequence that the final agreements recorded in the preamble to the resolution of the League Council of 17 December 1920, frequently referred to as "the Mandate", have not been located in any published separate signed instrument. If the fact of agreement is established, the identification of a document or instrument embodying the agreement is not required by any rule of international law. International law contains no rule comparable to a Statute of Frauds in some municipal legal systems. The well-known Ihlen Declaration dealt with by the Permanent Court in the case of *Eastern Greenland* became an engagement when it was uttered; the minute in which it was subsequently recorded was an instrument which proved the fact and the content of the engagement but these might have been proved by other evidence. As Judge Anzilotti said in his Dissenting Opinion (A/B No. 53, p.91):

"There does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid."

Nothing in the form—or formlessness—or novelty of the Mandate, militates against its being considered a "treaty".

It has already been shown that the historical record and the recital in the Council's resolution of 17 December 1920 prove the existence of the agreement of the Mandatory for South West Africa with the four Principal Allied Powers. Both the Permanent Court and this Court have considered that a Mandatory was bound by an international agreement, embodied in an article of the Mandates, to accept the jurisdiction of the International Court. Specifically, the Permanent Court in *Mavrommatis* (Series A, No. 2, 1924) considered that the compromissory clause in the Palestine Mandate was a treaty or convention upon which its jurisdiction could be founded in accordance with the requirements of Article 36 of the Statute. With reference to Article 26 of the Palestine Mandate which is the counterpart of Article 7 of the South West Africa Mandate, the Court said:

"The parties in the present case agree that Article 26 of the Mandate falls within the category of 'matters specially provided for

in Treaties and Conventions in force' under the terms of Article 36 of the Statute and the British Government does not dispute the fact that proceedings have been duly initiated in accordance with Article 40 of the Statute."

It must not escape emphasis that the British Government, one of the principal authors of the terms of the Mandates, while challenging the jurisdiction of the Court, agreed that such jurisdiction could not be challenged on the theory that the Mandate was not a "treaty or convention" within the meaning of Article 36 of the Statute.

In the 1950 Advisory Opinion on the *International Status of South West Africa*, there was no dissent from the view that Article 7 of the Mandate was a treaty conferring jurisdiction on this Court. In his Separate Opinion (at p. 158), Judge Sir Arnold McNair cited the *Mavrommatis* Judgment of the Permanent Court in asserting "there can be no doubt that the Mandate, which embodies international obligations, belongs to the category of treaty or convention...".

After a decade had passed, Lord McNair evidently found no reason to change his view. In the 1961 edition of his *Law of Treaties*, page 639, he says: "A Mandate is essentially a treaty containing many dispositive provisions, and it is not surprising that the Court should have pronounced in favour of its survival." In footnote 3, he adds: "The author begs to refer to his Separate Opinion in *I.C.J. Reports 1950*, at p. 146, stating the legal character of a mandate and the reasons for which it seemed to him that the mandate survived the events of 1945-1946 and continued to exist."

The more or less contemporary understanding that a mandate was a "treaty or convention" within the meaning of Article 36 of the Statute is further supported by an examination of Series E, No. 1 of the Publications of the Permanent Court of International Justice, published in 1925. Chapter III is entitled "The Court's Jurisdiction", and at page 129, one reads:

"As already stated, the Court's jurisdiction embraces all matters specially provided for in treaties and conventions in force. A special publication, issued by the Court and completed and brought up to date annually, enumerates these treaties and conventions and gives extracts from relevant portions. The instruments in question may be divided into several categories:

- A. Peace Treaties...
- B. Clauses concerning the protection of Minorities...
- C. Mandates...

The Mandatory States are seven in number. The following list gives the name of the mandatory, the mandated territory and the date and place of the conclusion of the *compact*."

The final italicized word again shows the flexibility of terminology in this branch of law.

Does the Charter of the United Nations reveal a nice choice of terms to describe international agreements? In interpreting the Charter, including the Statute of this Court, and in interpreting the terminology of other treaties, it is important to ascertain whether the draftsmen have been discriminating in the selection of terms or whether varying terms have been used without conscious intention to ascribe to the term any particular meaning or any limitation upon its meaning. This is especially true of an instrument like the Charter of the United Nations, the various Chapters of which were drafted by separate commissions and committees, even though the Conference also had an elaborate co-ordinating machinery.

Examining the Charter of the United Nations, we find in Article 102 the expression "every treaty and every international agreement". The comparable article of the Covenant of the League of Nations, namely Article 18, used the expression "treaty or international engagement". The report of Committee IV/2 of the United Nations Conference which prepared the Charter, said that the word "agreement" in Article 102 should be interpreted to include certain unilateral engagements of an international character. (XIII UNCIO 705.)

Article 103 of the Charter uses merely the expression "international agreement" but there appears to be no reason to interpret this Article as excluding any treaty, convention, accord, or other type of international engagement or undertaking. In Article 80 (1) the Charter refers to "international instruments to which Members ... may ... be parties". This clearly includes many kinds of international agreements.

In the Statute of the Court, Article 36, paragraph 1, refers to "treaties and conventions". But in paragraph 2 (a) of the same Article and in Article 35 (2), only the term "treaty" is used. It could not possibly be argued that Article 35 (2) and Article 36, paragraph 2 (a), intended to exclude "conventions" assuming that one was able to distinguish between a "convention" and a "treaty".

In Article 37 the term used again is "treaty or convention", but in Article 38 1 (a) the text refers merely to "international conventions". Surely it cannot be asserted that this last provision was designed to exclude "treaties", "agreements", "accords", etc. The Report of the U.N. International Law Commission, 3 July 1962 (A/CN. 4/148, p. 15, para. 7) emphasizes the impossibility of giving a narrow meaning to the terms in Articles 36 (2) and 38 (1) and that no clear distinction can be made between the two. It is also true that on the basis of the terms used, there is no ground for assigning any particular restricted meaning to the expression "treaty or convention" in Article 36 or Article 37.

In various alternate pleadings, Respondent considers Article 7 separately and apart from the "Mandate Agreement as a whole", and this approach can be justified as has already been indicated by treating this article as a "fifth agreement". For purposes of the jurisdictional issue now before the Court, Article 7 is the key; if the consent to the jurisdiction of the Court which was embodied in Article 7 has not been vitiated and if it is applicable to this Court and to these Applicants, this Court has jurisdiction to hear the instant cases on the merits, since, as will be shown, the third and fourth objections to the jurisdiction are untenable.

The principle of separability is now accepted in the law of treaties, especially with reference to multipartite treaties, although the older classical writers tended to reject it. It is a doctrine which exists in municipal contract law (sometimes under the label of "divisibility") and in the law governing the construction of statutes.

In treaty law the principle is evidenced in connection with the effect of war on treaties, and by the admission of reservations to treaties, since reservations essentially constitute the separation of a part of a treaty from the whole in order to exempt the contracting party from obligation under the separated part. Numerous examples of separability in the practice of States are to be found in such monographs as Tobin, *Termination of Multipartite Treaties* (1933); Stephens, *Revisions of the Treaty of Versailles* (1939); Hoyt, *The Unanimity Rule in the Revision of Treaties; a Reexamination* (1959). The Permanent Court of International Justice recognized the separability principle in the *Free Zones* and in *The Wimbledon* cases. From the standpoint of international law, part of the Mandate Treaty may have remained in force although other parts did not.

Given the generally agreed proposition that the Mandate as an institution survived, and the principle of separability being admitted, the question which, if any, of the provisions of the Mandate did not survive cannot be tested by an inquiry whether this or that provision was "essential" to the operation of the Mandate, or whether it was merely "important" or "useful" or, indeed, "inconsequential"; there is no objective standard which can be used to make such an appraisal. The question which can be answered is whether some provision or part of a provision became inoperable and if so whether that inoperable portion was so essential to the operation of the provision in question that the whole provision falls. The provision which is particularly in question is the reference in Article 7 of the Mandate to "another Member of the League of Nations".

