SEPARATE OPINION OF JUDGE VAN WYK

General Grounds for Dismissing Applicants' Submissions

I agree that the claim should be dismissed and I agree with the reasons stated in the Judgment. There are however several further and alternative grounds for dismissing the claim; and although I fully share the view of those members of the Court who, while agreeing that these grounds exist hold that once a court has found a general ground of a fundamental character for dismissing a claim, neither it, nor any judge, should proceed to state what its judgment, or his opinion, would have been had such ground not existed, I nonetheless believe that it would be unrealistic in the particular circumstances of this case if at least one judge did not deal with some of those further and alternative grounds from the standpoint which I adopt. Before doing so, however, I wish to make a few observations with regard to the Judgment.

2. It is true that a great deal of the reasoning of the present Judgment is in conflict with the reasoning of the 1962 Judgment with regard to the first three preliminary objections (particularly the second)—so much so that the inescapable inference is that in 1962 the Court assumed a jurisdiction it does not possess—but these considerations cannot in any way preclude the Court from now basing its judgment on the merits on its present reasoning. The Court is not bound to perpetuate faulty reasoning, and nothing contained in the 1962 Judgment could constitute a decision of any issue which is part of the merits of the claim.

3. The mere fact that a provision confers competence on a court to adjudicate upon disputes relating to certain matters at the instance of particular States, obviously cannot have the effect of conferring substantive legal rights or interests in respect of such matters on such States. Thus, for example, the acceptance of this Court's jurisdiction by the Netherlands—which is typical of several acceptances—is, with exceptions therein indicated, "in relation to any other State . . . in *all* disputes . . .". This acceptance confers competence on this Court to adjudicate, at the instance of any State complying with the prescribed conditions, upon *any* dispute between such a State and the Netherlands. This would include any dispute relating to the interpretation or application of the provisions of any treaty. But whether such a State has a legal right or interest in the subject-matter of any such dispute, i.e., a right or interest upon which a judgment in its favour could be based,

is a completely different matter. The answer to such a question is not to be found in this acceptance of the Court's jurisdiction, but depends on the interpretation placed by the Court on the provisions of the particular treaty upon which the claim is based. Such an issue is not part of the jurisdictional issue, but constitutes an integral part of the merits of the dispute, which can only be resolved after the Court has upheld the right of the Applicant to seise it. These two matters, i.e., the jurisdictional and the merits, cannot be dealt with simultaneously.

If any State should contend that the acceptance of the Court's jurisdiction by the Netherlands confers on it substantive legal rights or interests in respect of any particular matter, the Court will first decide whether it has jurisdiction in terms of the acceptance of jurisdiction by the Netherlands; and, only after having found that it has the necessary competence, will it consider the merits of such a contention.

Some confusion has resulted in this case from the fact that the same provision on which the Court's jurisdiction is founded is also alleged to constitute the source of the Applicants' substantive legal rights on which their claim is based. It should be appreciated that where a provision is alleged to serve such a dual purpose, only the jurisdictional aspect thereof can be considered at the preliminary objection stage. The existence of substantive legal rights is part of the merits, and must accordingly be determined at the merits stage of a case, and this is so, even if the interpretation of a jurisdictional clause is involved. It follows that if in 1962 this Court, *per incuriam*, or for any other reason, dealt with the Applicants' alleged substantive rights or interests, its statements with regard thereto cannot now prejudice its decision at this—the merits—stage.

4. The question of Applicants' legal right or interest in the claim not only arises generally—as happens at the merits stage of every case of this kind—but actually constitutes an important sub-issue for several specific submissions of the Applicants. The issue raised in their Submission No. 1 is whether the Mandate is still in force, and one of the questions bearing on this is the legal effect of Article 7 (2), particularly whether it conferred any substantive legal rights or interests on members of the League [1]. Another issue included in the merits (by Applicants' Submissions Nos. 3 and 4) is on what basis, if any, Article 2 (2) of the Mandate was intended to be justiciable, and here again the aforesaid question arises.

5. There is no substance in the contention that the Court is precluded from considering whether the Applicants have a legal right or interest in the claim merely because this issue was not specifically raised in the Respondents' submissions. Even if Respondent did not raise that question the Court would nonetheless be bound to determine whether the Applicants have a legal right or interest in the claim before considering the

[1] See, e.g., Counter-Memorial, Book II, Chap. V, Part B.

ultimate merits; but in any event this issue is embraced by the Respondent's submissions. In the Counter-Memorial, the Rejoinder and the oral proceedings the Respondent disputed not only the Applicants' legal right or interest in respect of the specific submissions referred to above, but did so also in regard to the claim generally [1]. In the final submissions the Respondent expressly claimed that upon the basis of the statements of fact and law set forth in the pleadings and oral proceedings the Applicants' submissions should be adjudged and declared unfounded, and that no declaration be made as claimed by the Applicants. In these circumstances no reasonable person could have been unaware of what the submissions were intended to convey.

6. As already stated the 1962 Judgment could not decide any issue forming part of the merits. This conclusion is not only in accordance with general principles and the rules of this Court, but also flows from the 1962 Judgment itself.

7. Reference has already been made to Article 62, paragraph 3, of the Rules of this Court which provides in express terms that on the filing of preliminary objections the proceedings on the merits shall be suspended. In these cases there was actually an Order dated 5 December 1961 formally recording that by virtue of these provisions the proceedings on the merits were suspended.