In order to analyze the legal position of other "Members of the League of Nations" in connection with the Mandates which use this

descriptive label in the compromissory article, such as Article 7 of the Mandate for South West Africa, and in various other articles, such as Article 5 of that same Mandate, it is not necessary, in my opinion, to assert that the Members of the League, presumably represented by the Council of the League, were "*parties*" to the Mandate agreements. They were certainly not "*parties*" to the agreements between the Mandatories and the four Principal Powers, and if the Council Resolution of 17 December 1920 is considered as the treaty, the facts of history indicate they were not "*parties*" thereto although the League of Nations itself may be considered a "*party*". The Members of the League were, however, third State beneficiaries. The inhabitants of the territories were also beneficiaries but the present issue before the Court does not require a consideration of the nature of the rights of "any peoples" as mentioned in Article 80 (1) of the Charter.

It is possible to agree with the Permanent Court of International Justice that "it cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour" (*Free Zones*, Series A/B, No. 46, p. 147), but still to decide, as that Court did, in the case then before it, that actual rights were created—in this case, in favour of Members of the League by the Mandates. The Peace settlements at the end of World War I contain various comparable examples such as Article 380 of the Treaty of Versailles relative to the Kiel Canal, and other provisions concerning the use of waterways of international concern. (Cf. Lauterpacht, *The Development of International Law by the International Court* (1958), sec. 96.)

Clearly the provision concerning missionaries in Article 5 of the Mandate for South West Africa was a *stipulation pour autrui* and the other Members of the League of Nations were beneficiaries thereof. The provision reads as follows:

"Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling."

As Sir Gerald Fitzmaurice, when Rapporteur on the Law of Treaties for the United Nations International Law Commission, said in the course of his excellent analysis of the *pacta tertiis* rule:

"It is not a condition ... that the third State should be specified *eo nomine*, provided it is clear from the context or surrounding circumstances what State is intended, or that a group or class of

States is intended of which the claiming State is a member." (1960 *Yearbook of the I. L. C.*, Vol. II, p. 81.)

The rights of these beneficiaries could be protected by contentious proceedings in the Permanent Court of International Justice because the compromissory clause in Article 7 was also a *stipulatio, pour autrui* of which League Members were beneficiaries. The "missionary clause" in Article 5 is the type of clause which Lord Finlay discussed in connection with the Palestine Mandate as being appropriate for submission to the Court. It supplies in this case a test for the survival of certain rights, thus contributing to a decision on the principle of such survival.

In the report of Committee IV/2 on Article 102 of the Charter, to which reference has already been made, it is implied that a third State which is the beneficiary of a unilateral engagement of an international character, must "accept" the engagement in order to make it binding. This intimation may well have been based upon an incidental comment of the Permanent Court in its discussion of the *pacta tertiis* rule in the *Free Zones* case. Lauterpacht's analysis of this judgment of the Permanent Court in which he concludes the Court did not consider formal acceptance to be requisite, is sound. (*Ibid.*, pp. 306 ff.) But if general acceptance by Members of the League in advance of specific invocation were considered necessary, one can find it in the Assembly's acceptance of the C Mandates and in the continuing conduct of both the Council and the Assembly with reference to the administration of the C Mandates.

As already quoted, Briery, as Rapporteur for the International Law Commission, suggested an explanation of the binding force of unilateral declarations creative of rights against the declarant, in a theory of "presumed consent of the beneficiary". As also quoted above, Corbin notes that in American contract law, the assent of the promisee is not always required. A *stipulation pour autrui* may also be considered an offer which remains outstanding until withdrawn or terminated in some other way. Since, as will be shown to be true in these cases, the offer contained in Article 7 was still outstanding on 4 November 1960, the filing of the Applications on that date was an acceptance.

Most of these explanations of unilateral engagements are based upon some municipal system of contract law and reveal an anxiety to fit international law into a national suit of legal clothes. For this purpose there is at times laboured insistence upon identifying the parties. It may be for this reason that this Court has analyzed declarations under the Optional Clause as acts by which a "State becomes a Party to the system of the Optional Clause" and speaks of the "contractual relation between the Parties". (*Rights of Passage*



over *Indian Territory, Preliminary Objections, I.C.J. Reports 1957*, p. 145. Italics inserted.) The Permanent Court of International Justice, however, had pointed out that a declaration under the Optional Clause is "a unilateral act" (*Phosphates* case, Series A/B, No. 74, p. 23), and, as Lauterpacht has reminded, "Privity of contract is not a general principle of law". International law, not being a formalistic system, holds States legally bound by their undertakings in a variety of circumstances and does not need either to insist or to deny that the beneficiaries are "parties" to the undertakings.

The situation in regard to the rights of Members of the League as third States beneficiaries, may be more clearly seen in its basic elements if one considers (without any wish to consider the merits and solely by way of illustration) one of the B Mandates, such as that held by Belgium for Ruanda-Urundi. Under Article 7 of this Mandate, Belgium agreed to the so-called Open Door principle which, *inter alia*, forbade Belgium to discriminate in favour of her own nationals and against the nationals of other "Members of the League" in the granting of concessions. It is not apparent why it would be reasonable to say that while it would have been a violation of Belgium's contractual obligation so to discriminate against a French citizen in the matter of a concession on 18 April 1946, the day before the dissolution of the League, Belgium would have been free so to discriminate on 20 April 1946. On the contrary, if Belgium had so discriminated on 20 April, France could properly (if diplomatic negotiations failed to result in a settlement) have seized the Court of this dispute concerning the interpretation or application of the Mandate, relying on Article 13 of the Mandate for Ruanda-Urundi (which contains a compromissory clause identical with that in Article 7 of the Mandate for South West Africa), and on Article 37 of the Statute to which both Belgium and France are parties.

In the Mandate for South West Africa the Open Door Clause was not included, but there was the provision in Article 5, already quoted, requiring the free admission of missionaries who were nationals of a "Member of the League". This Article embodies the same provisions as those in Article 8 of the Belgian Mandate. Is it to be assumed, following the same line of reasoning as before, that in this case, the Mandatory would have been free (so far as the obligation in the Mandate was concerned and assuming for the moment the non-applicability of any general rule of international law concerning the rights of aliens) to exclude or to oust a French missionary from South West Africa on 20 April 1946? There is no justification for such a conclusion as a matter of common sense

and reasonable construction unless again one espouses the rejected view that on the dissolution of the League nothing whatever was left of the Mandate or of the rights and obligations appertaining thereto, and unless one ignores the Mandatory's undertaking given at the final session of the League Assembly which will be discussed shortly.

But, it is argued, the right of the French missionary to enter into or to reside in South West Africa depended, according to the terms of Article 5 of the Mandate, upon the missionary being a national of a "Member of the League"; after the dissolution of the League there were no Members and hence no nationals of Members. Accordingly, it would be said, the French missionary did lose his right to enter or reside at the moment when the League was dissolved.

Such an argument assumes that the reference to "another Member of the League" was not, as Lord McNair concluded in his Separate Opinion in 1950 (at pp. 158-159), descriptive of a class or category, but that it posed an imperative condition. The most reasonable interpretation is that the specification of beneficiaries of various provisions in all the Mandates in terms of "Members of the League" was the natural result of the fact that the Mandates were drawn up as part of the whole League system, a system which it was fondly hoped in 1919 would become universal. In drawing up agreements within the framework of this system, it was natural to refer to other Members of the League. Article 22 of the Covenant, in accordance with which the Mandates were established, was part of the Treaties of Peace ending a great war with Germany and her allies. It is reasonable to suppose that the drafters may have had in mind a specification which would, immediately after the War, deny privileges in the mandated areas to Germans or other ex-enemies. This interpretation is borne out by the incident of the rejection of the complaint in 1925 by Germany before becoming a Member of the League. (Permanent Mandates Commission, *Minutes* 7th Session (1925), p. 54.) But the quality of League Membership as compared subsequently to the quality of a friendly former co-belligerent such as the United States, was not, and was not intended to be, an *essential* quality or a perpetually imperative condition. The loss by the French missionary in 1946 of the quality of being a national of a "Member of the League" did not introduce any element of frustration which would impede the performance of the Mandatory's obligation to permit his entry and residence. Granted the reasons which have been suggested why there should have been granted special rights to the Members in 1919, such reasons would not be applicable in 1946; *cessante ratione legis, cessat ipsa lex*. If the Mandatory claimed the right to limit the privileges to missionaries who were nationals of States which were Members of the League

when the League came to an end, the claim would be reasonable and it would avoid any charge that there was imposed on the Mandatory an obligation more onerous than that which it had originally assumed.