The basic consideration that a preliminary objection is not intended to, and is not capable of giving rise to a binding judgment on the issues of merits involved, has been recognized in several decisions—see *Mavrommatis Palestine Concessions*, *P.C.I.J.*, *Series A*, *No. 2*, page 10; and in the *Polish Upper Silesia* case, *P.C.I.J.*, *Series A*, *No. 6*, page 15, this principle was formulated as follows:

> "... the Court cannot ... in any way prejudice its future decision on the merits"

and—

> "Even if this enquiry involves touching upon subjects belonging to the merits of the case ... nothing which the Court says in the present judgment can be regarded as restricting its entire freedom to estimate the value of any arguments by either side on the same subjects during the proceedings on the merits."

It is in any event highly improbable that the Court could have intended to make any decisions on the merits when dealing with an interlocutory matter relating to jurisdiction. A court of law cannot be presumed to have intended to disregard its own rules and well-established principles of law.

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[1] On 13 April 1965 Respondent's Counsel made the following submission:

"... by reason of the considerations arising from the limited scope of Article 7 (2) of the Mandate, or of the lapse of that Article, the conclusion is arrived at that all the claims are inadmissible and the result would again be rejection of ... all the Applicants' ... submissions."

Moreover, *ex facie* the Court's 1962 Judgment, it did not intend deciding any part of the merits, for the aforesaid Order recording the suspension of the proceedings on the merits is actually quoted in that Judgment.

It will be observed that the Court's conclusion and the operative part of the 1962 Judgment respectively state that "the Court is competent to hear the dispute on the merits", and that it "finds that it has jurisdiction to adjudicate upon the merits of the dispute". The word "dispute" obviously meant the issues as encompassed in the Applicants' submissions as set out in full in the Judgment at pages 324-326.

8. While it is true that the Court remarked in the course of its Judgment that "the Mandate as a whole is still in force", this remark could not possibly have been intended to constitute a decision of any of the issues embraced by Submission No. 1 or 2 or any other part of the merits. The preliminary objections were argued on the assumption that the Mandate was still in force [1], and even a preliminary finding on this matter was therefore not necessary. Moreover, the Court could not have intended saying that all the original provisions of the Mandate were still in force, albeit in an amended form, because not only did it carefully avoid dealing with the issue whether Article 6 still applied, but a great deal of its reasoning on Article 7 suggests that, had it been called upon to decide whether Article 6 still applied, as is contended in the Applicants' Submission No. 2, it would have held that it had ceased to apply [2].

At no stage did the Court in 1962 specifically deal with the problems arising from the disappearance of the League's supervisory organs; and no reference is made at any stage to the suggestion that after April 1946 supervisory functions were to be exercised by the United Nations. All references to administrative supervision were omitted from the quotations from the 1950 Opinion [3].

The Court must have realized in 1962 that if the Applicants' first submission failed, all the submissions had to be dismissed. It could not have intended that if this happened any part of its Judgment should have any further application; otherwise one would have the absurd

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[1] Preliminary Objections, pp. 299, 359; Oral Proceedings 1962, pp. 4, 16-17, 49, 52-54, 336-337; Counter-Memorial, Book. II, p. 166. The following statement at page 332 of the 1962 Judgment is accordingly not correct: "The Respondent contends that it [the Mandate] is not in force . . ." Also incorrect is the statement that follows immediately thereafter (and which incidentally contradicts what has just been quoted): "It is argued that the rights and obligations under the Mandate in relation to the administration of the Territory of South West Africa being of an objective character still exist . . ." (The rest of the sentence also constitutes an incorrect representation of Respondent's argument, but in another respect.)

[2] See paragraphs 46 to 49 of the Chapter of this opinion dealing with Submissions 2, 7 and 8.

[3] Compare quotation at pp. 333 and 334 of the 1962 Judgment with full statement in 1950 Opinion, p. 136.

result that a party who has in the final judgment been held to have no legal right or interest in a claim nonetheless has, by virtue of an interlocutory decision, a judgment in its favour in respect of that claim or part thereof.

9. Inasmuch as the voting in 1962 was eight to seven it follows that, apart from all other considerations, no statement not made with the approval of all the eight majority judges and not intended by all those judges to constitute a decision could have effect as a decision of the Court.

It is therefore relevant to observe that it appears from the separate opinions of Judges Bustamante, Jessup and Sir Louis Mbanefo that none of them intended deciding any part of the merits.

10. Judge Jessup's opinion speaks for itself:

> "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'.
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> 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.
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> 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."

The fact that the learned judge, after having made these remarks, made some observations on the merits of the dispute is irrelevant, because he could not possibly have intended to decide an issue which he had just stated could only be dealt with at the merits stage of the cases.

11. That Sir Louis Mbanefo had no intention of deciding any part of the merits appears from the first paragraph of his separate opinion:

"I agree generally with the reasons given in the Judgment of the Court, but I feel that a great deal of the argument on the first three Preliminary Objections in the Judgment goes to the merits of the case. The Court is concerned essentially at this stage with the question of jurisdiction. The way in which the claims of the Applicants and the Preliminary Objections of the Respondent are framed make it difficult for the Court to avoid touching on the merits of the case. But that notwithstanding, I feel that emphasis should be on a line of reasoning that deals essentially with the issue of jurisdiction; and the opinion which I now give is intended to supplement the reasoning of the Court on the First, Second and Third Preliminary Objections."

12. There is at least one further reason which, apart from those advanced in the Judgment, would justify a conclusion that the Applicants have no legal right or interest in the claim, namely that, whatever rights the Applicants may have had under the provisions of the Mandate, these lapsed on the dissolution of the League. On that date, either the whole Mandate lapsed or at least those provisions, including Article 7, which depended on the existence of the League ceased to apply; and, in any event, Applicants could not retain any rights held by them as members of the League after terminating such membership. In either event all the submissions, including Submission No. 1, must be dismissed.

It is common cause that Article 7 can no longer apply, and Applicants can no longer hold any rights they may have had as members of the League, unless the words "Member of the League of Nations" in the Mandate are given a meaning which includes ex-members of the League who were members at the time of its dissolution. In 1962 the Court advanced three reasons for not giving these words their ordinary and natural meaning [1]. The first two are in direct conflict with the reasoning of the present Judgment; the third depends on the validity of the first

[1] It seems unavoidable that before rejecting these reasons all possible sources of evidence on which they could have been based should be examined.

two, and is in any event unfounded. I shall attempt to avoid as far as possible a repetition of what is already stated in the Judgment.

13. The first of these reasons is recorded in the second paragraph on page 336 of the 1962 Judgment which commences as follows:

> "In the first place judicial protection of the sacred trust in each Mandate was an essential feature of the mandates system."

This statement is bare assertion for which no support is to be found in the relevant instruments, in the *travaux préparatoires*, in the subsequent conduct of the Parties, or in any other possible source of evidence. The truth is that the concept of judicial protection of the sacred trust did not exist, and this explains why nothing to that effect was said either before or after the signing of the Covenant or the adoption of the Council resolutions which embodied the various instruments of mandate.

This paragraph of the 1962 Judgment then proceeded as follows:

> "The essence of this system, as conceived by its authors and embodied in Article 22 of the Covenant of the League of Nations, consisted, as stated earlier, of two features: a Mandate conferred upon a Power as 'a sacred trust of civilization' and the 'securities for the performance of this trust'. While the faithful discharge of the trust was assigned to the Mandatory Power alone, the duty and the right of ensuring the performance of this trust were given to the League with its Council, the Assembly, the Permanent Mandates Commission and all its Members within the limits of their respective authority, power and functions, as constituting administrative supervision, and the Permanent Court was to adjudicate and determine any dispute within the meaning of Article 7 of the Mandate. The administrative supervision by the League constituted a normal security to ensure full performance by the Mandatory of the 'sacred trust' toward the inhabitants of the mandated territory, but the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate."

In this passage the Court apparently overlooked the fact that Article 22 of the Covenant required in express terms that "securities for the performance of this trust should be embodied in this Covenant", and that there is not a word in the Covenant to suggest that either the individual members of the League or the Court were to play any part with regard to the performance of the trust. There is in any event no evidence to be found anywhere to support the statement that the rights and duties of ensuring the performance of the trust were—in addition to the rights and duties given to the organs of the League—conferred on all the members of the League. It follows that the suggestion that individual members of the League were given powers of administrative supervision over the mandatories is unfounded. The simple truth is that

the authors of Article 22 did not conceive of any role for the Court with regard to the mandates system, and that is why the Court is not mentioned in Article 22 of the Covenant.

13 *(a)*. As already stated, the Court was mentioned for the first time in connection with the mandates some time after the signing of the Covenant, when a compromissory clause was proposed for the 'B' mandates. But neither at that stage nor at any other stage was there any suggestion to the effect that the Court should be assigned the role of ensuring performance of the sacred trust, or that it should serve as a final bulwark of protection thereof; *not a word to this effect, or which may possibly be interpreted as suggesting anything of the kind, was said at any time by anybody*. On the contrary, what was said at the time reveals that it was thought that the purpose of the compromissory clause was to provide for disputes relating to national rights being referred to the Court [1].

13 *(b)*. If the Court had been intended to fulfil this special role of protection of the sacred trust, a provision to that effect would have been embodied in the Covenant, and it would not have been left to the Council to include this "super security" in the mandate declarations. There could have been no certainty that all the members of the Council—including the mandatories—would have approved such a provision, and without the requisite unanimity the Council could not function. Moreover, the Council's powers were confined to defining the "degree of authority, administration and control" of the mandatory, and it could have had no power to add to the securities for the performance of the sacred trust since these securities had to be embodied in the Covenant. Furthermore, even supposing that this important provision relating to the Court's special role had been intentionally omitted from the Covenant because it was thought that it would be included in the instruments of mandate, one would have expected that at the time the Covenant was signed some reference to this would have been made. But the facts are that, at the time, the Court was not even mentioned in the discussions. It is perhaps relevant to record that the day before the Versailles Peace Treaty (which included the Covenant) was signed, i.e., on 27 June 1919, the draft mandates were before the Council of Four, but nobody suggested that inasmuch as the Covenant, which was to be signed the next day, did not provide for the judicial protection of the sacred trust, a provision to that effect should be inserted into the mandates. In fact on the very day the Peace Treaty was signed the Milner Commission met in Paris, and yet nobody suggested the inclusion of any provision relating to the Court. It is significant that on this same day the minorities treaty with

[1] To the facts recorded by Judge Sir Percy Spender and Judge Sir Gerald Fitzmaurice in their joint dissenting opinion, *South West Africa, I.C.J. Reports 1962*, pp. 556-557, I wish to add that before Lord Milner made the remark referred to in the second paragraph of page 557, Lord Cecil had observed that there would be some advantage in withdrawing questions of personal claims by nationals from the sphere of diplomacy—see *Recueil des Actes de la Conference de la Paix*, Vol. VI A, pp. 348-349.