Whether the presence of missionaries in the territory in question was "essential" to the discharge of the "sacred trust" can scarcely be determined by some objective test, subjectively conceived; perhaps an answer could be given by taking evidence, but I leave that aside.

If it be said that only such elements of the Mandates survived as related to the welfare, etc., of the inhabitants, then the rights of missionaries would be included in that group of provisions. The rights of missionaries in the South West African Mandate are set out in Article 5, which deals in general with freedom of conscience and worship. Surely the Mandatory should not be privileged to interfere with the religious life of the inhabitants by expelling missionaries on April 20 1946, on the technical ground that they no longer qualified as nationals of a Member of the League. If this *stipulation pour autrui* survived the dissolution of the League despite the reference to a descriptive qualification which was no longer applicable, other such stipulations could also have survived.

What then of Article 7—and for the purpose of the present analysis one refers only to paragraph 2 of that Article? Again one looks in vain for some established objective test to determine whether in 1919 and 1920 possible reference to the Court was considered "essential" to the operation of the Mandate. One knows that the provision was inserted in all the drafts from the outset without any opposition to the fundamental principle, though there were some drafting problems to which attention has been called. In *Mavrommatis*, Lord Finlay said (at page 43) "it was highly necessary that a Tribunal should be provided for the settlement of such disputes" as he thought might well arise under the Palestine Mandate; he might have felt differently about C Mandates, but the Court clause was in A, B and C Mandates as in all the minorities treaties. Was there frustration, impossibility of performance after 19 April 1946? Did Article 7 become inoperable? In contrast to Article 6, where the organ—namely the Council of the League—disappeared, in Article 7 a new organ had been substituted for the old by the operation of Article 37 of the Statute of the Court to which of course the Mandatory was a party. That transformation took place on the birth of the United Nations, and there can be no doubt that Article 7 provided for reference to this Court during that period from the birth of the United Nations to the death of the League.

On the dissolution of the League it is true there were no longer States which were "Members of the League", but did this fact frustrate performance? It has been shown that the disappearance of the quality of Member did not make Article 5 inoperable and the case is even stronger here since under Article 7 the Mandatory is not the actor, is not the operator, so to speak. In so far as concerns the administration or operation of the Mandate, the disappearance of the Council of the League might be said to create a measure of frustration in regard to the required acts of the Mandatory in filing reports. In regard to Article 7, however, the new Court was available. In contrast to the United Nations system it will be recalled that the Permanent Court was not a part or organ of the League and the winding up of the Court was separate from the dissolution of the League. For the successful operation of the Mandate during the life of the League, the quality of being a Member of the League was not necessary to the operation of Article 7; as already shown there were quite other reasons for referring to the Members. After all, these "Members of the League" were not just concepts, "ghosts seen in the law, elusive to the grasp". They were actual States or self-governing entities whose names could be recited. The names of the original Members were listed in the Annex to the Covenant, but it was not a fixed group; it fluctuated as new Members were admitted or as old Members terminated their memberships. Yet at any given moment—as for example the moment of the dissolution of the League—the Mandatory would always have been able to draw up, by names, a list of the States included in the descriptive term "Member of the League".

It must also be remembered that the Mandatory was a "Mandatory of the League of Nations". But according to the accepted view, the termination of the League did not terminate the Mandate as an institution which means that the Mandatory also, and specifically the Union of South Africa, *qua* Mandatory, must have survived the dissolution of the League although its mandator was no longer in existence.

After the dissolution of the League, how could the Mandatory assert frustration or impossibility of performance in regard to accepting the jurisdiction of the Court as he had agreed to do, in accepting Article 7 originally; in accepting the transformation effected by Article 37; and by promising in the final session of the League Assembly that he would "continue to administer the territory scrupulously in accordance with the obligations of the Mandate"?

It has now been pointed out with regard to Respondent's acceptance of the jurisdiction of the Permanent Court of International Justice, that there are no technical rules of international law which

require that this acceptance be poured into some particular mould known as "treaty or convention". It has further been shown that these terms as used in Articles 36 and 37 of the Statute cannot be considered generally to have any narrow, technical, restricted meaning. It is now necessary to see whether, when the Charter provided that in certain cases the International Court of Justice should be substituted for the Permanent Court of International Justice, it was intended that those provisions should be interpreted in a strict and technical sense.

There is no basis for such an assumption. It is familiar history that two of the central problems involved in adjusting the international judicial machinery which had existed under the League of Nations, to the United Nations Organization, were the questions whether the old Court should be continued or whether there should be a new Court, and whether the Court should be given general compulsory jurisdiction. In the final decision to establish a new Court, it was agreed that there should be as much continuity with the old as possible and to emphasize the close relationship, the Charter recites in Article 92 that the new Statute "is based upon" the old Statute. "In a sense", says the Report of Committee IV/I of the San Francisco Conference, "... the new Court may be looked upon as the successor to the old Court which is replaced. The succession will be explicitly contemplated in some of the provisions of the new Statute, notably in Article 36, paragraph 4 [later numbered 5], and Article 37." (13 UNCIO 384.)

It was clearly the intention in the drafting of the Statute of the International Court of Justice to preserve for the new Court just as much as possible of the jurisdiction which appertained to the old Court. For this purpose, Article 36 (5) provided for the transfer of the obligations assumed by States which made declarations under Article 36 of the old Statute, and Article 37 provided for a similar transfer where a "treaty or convention" had contained a provision for the jurisdiction of the Permanent Court. As is said in the Joint Dissenting Opinion in *Aerial Incident* (1959), page 166 and page 171: "It was for the purpose of preserving for the new Court the compulsory jurisdiction which had been conferred upon the old Court and whose period of validity had not expired that paragraph 5 was adopted and inserted in Article 36 of the present Statute and that Article 37 was introduced... Article 37 provides the consensual link with regard to the succession of the International Court of Justice to the jurisdiction of ... the Permanent Court..." It would not be in accordance with the spirit and intent of Articles 36 (5) and 37 to interpret them in such a way as to leave a gap through which would fall to the ground such an agreement as is recorded in Article 7 of the Mandate.

In applying the foregoing analysis to the instant cases, it must be reemphasized that this analysis is made with aid of aspects of the

Mandate which are used solely for the purpose of illustration and without wishing to enter upon the merits. Having this approach in mind, it can be said that the Applicants, Ethiopia and Liberia, had, on 18 April 1946, certain rights in South West Africa for and on behalf of missionaries who were their nationals, that these rights and their continuance did not depend upon the question whether or not these missionaries continued to have the quality of being nationals of "Members of the League of Nations"; and that accordingly these rights survived the dissolution of the League. If a missionary who was a national of one of the Applicants had been denied admission, and if negotiations over the resulting dispute between the Applicant and the Mandatory failed, Applicant would have been entitled to seize this Court by virtue of Article 7 of the Mandate and Article 37 of the Statute. This is true because the Mandate agreement was, in 1945, and was on 4 November 1960, a "treaty in force" between the Mandatory and the four Principal Allied Powers. The contractual arrangement between the Mandatory and the four Principal Powers was not terminated by the dissolution of the League and therefore the rights and obligations of the four Powers at any rate were not affected by the dissolution of the League, and the rights vested in third States beneficiaries, which category includes the Applicants, persist as long as this treaty is in force. The only theory on which it can be said that this treaty is no longer in force would be one posited on the total elimination of the Mandate in every respect. Such a conclusion would eliminate not only the obligations but also the rights of the Mandatory and it could not tolerate the generally accepted thesis that the Mandate continued as an institution.