Poland was signed, and this treaty contained a compromissory clause coupled with the "deeming" clause which became a feature of the minorities treaties, but nobody suggested that any similar provision should be inserted in the mandates.

13*(c)*. Judge Jessup attached some importance in his 1962 opinion to the compromissory clauses in the minorities treaties, particularly in order to establish that in 1920 a State could acquire a legal interest in matters not affecting its own material interests [1]. That this is so is not disputed, but the learned judge overlooked the difference in the wording of the minorities treaties and the mandates. In the first place the minorities treaties contained a deeming clause which provided that a difference of opinion arising out of the provisions of the treaty "shall be held to be a dispute of an international character"; secondly, the right of invoking the Court's jurisdiction was limited to the Principal Allied and Associated Powers and to other members of the Council of the League, and, thirdly, the provision contained no requirement such as the mandates relating to the settlement of the dispute. It should be borne in mind that the minorities treaties were imposed on the defeated nations and new States by the Great Powers. It is incredible that these Powers would have limited the grant of substantive legal rights in the case of these defeated nations and new States to a few States only, but should have voluntarily granted in respect of mandates such rights against themselves to all the members of the League. Judge Jessup rightly remarked in his *Modern Law of Nations*, 1959, page 89:

> "But the minorities treaties were obnoxious largely because they carried the stigma of imposition upon small States by the great powers, who were unwilling to accept like obligations in their own territories."

14. The second reason advanced in the 1962 Judgment for not giving the words "Members of the League" their ordinary meaning was that:

> "In the second place, besides the essentiality of judicial protection for the sacred trust and for the rights of Member States under the Mandates, and the lack of capacity on the part of the League or the Council to invoke such protection, the right to implead the Mandatory Power before the Permanent Court was specially and expressly conferred on the Members of the League, evidently because it was the most reliable procedure of ensuring protection

[1] Further arguments on this issue advanced by Judge Jessup are dealt with in the Counter-Memorial, Book II, Chapter V B; I do not consider it necessary to deal with them in this opinion.

by the Court, whatever might happen to or arise from the machinery of administrative supervision."

But the fact is that at the time of the establishment of the mandates system the possibility of something happening to the machinery for administrative supervision was not discussed or mentioned at all, and was clearly not even contemplated. The above-cited reasoning of the 1962 Judgment is accordingly also neither warranted nor substantiated by the facts.

15. The third reason given by the 1962 Judgment was that at the final session of the League in April 1946 an agreement was entered into between all the members of the League to continue the different mandates as far as was practically feasible or operable, and therefore to maintain the rights of members of the League itself. The agreement referred to is inferred from this 1946 "dissolution resolution" and "the whole set of surrounding circumstances which preceded, and prevailed at the session". Not only is the alleged general agreement based on inference, but the preservation of the alleged rights of League members individually in respect of Mandates is in turn inferred from this tacit agreement.

In essence these conclusions seem to rest on the proposition that the dissolution resolution was adopted "precisely with a view of averting ... the literal objections derived from the words 'another Member of the League of Nations' ". But this proposition is, with respect, another bare assertion. The facts are that the rights of members of the League, or the possible consequences flowing from the meaning of the words "another Member of the League of Nations", were not discussed or mentioned, expressly or impliedly, directly or indirectly, either before or after the adoption of the said resolution. Nor does the resolution itself make reference to any such matter. There is no evidence of any intention to enter into any agreement relative thereto.

15 *(a)*. In my view there is no substance in any of the reasons advanced by the Court in 1962 for placing "no reliance" on the natural and ordinary meaning of the words "another Member of the League of Nations" in Article 7, and for holding that ex-members of the League retained after the dissolution such rights as they may have had as members of the League.

Judges Bustamante, Jessup and Mbanefo followed in some respects a somewhat different line of reasoning.

16. Judge Jessup first considered the meaning of "Members of the League" in Article 7 of the Mandate for Ruanda-Urundi held by Belgium. After pointing out that in this Article 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", the learned Judge remarks:

"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."

The Judge thereupon concludes that if his aforesaid conclusion is sound, the provisions of Article 5 of the Mandate for South West Africa which required the Respondent to allow all missionaries, nationals of any State Member of the League of Nations to enter into and reside in the Territory for the purpose of prosecuting their calling, could not have ceased to apply on the dissolution of the League. He thereupon concludes that the reference to "another Member of the League" in the Mandates was "descriptive of a class" and not "an imperative condition".

The learned Judge thus bases a great deal of his reasoning on the conclusion reached by him on the meaning of "Members of the League" in the Ruanda-Urundi Mandate. But this conclusion is based on hardly any reasoning at all. All we have is the Judge's statement that it is not apparent to him why a contrary result would be "reasonable". He offers no reason why such a result would be unreasonable.