Are the conclusions which have up to this point been arrived at, vitiated by a consideration of the case of a State such as Brazil which gave up its League membership during the active life of the League? I think not. *While the League was operating*, it was natural for the Members to intend that membership, which entailed some very definite obligations—actual in the matter of financial contributions and potential in the matter of political responsibilities such as might arise under Article 16 of the Covenant—should entail also some corresponding advantages. Obviously the territorial guarantees under Article 10 of the Covenant were reciprocal and Brazil—to continue the example—lost its right to invoke that guarantee. Similarly in regard to economic rights in the mandated areas, a Mandatory might well have said: "My freedom is limited, I am restricted by the obligations which I have assumed in the Mandate and I shall continue to bear these burdens in respect of the large numbers of States which are Members of the League. But since you have chosen to leave the League, I am not obliged to continue to subject myself to an additional burden on your

behalf." The view set out above, following Sir Arnold McNair, that the term "Members of the League" was descriptive and not conditional, does not mean that upon assuming the Mandate for South West Africa the Union of South Africa was obligated to grant certain privileges to missionaries, nationals of Germany. Nor does it mean that after the resignation of Brazil, the Union was bound to grant those privileges to nationals of Brazil. But the situation was very different when by common consent in 1946 the Mandatory joined with the other States which were then Members of the League in dissolving the League because the United Nations had been established in its place. To assert that this dissolution immediately freed the Mandatory of the obligations in the Mandate such as those relating to missionaries, in regard to which the disappearance of the League introduced no iota of frustration or impossibility of performance, but that at the same time the Mandatory retained rights of authority, control and administration, cannot, in the language of the Court's 1950 Opinion, "be justified". What is said concerning the "missionary clause" applies with equal force to the provisions in the compromissory clause of Article 7 which provided that disputes concerning these surviving rights might be submitted to the Court. If the Mandate survived as an institution, the Mandatory was still subject to certain obligations and those obligations were owed to the States which were Members of the League at the moment when by common consent the League was dissolved.

The foregoing reasoning stands by itself, but it is supported by another aspect of the situation.

In the meeting of the League Assembly on 9 April 1946, the representative of the Union of South Africa made a statement in part as follows (Preliminary Objections, pp. 38-39):

"Since the last League meeting, new circumstances have arisen obliging the mandatory Powers to take into review the existing arrangements for the administration of their mandates... it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South West Africa a status under which it would be internationally recognised as an integral part of the Union... *In the meantime the Union will continue to administer the territory scrupulously in accordance with the obligations of the mandate*, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.

The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commis-

sion and the League Council, will necessarily preclude complete compliance with the letter of the mandate. *The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate* which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory." (Italics supplied.)

This was an undertaking of an international character by which the Union of South Africa assumed an international obligation. The Permanent Court held in the *Free Zones* case that binding force attached to a declaration made in the Court by the Agent of a State (A/B No. 46, at p. 170). The Permanent Court held in *Eastern Greenland* that a declaration by a Foreign Minister to the Ambassador of another State created a binding international obligation (A/B No. 53 (1953), at p. 71).

Surely a formal pledge of the kind just quoted made by the representative of a State to the Assembly of the League also constituted a binding international obligation. As quoted above from McNair, *Law of Treaties*, "a declaration contained in the minutes of a conference" may embody a binding international engagement.

There was reliance on this and other similar declarations as revealed by the fourth paragraph of the League Assembly's resolution of 18 April, in which the Assembly:

"4. Takes note of the expressed intentions of the members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned *in accordance with the obligations contained in the respective mandates* until other arrangements have been agreed between the United Nations and the respective mandatory powers." (Preliminary Objections, p. 43. Italics supplied.)

Now one of the "obligations" under the Mandate which the Union of South Africa thus newly agreed to respect after the dissolution of the League, was the obligation under Article 7 to submit to the jurisdiction of the Court; by accepting the Charter, it had already agreed to substitute the International Court of Justice for the Permanent Court. In its pledge to the Assembly, the Union of South Africa pointed out that the disappearance of certain organs of the League would prevent full compliance with the letter of the Mandate. Since the Permanent Court had by agreement (Article 37 of the Statute) been replaced by the International Court, the disappearance of the Permanent Court in no way prevented full compliance with the letter of Article 7, so far as concern the basic consent to the jurisdiction of the Court.



Did the Union of South Africa indicate that with regard to the obligation under Article 7 it intended to rely on the fact that in some ten days there would be no State which could call itself a "Member of the League of Nations"? It did not; it could hardly be claimed that "Members" of the League were "organs" of the League, which disappeared. It would be a complete denial of the *bona fides* of the Government of the Union of South Africa to assert that the pledge, in sweeping terms, "to regard the dissolution of the League as in no way diminishing its obligations under the Mandate", was given tongue-in-cheek; as if saying that we still agree to submit to the jurisdiction of the Court only because we know that in a few days there will be no State which will be entitled to call us to account for the fulfilment of that obligation. The Court cannot thus impugn the good faith of the Respondent. If one attributed such an unspoken mental reservation to the Union of South Africa, it would be necessary to assume also, in accordance with the preceding analysis of the obligations under the Mandate, that when the Union Government undertook to continue "to administer the territory scrupulously in accordance with the obligations of the Mandate" it did not intend to respect its obligation to permit the entry and residence of missionaries because none of them could any longer claim to be a national of a Member of the League.

It must also be recalled, as stated above, that a *stipulation pour autrui* may be considered an offer which remains outstanding until withdrawn or terminated in some other way. The declaration of the Respondent of 9 April 1946 certainly negatives the idea of a withdrawal and may, indeed, properly be considered a renewal of the offer, specifically extending it beyond the dissolution of the League. Nothing further intervened which could have had the legal effect of terminating the offer before the Applications in these cases were filed on 4 November 1960.

The binding undertaking given by the Union of South Africa on 9 April 1946 must be taken as a confirmation and an acceptance of the interpretation given above, namely that the obligation, *inter alia*, under Article 7, paragraph 2, continued to be applicable to and for the benefit of those States which at the moment of the dissolution of the League of Nations were Members thereof. It is of no consequence that there was no express mention of the Court. Consent in advance is just effective as consent during judicial proceedings. The Permanent Court of International Justice (in *Upper Silesia (Minority Schools)*, Series A. No. 15 (1928), pages 24-25), said "there seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it". And, again, "there is no rule laying down that consent must take the form of an express declaration rather than

that of acts conclusively establishing it". His review of these and other holdings by the Permanent Court led Judge Sir Hersch Lauterpacht to conclude that "the Court will not subject acceptance of its jurisdiction to requirements of form likely to deny effect to the consent of the parties, however expressed; it will not permit a party to withdraw consent—which, in good faith, must be assumed to have actually been given—on the ground that it has not been expressed in accordance with alleged stringent requirements of the Statute. There are no such requirements." (*The Development of International Law by the International Court* (1958), p. 106.)

Because of the last-minute amendment of Respondent's submissions, a few words should be said about the registration of treaties.

The suggestion has been made that perhaps the Mandate for South West Africa was never "in force" because the agreement with the Four Powers or the Council resolution of 17 December 1920, was not formally registered and published in the League of Nations *Treaty Series*. Aside from the patent absurdity of flying in the face of history and the practice of States and of international organizations for some 40 years, an analysis of Article 18 of the Covenant and of applications of that Article forbids a strict literal interpretation of the Article's last sentence which reads: "No such treaty or international engagement shall be binding until so registered."

There is abundant literature on the subject of registration under Article 18 and various theories as to the legal effect of the last sentence have been supported by different writers. There is no general support for a strict literal interpretation. The Third Assembly of the League of Nations said that "time and experience alone" would provide the material needed for a precise interpretation. Confronted with a comparable problem, the Legal Committee of the United Nations General Assembly in 1946 recognized that "experience and practice" would aid "in giving definition to the terms of the Charter" as set forth in Article 102.