There is no evidence to justify an inference that the authors of the mandates system intended that a State which has ceased to be a member of the League should retain rights conferred on it as a member of the League, and there is nothing unreasonable in a conclusion that a State which has lost the qualification entitling it to the enjoyment of a right, has lost that right. Whenever a right is terminated it would be possible to say that what would have constituted a violation of an obligation on the one day would be permissible the following day, but this is no reason for saying that the right has not come to an end. *Instans est finis unius temporis et principium alterius.* If France had resigned as a member of the League on 19 April 1946, she would no longer have been entitled to claim any rights under Article 7 of the Ruanda-Urundi Mandate on 20 April 1946. The fact that she still could have done so on 18 April 1946 is entirely irrelevant. The same consequence must have flowed from the termination of membership of the League on 19 April 1946 as would have followed had membership been terminated the day before, or ten years sooner.

In my opinion there is no cogency in the reasons advanced by the learned Judge for his finding that the words "Members of the League"

were descriptive. His first reason is that it was fondly hoped that the League system would become universal. I fail to see what bearing this hope had on the meaning of these words. Had this hope been fulfilled the words "Members of the League" would have become synonymous with "all States" as long as all States remained members of the League, but even then "Members of the League" could only have meant members of the League.

The maxim *cessante ratione legis, cessat ipsa lex* is completely misapplied by the learned Judge. It is invoked by him to change the provisions of an instrument: to amend Article 7 of the Mandate by substituting "ex-member of the League which was a member at the dissolution of the League" for "Member of the League". The maxim simply means that where the reason for a law ceases, the law itself ceases, and it in no way justifies an interpretation imposing on a State an obligation it did not agree to. There is in any event no justification for the view that the authors of the mandates system intended that the privileges of ex-members should continue after the dissolution of the League. Provision was made for the amendment of the Covenant and the mandates by the organs of the League, and there was accordingly no need for any agreement, express or implied, as to what would happen in the event of the dissolution of the League. Had the issue been raised, the answer would probably have been that it was left to the organs of the League and the mandatories concerned to take such steps as were considered reasonable in the light of circumstances prevailing at the time of such dissolution; but it certainly cannot be said that all the parties would have agreed that the rights of States who were members immediately prior to the dissolution of the League would continue after its dissolution.

I must confess that I am unable to understand the Judge's "frustration" argument. I know of no legal principle which requires that a provision should continue to apply after the conditions for its application have ceased to exist, simply because it would be capable of being complied with if those conditions did still exist or are ignored.

Equally erroneous is Judge Jessup's following approach:

> "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." (Italics added).

If the learned Judge's view that the expression "Member of the League" was descriptive is correct, there would appear to be no reason for limiting the privileges conferred on "Members of the League" to States which were members on the dissolution of the League. This passage—

and other passages—suggest that the learned Judge thinks that as long as the League existed the words "Member of the League" had their ordinary meaning, but that on the dissolution of the League they became descriptive of States who were members at its dissolution. This means that the same words had different meanings at different periods of time. The learned Judge appears to have lost sight of the elementary principle that all rights and duties under an agreement are determined in accordance with the intention of the parties at the time the agreement is entered into. No party can "claim" rights or privileges not properly derivable from the agreement, and nobody other than a legislature can "impose" duties not agreed to.

The opinion of Judge Jessup further advances the argument that if the elements of the mandates which related to the welfare of the inhabitants survived the League, then the rights of missionaries under Article 5 and the rights of the inhabitants to their services should also have survived the League despite the technical requirement that these missionaries had to be nationals of members of the League. The learned Judge appears to be confusing the Respondent's duties towards the inhabitants under the provisions of the Mandate and the rights conferred on States, members of the League. In any event the survival of those rights, which depended on the existence of members of the League, depends on the meaning of the words "Member of the League"; and the problem arising in regard thereto is exactly the same as that which arises in regard to Article 7. The solution given to it is not made any more valid by first interpreting Article 5, or provisions of other mandates in which the words "Members of the League" appear, as applying to ex-members of the League.

The learned Judge appears to revert to his descriptive test in the following passage:

> "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'."

Rights are conferred by the constitution of a company on its members. These members are not "ghosts seen in the law, elusive to the grasp". They are actual persons, whose names could be recited. The names of the original members appear on a list, but it is not a fixed group; it fluctuates as new members are admitted or as old members terminate

their membership. At any given moment—as for example the moment before the dissolution of the company—it would always be possible to draw up, by names, a list of those included in the descriptive term "member of the company". This, however, affords no reason for saying that the expression "member of the company" is descriptive in the sense that the rights conferred on members, *qua* members, continue on termination of membership whether during the lifetime of the company or on its dissolution and liquidation. Whenever it is desired to confer any rights on ex-members of a company, express provisions to that effect are required.

17. Judge Bustamante came to the conclusion that rights conferred on members of the League were not limited to the lifetime of the League but extended to the whole duration of the Mandate [1]. The Mandate does not state that the rights and duties of members will survive their membership of the League. On the contrary their rights and duties were held as "Members of the League", and this obviously means that on the termination of their membership their rights and duties as members also terminated. The possibility of the Mandate surviving the League was not contemplated, and there is no justification for inferring that, had it been considered, all the parties, including the Respondent, would have acknowledged that in such a case the rights and duties of members—whatever they were—would continue despite their loss of membership.