The history of the provision which is well-known, and numerous reports and discussions, show that the main objective of Article 18 of the Covenant was publicity—it was a provision against secret treaties. At least two types of recording were provided for in the regulations adopted by the Council of the League in 1920 for the operation of Article 18. In addition to the usual registration and publication in the *Treaty Series*, Article 11 of the Council's Memorandum, approved 19 May 1920, points out that there are or may in the future be various treaties or conventions requiring special treatment. The principal example was afforded by Article 405 of the Constitution of the International Labour Organisation which provided that copies of Draft Conventions (under which actual

legal obligations arose) were to be "deposited" with the Secretary-General of the League who would communicate a certified copy to each Member. Subsequently *ratifications* of such Draft Conventions were "registered" by the Secretary-General of the League (see P.C.I.J., Series A/B, No. 50).

There were numerous instances of agreements which were considered legally effective but which were not registered. Some examples may be given.

Although it is the practice of the United Nations to register the Declarations made by States upon becoming Members of the Organization, such Declarations concerning Membership in the League of Nations were not registered; unquestionably, however, they resulted in the assumption of rights and obligations under the Covenant. For example, according to the records of the Fifteenth Assembly of the League (pp. 74-77 of the Plenary Meetings) the Minister of Afghanistan in London telegraphed to the Secretary-General that on instructions of his Government he asked that Afghanistan be admitted as a Member of the League. His telegram said:

"The Government of Afghanistan is prepared to accept the conditions laid down in Article I of the Covenant and to carry out all obligations involved in membership of the League."

The League Assembly by resolution admitted Afghanistan to Membership.

Special agreements submitting cases to the Permanent Court were not always registered but the Court did not hesitate to base its jurisdiction upon such unregistered agreements. A good example is afforded by the formal agreement between France and Switzerland of which ratifications were exchanged on 21 March 1928, concerning the submission of the *Free Zones* case to the Permanent Court. In the *Mavrommatis* case the jurisdiction of the Court was based partly on the Mandate, which was not registered, and partly on the concession protocol of the Treaty of Lausanne which was not registered until after the Court's decision.

It seems unnecessary to multiply authorities to support a well-established conclusion.

In any event, the regulations for registration adopted by the Council were measures of administrative convenience and did not even purport to be comprehensive interpretations of the scope and effect of Article 18. The recording of an engagement in a public resolution of the Council of the League fulfilled the essential publicity purposes of Article 18 of the Covenant. The deposit of the Mandate instrument for German South West Africa in the archives of the League and the forwarding of certified copies by

the Secretary-General to various States indicate a practice quite similar to that prescribed for Draft Conventions of the International Labour Organisation.

The references in this Mandate instrument to the basic agreements on the Mandates and their terms, also satisfied, in respect to those agreements, the purposes of Article 18. (Cf. Schachter "The development of international law through the legal opinions of the United Nations Secretariat", XXV *Br. Yr. Bk. Int. L.* (1948), p. 91 at 127 ff; Hudson, *The Permanent Court of International Justice 1920-1942* (1943), pp. 435, 439, 636 and authorities cited.)

\* \* \*

For purposes of illustration and analysis, the foregoing discussion has dealt principally with what may be called "tangible" rights such as those subsumed under the "open door" label or those specifically dealing with the entry and residence of missionaries. It remains to be determined whether States who were beneficiaries of the undertakings given by the Mandatory in the Mandate Agreement obtained other rights in connection with the operation of the Mandate as an institution or status, or in connection with the operation of the Mandate as a treaty. This inquiry bears upon Respondent's contention that a "dispute" within the meaning of Article 7 of the Mandate must involve a conflict concerning a legal right or interest and not differences of opinion unconnected with legal rights or interests. Without pausing to consider the basic validity of this contention, I shall analyze the nature of the rights or interests involved in the alleged "dispute" between Applicants and Respondent.

It may be noted at once that Applicants assert that there is a "dispute" with reference to Articles 2, 4, 6 and 7 of the Mandate (Memorials, p. 62). This assertion does not refer to Article 5 which, as noted above, is the only article in this particular Mandate which contains a specification concerning the rights of nationals of States other than the Mandatory. Hypothetically, provisions referring to the "inhabitants" of the territory could refer to nationals of such States if they happened to inhabit the territory, but no such situation has been presented here.

The jurisdictional provision in Article 7 can be invoked only if there is a "dispute". If there is a "dispute" it must further be shown that it has two characteristics: first, it must be a dispute which cannot be settled by negotiation; and second, it must relate to the interpretation or application of the Mandate. Attention may be paid first to the meaning of "dispute". The identification of the other party to the "dispute" will also be considered.

To take the narrow definition which has respectable support, a "dispute" in the context of a compromissory clause is one which can be settled by the application of principles of law. But as the Permanent Court said in *Serbian Loans* (Series A, Nos. 20/21, at p. 20), Article 38 of the Statute cannot be regarded as excluding the possibility of the Court's dealing with disputes which do not require the application of international law, seeing that the Statute itself expressly provides for this possibility. The new words inserted in Article 38 of the Statute of this Court do not affect the validity of the Permanent Court's observation. The four sub-paragraphs of Article 36 (2) of the Statute of the Court give a more complete description but they have a particular purpose and do not constitute a comprehensive definition. The Permanent Court of International Justice, quoting the first paragraph of Article 36, commented: "The Court's jurisdiction depends on the will of the Parties. The Court is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it." (*Upper Silesia (Minority Schools)*, Series A, No. 15, at p. 22.) It is of course apparent from common practice in drafting treaties for pacific settlement and compromissory clauses, as well as from sub-paragraph (c) of paragraph 2 of Article 36 of the Statute, that a "dispute" in the sense here intended may relate to a question of fact. The "facts the existence of which the Court has to establish may be of any kind" said the Permanent Court in *Serbian Loans* (p. 19). For this analysis, one may admit that an argument between two governments as to whether their armaments were designed for offence or for defence, would not be a "dispute". But if the challenge to the existence of a "dispute" in its legal sense is raised in a preliminary objection to the jurisdiction of a tribunal, the question is how deeply the Court must probe into the facts and law in order to determine whether there is a "dispute".

Suppose, for example, State A alleges in a diplomatic note to State B that State B has violated a commercial treaty of 1880 between A and B. B in reply affirms that the treaty is no longer in force. After futile negotiations, A submits the case to an international court in accordance with the terms of a treaty for pacific settlement concluded by B with A. This treaty for pacific settlement contains the ordinary provision that the parties agree that disputes concerning legal rights may be submitted to an international court by either party. B contends that the court has no jurisdiction since there is no "dispute" within the meaning of the treaty for pacific settlement because A bases its contention on a treaty which is no longer in force. The adjudication of the question whether the treaty is in force and therefore whether A's case rested upon a legal right, is a question for the merits and not a question

to be settled on a plea to the jurisdiction. B in effect admits there is a "dispute" but asserts that A's substantive position is unsound. It may be possible to imagine a case where the allegation of a legal right was so obviously absurd and frivolous that the Court would dismiss the application on a plea to the jurisdiction, but such a situation would be rare. In any event, it is not the situation in the instant cases.

In the instant cases, it is helpful to look first at the second characteristic of the "dispute" which has been noted above, i.e. that it must relate to the interpretation or the application of the provisions of the Mandate. I do not see how it can be seriously contended that this condition is not fulfilled since it is sufficient basis for the jurisdiction of the Court if any of Applicants' contentions are so related. On the face of those contentions, and before the Court has examined them on their merits, the Court must find that, assuming there is a "dispute", it is one which relates to the interpretation or application of the provisions of the Mandate.

In *Interpretation of Peace Treaties*, this Court had to deal with the meaning of the term "dispute" in a treaty clause providing for decision by a special procedure. The Court said (*I.C.J. Reports 1950*, at pp. 74-75):

"Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence... There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen... Inasmuch as the disputes relate to the question of the performance or non-performance of the obligations provided in the articles dealing with human rights and fundamental freedoms, they are clearly disputes concerning the interpretation or execution of the Peace Treaties."