The learned Judge concedes that the rights of States which voluntarily resigned or were ejected from the League, terminated on the termination of their membership; but he contends that the dissolution of the League *was not the result of a voluntary act of its members*. He arrives at this conclusion by having regard "to the historical facts which determined the disappearance of the League of Nations". These facts are (according to the learned Judge): *(a)* that the League was already "greatly weakened" before the Second World War, *(b)* that it remained "paralysed" for the whole of the war, *(c)* that the results of the conflict "completely upset international realities" by profoundly modifying the former conformation and distribution of States on which the League of Nations had been based, *(d)* that the League was already "dead" when it was dissolved, *(e)* that Articles 77, 79 and 80 of the Charter established the "compulsory character" for the transformation of former mandates into modernized tutelary systems. The expressions "weakened", "paralysed" and "dead" have no known legal connotation in the context in which they are used, but whatever their meanings may be, the fact is that the League of Nations was still in existence as a legal entity, and its members still had the qualification and the rights and duties of members of the League, up to the time of its dissolution. They were

[1] It will be recalled that the survival of the Mandate was assumed.

consequently not powerless. Equally the Charter could have provided for the compulsory transformation of former Mandates into trusteeship agreements, or to use the Judge's words "*en régimes tutélaires modernisés*"—see *International Status of South West Africa, I.C.J. Reports 1950,* page 140, where it was held that "the Charter does not impose on the Union an obligation to place South-West Africa under the Trusteeship System".

In any event, even if the provisions of the Charter provided for such compulsory transformation, they were voluntarily agreed to by the members of the League. One cannot voluntarily agree to enter into an agreement and then after having done so contend that it (the latter) was not voluntarily entered into because of the prior agreement.

The members of the League voluntarily dissolved the machinery created for the supervision of the Mandatory, and voluntarily terminated their qualifications as members which was a *sine qua non* to their holding rights and duties under the Mandate, and members of this Court have no right to disregard the legal effects of these voluntary acts, however much they may dislike them.

18. Sir Louis Mbanefo thought that the rights and obligations embodied in the Mandate "became as it were maintained at the level on which they were on the dissolution of the League".

The reason advanced for this conclusion is that the purpose of the Mandate has not yet been achieved. There is no principle of law to the effect that parties to an instrument cannot lose their rights and obligations until the purpose of the instrument in question has been achieved; nor is there any principle that, if parties voluntarily terminate their qualifications necessary for holding certain rights and obligations, such rights and obligations are nonetheless maintained "at the level" they were on the date of the loss of such qualification.

19. In all the articles of the Covenant except Articles 2, 9, 21 and 24 the words "Member(s) of the League" are used. In terms of Article 3 the Assembly consists of representatives of "Members of the League", and "each Member of the League" was given one vote. Article 4 provided for the election of "four other Members of the League" to the Council. Article 6 imposed the obligation to contribute to the expenses of the Secretariat on "the Members of the League". Article 7 dealt with the diplomatic privileges of representatives of "Members of the League". Articles 8, 12 and 15 imposed various obligations on "Members of the League". Article 22 dealt with equal opportunities for trade and commerce of "other Members of the League". Article 1 (1) provided which States would be the original "Members of the League". Article 1 (3) provided that any "Member of the League" could withdraw after giving two years' notice. Article 16 (4) provided for declaring a "Member of the League" to be no longer a "Member of the League". It is clear that the expression "Member of the League" was used to mean a State which

in fact was a member of the League at the time of the application of the particular provision in which it appears.

Any interpretation of this expression in any of these provisions to the effect that States which had never been or had ceased to be members of the League are included would be ridiculous and there appears to be no sound reason for not giving it the same meaning it had in the Covenant, wherever it occurs in the instrument of mandate.

FURTHER GROUNDS FOR DISMISSING SPECIFIC SUBMISSIONS

Article 6 of the Mandate

(Applicants' Submissions Nos. 2, 7 and 8)

1. At the outset I wish to repeat that Article 7 (2) of the Mandate Declaration is the only provision upon which the jurisdiction of this Court could in these cases be founded. The said Article limits such jurisdiction to disputes relating to the interpretation or application of the provisions of the Mandate; i.e., the provisions contained in the Mandate Declaration. It follows that provisions of other instruments may only be considered if they have been incorporated into, or have bearing on the legal effect of the provisions of the Mandate Declaration. Thus, for example, Article 22 of the Covenant is only relevant when considered in conjunction with the provisions of the Mandate Declaration. Divorced therefrom it has no relevance in these proceedings.

2. In my 1962 opinion [1] I came to the conclusion that Article 6 of the Mandate ceased to apply on the dissolution of the League. I adhere to that opinion.

My reasons for holding that Article 6 of the Mandate Declaration, and also Article 22, paragraph 7, of the Covenant of the League, no longer apply are briefly set forth in the following paragraphs.

3. The obligation imposed on the Respondent by Article 22, paragraph 7, of the Covenant and Article 6 of the Mandate Declaration was an obligation to report to a particular body, *viz.*, the *Council of the League*.

Article 22 of the Covenant of the League provided that to certain colonies and territories, which included German South West Africa, there should be applied the principle that the well-being and develop-

[1] Judgment on Preliminary Objections (*I.C.J. Reports 1962*, pp. 575-662).

ment of the peoples of such colonies and territories formed a sacred trust of civilization, "and that securities for the performance of this trust should be embodied in this Covenant". The Article then continued to state that the best method of giving practical effect to this principle was that the tutelage of such peoples should be entrusted to certain advanced nations, and that this tutelage should be exercised by such nations as "*mandatories on behalf of the League*".

The only securities embodied in the Covenant relative to reporting and accounting by the mandatory are be to found in paragraphs 7 and 9 of Article 22, and they read as follows:

> "7. In every case of mandate, the Mandatory shall render to *the Council* an annual report in reference to the territory committed to its charge." (Italics added.)
>
> "9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise *the Council* on all matters relating to the observance of the mandates." (Italics added.)

And in the relevant Mandate Declaration the only reference to reporting and accounting is to be found in Article 6, which reads as follows:

> "The Mandatory shall make to the *Council of the League of Nations* an annual report *to the satisfaction of the Council*, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5." (Italics added.)

This duty to make a report to the satisfaction of the Council is hereinafter referred to as the Mandatory's duty to report and account, and the corresponding rights of the Council in that regard are referred to as the Council's powers of supervision.

4. Article 6 of the Mandate Declaration, and paragraphs 7 and 9 of Article 22 of the Covenant of the League, depended for their operation on the existence of the League of Nations, inasmuch as without a League in existence there could not be a Council of the League. The League was dissolved in 1946 and the aforesaid provisions accordingly must as from that date have ceased to apply unless some other body, such as, for example, the General Assembly of the United Nations, was substituted for the Council of the League as the body to which the Respondent had to report and account.

Such substitution could have come about only if:

(a) there exists a principle or rule of international law which provides for such substitution to take effect automatically—i.e., without any question of consent on Respondent's part, *or*

(b) the Respondent consented to such substitution.

It is now common cause that there is no principle or rule of international

law which could have brought about such an automatic succession[1]. There is certainly no principle to be found in any legal system to the effect that, where the creators of a trust (or anything in the nature of a trust) also create an organ to supervise the administration of that trust, and they themselves thereafter dissolve such organ without substituting another, a court of law may effect such substitution.

The only issue to be determined, therefore, is whether Respondent ever consented to such a substitution. It is common cause that no agreement to which Respondent was a party contains any express provision effecting such substitution.

The issue, therefore, really involves an enquiry as to whether Respondent tacitly agreed to such a substitution—i.e., whether any agreement to which Respondent was a party contains an implied term to that effect, or whether Respondent by its conduct tacitly consented to such a substitution.

In this regard only three possibilities arise for practical consideration, *viz.*:

(i) whether the mandate instrument must be interpreted as embodying an implied term to the effect that Respondent would upon the dissolution of the League become obliged to report and account to another body such as, for example, the General Assembly of the United Nations;

(ii) whether, if the mandate instrument does not contain such an implied term, the Charter of the United Nations embodies such a term;

(iii) whether, in the absence of any such implied term in the aforementioned instruments, Respondent at the time of the creation of the United Nations and the dissolution of the League, or thereafter, by its conduct tacitly consented to such a substitution.

I shall deal separately with these three matters but, before doing so, I wish to restate certain basic principles of interpretation concerning the reading of implied terms into an agreement.

5. The universally accepted basic principle of interpretation, applicable in municipal law and international law alike, is that in the interpretation of all contracts, statutes and instruments one should endeavour to determine the true intention of their authors. An implied term may be read into an agreement only if there arises from the agreement itself,

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[1] Although the Applicants in earlier stages of the proceedings used such expressions as "automatic succession", "doctrine of succession" and "principle of succession" (Observations on Preliminary Objections, pp. 429, 443 and 445; and see also *Oral Argument on Preliminary Objections*, p. 302), they intimated in the oral proceedings on the merits that such terminology was ill chosen, and they stated categorically that they did not rely on any "international legal principle of devolution or succession *aliunde* the Mandate". Not one of the members of the Court in 1962 relied on any principle or rule of succession.

and the circumstances under which it was entered into, a necessary inference that, although a suggested term was not incorporated in the agreement in so many words, the parties must have had a common intention that it should apply. A term should only be implied if the evidence reveals that the parties in fact intended it to apply, or if it can confidently be said that had it been suggested to them at the time they would have acknowledged that it fell within the scope of their agreement. It follows that a term cannot be implied if it goes beyond the declared scope and object of an instrument, or would involve radical changes or additions thereto, or would do violence to clear and unambiguous express provisions thereof, or if it is inconsistent with the admissible extraneous evidence relating to the intention of any of the parties. It is not sufficient to find the intention of some of the parties; a term can only be implied if it reflects the intention of *all* the parties. See *South West Africa* cases, *I.C.J. Reports 1962*, pages 576-591.

6. I now proceed to consider whether the Mandate Declaration, read with Article 22 of the Covenant of the League, contains any such implied term, i.e., that on the demise of the League an organ or organs of a future international organization would be vested with the powers of the organs of the League with regard to mandates, and that the mandatory would be obliged to report and account to such an organ or organs.

(a) Would such an implied term do violence to clear and unambiguous express provisions of the Covenant and the Mandate Declaration? The answer is in the affirmative. In terms of paragraphs 7 and 9 of Article 22 of the Covenant and Article 6 of the Mandate the Respondent accepted an obligation to render annual reports to the *Council of the League*. The words of these provisions are capable of one construction only. They are clear and unambiguous. *The Council of the League was an organ of the League specifically provided for by the Covenant, which defined its functions and prescribed its procedures.* Thus Article 4 of the Covenant provided:

> "1. *The Council* shall consist of Representatives of the Principal Allied and Associated Powers, together with Representatives of four other Members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion. Until the appointment of the Representatives of the four Members of the League first selected by the Assembly, Representatives of Belgium, Brazil, Spain and Greece shall be members of the Council.
>
> 2. With the approval of the majority of the Assembly, the Council may name additional Members of the League whose Representatives shall always be members of the Council; the Council with like approval may increase the number of Members of the League to be selected by the Assembly for representation on the Council.