However, it has in effect been contended that the allegations of the Applicants bear no relation to Applicants' legal rights and that the true meaning of the compromissory clause is that the "dispute" must relate to the interpretation or application of those provisions of the Mandate which vest certain *legal* rights in the Applicants, such as, perhaps, the right under Article 5 for missionaries to enter the territory. No such limitation is to be found in Article 7 which refers to "any dispute whatever ... relating to the interpretation or application of the provisions of the Mandate". Since, however, jurisdictional issues must be scrupulously explored, one may consider whether it is to be presumed that the rights of other States to dispute about the interpretation or application of the Mandates were limited to rights concerning what have been called their "material" interests.

International law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other "material", or, say, "physical" or "tangible" interests.

One type of illustration of this principle of international law is to be found in the right of a State to concern itself, on general humanitarian grounds, with atrocities affecting human beings in another country. In some instances States have asserted such legal interests on the basis of some treaty, as, for example, some of the representations made to the Belgian Government on the strength of the Berlin Act of 1885, concerning the atrocities in the Belgian Congo in 1906-1907. In other cases, the assertion of the legal interest has been based upon general principles of international law, as in remonstrances against Jewish pogroms in Russia around the turn of the century and the massacre of Armenians in Turkey. (See generally, Rougier, Antoine, *La théorie de l'intervention d'humanité*, XVII, *Revue générale du droit international public* (1910), pp. 468-526; Stowell, *Intervention in International Law* (1921), *passim*.)

States have also asserted a legal interest in the general observance of the rules of international law. For example, in the cases of *Manouba* and *Carthage*, as submitted by France and Italy to the Permanent Court of Arbitration in 1913, in addition to claims for material damage, France claimed 100,000 francs for the "moral and political injury resulting from the failure to observe international common law...". Although the Permanent Court did not award damages on this ground, the Arbitral Tribunal in the case of the *I'm Alone* between the United States and Canada in 1935, awarded in addition to amounts for compensation for material damage, a sum of \$25,000, "as a material amend in respect of the wrong".

For over a century treaties have specifically recognized the legal interests of States in general humanitarian causes and have frequently provided procedural means by which States could secure respect for these interests. The history of the international efforts to suppress the slave trade from at least 1841 affords numerous examples, but one may turn to more recent cases, for example, the Minorities Treaties at the end of World War I. Illustrative is the provision in Article 11 of the Treaty of St. Germain-en-Laye of 10 September 1919:

"The Serb-Croat-Slovene State further agrees that any difference of opinion as to questions of law or fact arising out of these Articles between the Serb-Croat-Slovene State and any one of the Principal Allied and Associated Powers or any other Power, a member of the Council of the League of Nations, shall be held to be a dispute of an

international character under Article 14 of the Covenant of the League of Nations. The Serb-Croat-Slovene State hereby consents that any such dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice." (Hudson, I *International Legislation*, pp. 312-319.)

The same provision is found in Article 69 of the Peace Treaty with Austria, and Article 60 of the Treaty of Trianon with Hungary.

Similarly the Genocide Convention, which came into force on 12 January 1951 on the deposit of the twentieth ratification, provides in Article IX:

"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." (Vol. 78 United Nations *Treaty Series*, pp. 278-282.)

As this Court said of the Genocide Convention: "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions." (*I.C.J. Reports 1951*, at p. 23.) The question is not, therefore, whether one can conceive of a treaty being concluded in such a spirit and with such results but whether the Mandate was of this character.

Striking examples are also to be found in the Constitution of the International Labour Organisation, in the various conventions which the Organisation has brought into effect, and in operations under those treaty provisions. It will be remembered that the Constitution of the International Labour Organisation, like the Covenant of the League, also formed part of the Treaty of Versailles. The Preamble recites:

"Whereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based on social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled...



Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries...

Article 411 (later renumbered Article 26) of the Constitution is a broad recognition of the legal interest which all States, Members of the Organisation, have in the maintenance of labour standards and in the welfare of workers. The Article provides:

1. "Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles."

Article 423 of the Constitution provides:

1. "Any question or dispute relating to the interpretation of this Part of the present Treaty or of any subsequent convention concluded by the Members in pursuance of the provisions of this Part of the present Treaty shall be referred for decision to the Permanent Court of International Justice." (See in general Jenks, *International Protection of Trade Union Freedom*, pp. 157-161.)

Acting on the basis of Article 26 (to use the numbering of the amended text) of the Constitution, the Republic of Ghana sent a communication to the Director-General of I.L.O. on 24 February 1961, in which it stated:

"The Republic of Ghana is not satisfied that Portugal is securing the effective observance in her African territories of Mozambique, Angola and Guinea of Convention No. 105, [Abolition of Forced Labour Convention, 1957] which both Portugal and the Republic of Ghana have ratified.

Accordingly, the Republic of Ghana requests that the Governing Body of the I.L.O. take appropriate steps, for example, by setting up a Commission of Inquiry to consider this complaint and to report thereon."

The Governing Body of the I.L.O. on 10 March 1961, approved the report of its Officers in regard to the procedure which included the creation of a Commission of Inquiry. The judicial nature of the inquiry is indicated by the composition of the Commission: the Chairman was a Member of the Permanent Court of Arbitration, another Member was a former judge of the International Court of Justice and had previously been President of the High Court of Justice in his own country, and the third Member was the First President of the Supreme Court of another country. Further, the Commission in its report said:

"The Governing Body in appointing the Commission placed special emphasis on the judicial nature of the task entrusted to it, indicated its desire for 'an objective evaluation' of the contentions submitted by 'an impartial body' and required the members of the Commission

before taking up their functions to make a solemn declaration in terms corresponding to those of the declaration made by Judges of the International Court of Justice."

The Commission also noted in its report that if its findings or recommendations were not accepted by both governments, either one of them might refer the case to the International Court of Justice under Article 29 of the Constitution of the I.L.O. (See International Labour Office *Official Bulletin*, Volume XLV, No. 2, Supplement II, April 1962, *Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Complaint filed by the Government of Portugal of the Abolition of Forced Labour Convention, 1957 (No. 105).*)

The fact which this case establishes is that a State may have a legal interest in the observance, in the territories of another State, of general welfare treaty provisions and that it may assert such interest without alleging any impact upon its own nationals or its direct so-called tangible or material interests. The operation of the International Labour Organisation further indicates that disagreements over the observance of general welfare provisions may be the subject of judicial investigation and of ultimate resort to this Court. Although, in the case cited, the special procedure of a Commission of Inquiry was utilized, the basic situation of a difference of opinion concerning the application of a treaty provision on the general welfare of the inhabitants might perfectly well be the subject of negotiation between two States.

Although it has been asserted that disputes concerning the fulfilment of the requirements stated in paragraph 2 of Article 2 of the Mandate for South West Africa would be difficult to settle by negotiation, there is no reason in logic or in experience why this should be true. Certainly courts can determine and have determined whether particular laws or actions comply with general broad criteria such as "due process", "equal protection" and "religious freedom". The Supreme Court of the United States is able to determine what measures are or are not compatible with religious freedom (*Reynolds v. United States* (1879) 98 U.S. 244; *Engel et al. v. Vitale* (1962) 370 U.S. 421); or what is "the liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people". (*West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 391.) So too, bilateral commercial treaties may involve negotiable disputes concerning what measures affecting liberty of conscience and worship are "necessary to protect the public health, morals and safety". (See Wilson, *United States Commercial Treaties and*

*International Law* (1960), p. 271.) There is no reason why this Court should be unable to determine whether various laws and regulations promote the "material and moral well-being and the social progress of the inhabitants" of the mandated territory.

If courts can pass on such questions, there is no reason why two governments should not discuss them (and such discussion would constitute a negotiation) and reach agreement that the measures were improper; or that the deficiencies alleged to exist were not established; or failing agreement, resort to this Court.

In the light of the foregoing, and in the light of the familiar history of the establishment of the Mandates System, it is not surprising to find that in 1920 it was the intention of States to recognize and to provide for a "legal" interest of States in questions which did not directly touch their "material" interests or those of their nationals. That was what was done in defining the terms of the Mandates.

The Mandates System was one of at least four great manifestations in 1919-1920 of the recognition of the interest of all States in matters happening in any quarter of the globe. The first manifestation was in Article 11 of the Covenant which recognized—as the phrase was later used—that peace was indivisible. The second manifestation was in the recognition of the interest of the international community in the protection of minorities. As provided in Article 69 of the Treaty of St. Germain with Austria (prototype for other minority treaties): "Austria agrees that the stipulations in the foregoing Articles of this Section, so far as they affect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern..." The third manifestation was in the recognition in the Constitution of the International Labour Organisation (just quoted) of the interest which all States have in "humane conditions of labour" in all other States. The fourth manifestation is in Article 22 of the Covenant recognizing the "sacred trust of civilization" in promoting the well-being and development of peoples not yet able to stand by themselves.

In the minorities treaties, in the Constitution of the Labour Organisation and in the Mandates, there were provisions for reference to the Permanent Court of International Justice. In each case the States entitled to invoke the jurisdiction were designated by a description; in no instance was the class one of unchanging composition. In connection with the minorities treaties, the procedural or enforcement rights were delegated to a representative group; both the permanent members and the changing non-perma-

ment members of the Council of the League had the right to resort to the Court. In the International Labour Organisation the Members of the I.L.O. had the right and in the mandates the Members of the League had the right. The text itself of the minorities treaties recognized that disputes arising out of the treaty might relate to questions of either law or fact. In the Constitution of the International Labour Organisation the jurisdictional clause refers to "any question or dispute relating to the interpretation...". As the Ghana-Portugal case just cited shows, the dispute might involve either facts or law or both. In the mandates, the reference is to "any dispute whatever ... relating to the interpretation or the application...". Clearly this provision also must embrace both issues of law and issues of fact. Article 50 of the Statute gives this Court ample powers to deal with questions of fact.

In no one of the three examples—minorities, labour, mandates—was it necessary for a State invoking the jurisdiction of the Court to allege that it had a direct "material" interest, either for itself or for its nationals. It has been well said:

"States conclude multilateral treaties not only in order to secure for themselves concrete mutual advantages in the form of a tangible give and take, but also in order to protect general interests of an economic, political or humanitarian nature, by means of obligations the uniformity and general observance of which are of the essence of the agreement. The interdependence of international relations frequently results in States having a vital interest in the maintenance of certain rules and principles, although a modification or breach of these principles in any particular single case is not likely to affect adversely some of them at all or at least not in the same degree..." (Note by "H. L." in 1935 *British Yearbook of International Law*, p. 165.)

At the first session of the Assembly of the League, the representative of Sweden said:

"People have asked me why we small nations in the North seem to be so interested in this Article 22. It may be because of its guaranteeing freedom of trade with the Colonies. Yes, of course. We think freedom of trade to be a good thing and monopolies a bad thing from our commercial point of view. But I know that I have a right to say, and I am proud to state, that this is not for us the essential thing. No. To establish a world-wide culture, to preserve a lasting peace—such are the reasons for our peoples' interest in Article 22. Have we not shown such moral interest for the natives, for instance, of Africa?" (Thirtieth Plenary Meeting, 18 December 1920, pp. 716-717.)

The conviction registered in the peace treaties at the close of World War I in regard to minorities, labour, and dependent peoples, was that just as peace was indivisible, so too was the welfare of mankind. Those responsible for the insertion of this principle in the Peace Treaties were giving international application to the philosophy that

“No man is an Island, entire of itself; every man is a piece of the Continent, a part of the main.

Any man's death diminishes me, because I am involved in Mankind...”

The foregoing interpretation of Article 7 is supported by the history of the so-called Tanganyika clause. It will be remembered that this clause, which constitutes the second paragraph of Article 13 of the British Mandate for East Africa, does not appear in the final text of any other mandate. It was originally proposed in the sessions of the Milner Commission in London in the summer of 1919 as a clause to be inserted in all B Mandates. Following the general jurisdictional paragraph which appears in identical terms in paragraph 2 of Article 7 of the Mandate for South West Africa, the Tanganyika clause goes on to provide that: “States Members of the League of Nations may likewise bring any claims on behalf of their nationals for infractions of their rights under this mandate before the said Court for decision”. When the Belgian and British Governments first agreed that a portion of German East Africa should be assigned to Belgium as a Mandate, the Tanganyika clause was included in the draft of the Belgian Mandate. Subsequently, it was dropped. In 1925, at the 6th Session of the Permanent Mandates Commission, M. Rappard thought that its insertion in the British East African Mandate was accidental but Sir Frederick Lugard said that the British Government did not believe that it could be so described.

Aside from the various interpretations or comments on this clause in the *Mavrommatis* case, it must be concluded that paragraph 2 of Article 7 of the Mandate for South West Africa, which is identical with the first paragraph of the jurisdictional article in the East African Mandate, must mean something different from, or more than, what is meant by the Tanganyika clause. The paragraph in Article 7 of the South West Africa Mandate may *include* claims on behalf of citizens but the Court is not required to decide that point now. The paragraph *must* include something other than or in addition to the claims of nationals or else the East African Mandate would have omitted paragraph 1 because paragraph 2 would have covered the field.

The language of paragraph 2 of Article 7 of the South West Africa Mandate is very broad indeed and there is no evidence that it is limited to matters in which other States might have a “public”

concern, as for example the interest of a neighbouring State in the control of the traffic in slaves, arms, or liquors. Even if one considered it necessary to identify some such regional interest of this kind, the regional interest of the Applicants cannot be gainsaid. Although under the Labour Conventions no direct material interest had to be established, the interest of Ghana in the question of forced labour in Angola, etc., can be considered comparable to the interest of Applicants in the conditions of the indigenous inhabitants in South West Africa.

Bearing in mind the absence of the open-door clauses in the C Mandates and the resulting restricted category of what might be called direct, material interests of other States in the application of the Mandate, why should the jurisdictional clause (i.e. Article 7), if it was intended to apply only to these restricted categories, have used the sweeping phrase: "any dispute whatever ... relating to the interpretation or the application of the provisions of the Mandate"? Is it possible to interpret the words "the provisions" as meaning only "some of the provisions"?

It is impossible to escape the conclusion that paragraph 2 of Article 7 of the South West Africa Mandate was intended to recognize and to protect the general interests of Members of the international community in the Mandates System just as somewhat comparable clauses recognize this broad interest in the minority treaties, in the Constitution of the International Labour Organisation and, as more recently, in the Genocide Treaty and in some of the trusteeship agreements concluded under the United Nations. When the Mandate treaties were concluded, it was disputes over these broad interests which were contemplated. (Cf. *U.S. Nationals in Morocco, I.C.J. Reports 1952*, at p. 189.)

It has been urged that those who concluded the Mandate agreements could not have intended the meaning of Article 7 (2) which has just been stated, because they would have wished to avoid the confusion and conflict which it might have entailed between the respective roles of the Council of the League and the Permanent Mandates Commission on the one hand, and the Permanent Court of International Justice on the other hand. The Permanent Court disposed of a comparable objection in connection with the Minorities treaties which contained provisions both for invoking action by the Council and for submitting a case to the adjudication of the Court. (*Settlers of German Origin*, Series B, No. 6 (1923), pp. 21-23; *Upper Silesia (Minority Schools)*, Series A, No. 15 (1928), pp. 19-25.) And to the same general effect, although with certain differences of treaty terms, *Statute of the Memel Territory*, Series A/B, No. 47 (1932), pp. 248-249.

Reference has been made to Article 62 of the Statute of the Court to establish the point that the Court is competent to pass only on

“an interest of a legal nature”. It is not demonstrated that Article 62 establishes a norm which must be used in interpreting Article 36 which says: “The jurisdiction of the Court comprises all *cases* which the parties refer to it and all *matters* specially provided for in the Charter of the United Nations or in treaties and conventions in force.” The criteria for intervention may well be different from those for original submission. In *The Wimbledon*, Poland at first claimed the right to intervene under Article 62, but subsequently abandoned that ground and claimed a right under Article 63 as a party to the treaty in question. The Permanent Court said:

“The attitude thus adopted renders it unnecessary for the Court to consider and satisfy itself whether Poland’s intervention in the suit before it is justified by an interest of a legal nature, within the meaning of Article 62 of the Statute.” (Series A, No. 1, p. 13.)

The Court did not say that the interests under Articles 62 and 63 were identical on the ground that both must involve legal interests of a particular kind. To take a clear case, when the minorities treaties or the labour conventions provide for reference to the Court of differences of fact or law arising under the treaties, the Court is not entitled to disregard the plain terms of Article 36 of the Statute and to assert that the Applicant State may not submit the case because the Court does not think that general interests in the welfare of minorities or of labour are the kinds of interests on which an intervention under Article 62 could be based. The same reasoning applies to the Mandates. Moreover, it may be recalled that the Permanent Court held that States can ask the Court “to give an abstract interpretation of a treaty”. (*Polish Upper Silesia*, Series A, No. 7, pp. 18-19.) In my opinion, however, the short answer to this argument is that, for the reasons which have been stated, the general interest in the operation of the mandates was a legal interest.

\* \* \*

The other aspect of a “dispute” which calls for examination is whether it was one which, in the words of Article 7, “cannot be settled by negotiation”. As in other respects, this aspect is to be determined as of the date of the filing of the Applications in the instant case, that is 4 November 1960.

Although frequently omitted in clauses providing for adjudication on the interpretation or application of a particular convention, and although not mentioned in Article 36 of the Statute of the Court, the provision is a familiar one. The phraseology varies; some clauses speak of settling the dispute “by diplomacy” which in these days must be interpreted to include what has been called “parliamentary

diplomacy" by which is meant the negotiation of solutions of international problems within the framework and through the procedures of an organized body acting under established rules of procedure, such as the General Assembly of the United Nations. The General Assembly, and indeed the whole United Nations complex with its permanent missions and its special committees, are today a part of the normal processes of diplomacy, that is of negotiation.

Of course negotiation at or by conference is not new in the history of diplomacy. One may recall the negotiations among "the Big Four" at the Paris Peace Conference at the end of World War I, the negotiations on problems of the Far East at the 1921-1922 Washington Conference on the Limitation of Armaments, and even the many negotiations which went on at Vienna in 1815. But in the earlier conferences there was usually no question of negotiating *with* the conference as a body although examples are not lacking where some of the smaller Powers did indeed have to negotiate with the Great Powers acting corporately as the Concert of Europe.

Traditional diplomacy was also familiar with devices for carrying on negotiations without the actual participation of the disputing parties, as for example by the use of good offices or mediation. It will be recalled that in the present era of the United Nations, that Organization utilized a Mediator in Palestine and Good Offices in Indonesia.

It must surely be said that negotiations on many subjects have taken place at and through the instrumentality of the United Nations. There have certainly been negotiations in the United Nations over a number of years concerning the Palestinian Arab Refugees although the States principally concerned have not met together separately to discuss these issues. Numerous other examples could be cited as for example the negotiations in the General Assembly concerning the eventual federation of Eritrea and Ethiopia. The problems of disarmament have been the subject of negotiations through direct diplomatic channels whether bipartite or multipartite; through conferences around a table of ten or more delegations; and through the regular debating procedures in the Committees and in the plenary sessions of the United Nations General Assembly. (I leave aside negotiations in the *couloirs*.)

The question of the authority of the General Assembly under Chapter XI of the Charter to exercise supervision of non-self-governing territories was negotiated in the General Assembly and its committees over a period of years. So likewise the questions of the obligation of the Mandatory to negotiate a trusteeship agreement for South West Africa has been itself the subject of negotiations in the General Assembly. The existing trusteeship agreements were indeed negotiated in the General Assembly in a way in which the Mandate agreements were never negotiated in the Council or in the Assembly of the League.



I have already dealt with the argument that the nature of the issues raised in the Memorials in this case makes them unsusceptible to negotiation in any forum.

Granted that there have been negotiations, have they demonstrated that the dispute "cannot be settled by negotiation"? The phrase "cannot be settled" clearly must mean something more than "has not been settled". In the *Mavrommatis* case, the Permanent Court said:

"The Court realizes to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it. It recognises, in fact, that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations. Nevertheless, in applying this rule, the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation." (Series A, No. 2 (1924), at p. 15.)

There certainly is no absolute litmus test which would enable a Court to assert in all situations at just what moment settlement by negotiation becomes impossible. To me it seems clear on the face of the record that the condition is fulfilled in this case. I know of nothing in the record which would lead the Court to conclude that if either of the Applicants entered into direct diplomatic negotiations with Respondent *on the specific issues which have been debated over the years* in the General Assembly and which have been alleged in the Memorials, settlement could be reached on *all* of the points which, in the allegations of Applicants, relate to the interpretation or application of the Mandate. If there is *one* point of disagreement between Applicants or either of them on the one hand and Respondent on the other, which, it is fair to say, "cannot be settled by negotiation", then this requisite quality of the dispute exists. In this respect States are not eternally bound by the old adage: "If at first you don't succeed, try, try again."

It is not persuasive to assert that the negotiators on one side or the other have been stubborn, or unreasonable, or adamant. Such allegations are common in international negotiations and are often sincerely believed. One cannot take the position that the dispute can be settled by negotiation because it would be if one side wholly gave in to the contentions of the other. As the Permanent Court said, the Court cannot disregard "the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation"

In this, as in other cases, the important point is whether the Respondent was made aware of the complaints of Applicants, had an opportunity to state its point of view, did state it, and that Applicants were not persuaded but still maintained their positions. As was said by Judge Hudson in his dissenting opinion in the *Electricity Company* case: "What is essential is that prior to the filing of an application by one party bringing the dispute before the Court, the other party must have been given the opportunity to formulate and to express its views on the subject of the dispute." (Series A/B, No. 77, 1939, p. 132.) Certainly this test is met in the present cases. It is true that Judge Hudson, speaking with reference to the facts in the case before him, continued to say: "Only diplomatic negotiations will have afforded such an opportunity. The precise point at which it may properly be said that the negotiations instituted cannot result in a settlement of the dispute may have to depend, as the Court has also recognized [citing *Mavrommatis*] upon the 'views of the States concerned'." Judge Hudson was not considering the modern operations of diplomacy in the United Nations context and his remarks in 1939 in the case before him cannot be considered to negate the conclusions reached herein.

The nature of this modern conference or parliamentary diplomacy may tend to exaggerate the separate individuality of the international organization or one of its organs. The problem existed in political matters in the days of the League of Nations, when it could at times be observed that the Council of the League might be used as a kind of whipping boy in the sense that an influential Member of the Council might plead that there was nothing it could do because the "Council" had not acted, ignoring the fact that the Member in question had not taken steps to activate the Council. Similar phenomena have been remarked in the era of the United Nations. An international organization may indeed be something more than the sum of its parts, but, to change the metaphor, one must not overlook the trees when one sees the forest.

There are numerous instances in the history of the United Nations where it might be said that certain States which are in a minority in the voting on some action to be taken by the Organization, have a "dispute" with the Organization, but it cannot be doubted that in many of these cases the States in the minority also have a "dispute" with certain States in the majority and that the latter States can easily be identified. It might be invidious, and it is unnecessary to mention specific cases which illustrate the point. It is not maintained that in every instance in which there is a division of votes, every State voting in the majority has a "dispute" with every State voting in the minority. It is maintained that in the instant cases, on the record, there is a dispute between Applicants and Respondent.

(Signed) Philip C. JESSUP.