2*bis*. The Assembly shall fix by a two-thirds majority the rules dealing with the election of the non-permanent members of the Council, and particularly such regulations as relate to their term of office and the conditions of re-eligibility.

3. *The Council* shall meet from time to time as occasion may require, and at least once a year, at the seat of the League, or at such other place as may be decided upon.

4. *The Council* may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

5. Any Member of the League not represented on the Council shall be invited to send *a Representative to sit as a member* at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League.

6. At meetings of the Council, *each Member of the League represented on the Council shall have one vote*, and may have not more than one Representative." (Italics added.)

And Article 5 (1) of the Covenant provided that,

"Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the *Council* shall require the agreement of *all the Members of the League represented at the meeting*." (Italics added.)

All these provisions were incorporated by reference in Article 22, paragraphs 7 and 9, of the Covenant, and in Article 6 of the Mandate Declaration. The obligation to report and account was confined by clear and unambiguous language to the Council of the League and did not include an obligation to report and account to any other body. The addition of a new security not embodied in the Covenant and having the effect of substituting an organ of another institution for the Council of the League would undoubtedly constitute radical changes and additions to both the Covenant and the Mandate Declaration.

(b) Moreover, such an implied term would go beyond the declared scope and object of the instruments in question. It is true that the general object of the parties was that the principle should be applied "that the well-being and development" of the peoples of South West Africa "should form a sacred trust of civilization"; but their object was also that this purpose should be achieved in a particular manner, i.e., within the framework of Article 22 of the Covenant. The object was, in a sense, to define the international status of South West Africa, to create an international régime; but an integral part of the definition of the régime, *was supervision by the Council of the League*. This appears clear not only from the very provisions of Article 22 of the Covenant, but also from the *travaux préparatoires*, which reveal that the general provisions would not have been agreed to had the Article not contained the specific provisions relating to the methods devised to give practical effect thereto. President Wilson reflected the attitude of the parties at the time when he said:

"no one should accept the scheme unless he was shown how it was going to work [1]."

It was with considerable reluctance that the Respondent, New Zealand and Australia agreed to the mandates system devised in Article 22 of the Covenant. On what possible basis can it now be said that *their* object was to create an international régime which imposed upon them obligations other than those specifically agreed to by them?

Indeed, it was in order to avoid a stalemate that the Respondent and other States were prepared to accept Article 22 of the Covenant as a compromise. The contemporary statements of the South African Prime Minister and others leave no room for doubt that they were agreeing to supervision by *the Council of the League only*, and not to that of any organ of any other institution. For Australia and New Zealand, Article 22 "represented the maximum of their concession" [2], and South Africa agreed thereto because, in the words of General Botha, "the League of Nations would consist mostly of the same people who were present there that day, who understood the position . . ." [3].

(c) The fact that Article 22 was the result of a compromise is in itself, apart from all other considerations, sufficient reason for not reading into the instruments in question, by way of implication, that the Respondent and other mandatories had agreed to obligations of reporting and accounting which they were not asked to agree to, and which would have exceeded what was required to effect the compromise.

In these circumstances it cannot be said that the suggested implied term was contemplated, or that all or any of the parties would have agreed that it fell within the ambit of their general intent had the matter been raised when the Covenant of the League and the Mandate Declaration were agreed to.

(d) The possibility of the dissolution of the League at some future date was not contemplated at the time, and there would, therefore, not have been any agreement or intention as to what would happen to the Mandate in such an event. Had it been suggested at the time that provision should be made for such an eventuality the reaction would probably have been that, inasmuch as specific provision had been made for the amendment of both the Covenant and the Mandate Declarations by, or with the consent of, the organs of the League, it should be left to those organs and the respective Mandatories to do what they considered to be in the best interests of all concerned in the circumstances prevailing at the time of such dissolution.

The possibility that the League would at some future date be dissolved by its members without providing for supervision of the administration of mandates was definitely not foreseen by its founders, and it is impossible to determine what the unanimous reaction, if any, would have been

[1] *Foreign Relations of the United States: The Paris Peace Conference*, Vol. III, pp. 788-789.
[2] *Ibid.*, p. 800.
[3] *Ibid.*, pp. 801-802.

had such a possibility been raised. The probability is that their reaction would have been that if they, as Members of the League, were ever to dissolve the League without providing for the transfer of its powers to another organization, those provisions which depended on the existence of the League would simply cease to apply. In the circumstances that would obviously have been their intention. It can, however, be said with certainty that the reaction of some of the parties, including the Respondent, would have been that they were not agreeing to any automatic transfer of the supervisory powers of the League to the organs of an unknown future international organization. They would at least first have required assurances with regard to the constitution of such an organization before agreeing to any such automatic substitution. Had they been told that the constitution of this future international organization would not retain the unanimity rule of the League, there can be no reason to suppose that their consent would nevertheless have been given.

(e) It has been suggested that inasmuch as the League of Nations during its lifetime constituted, or represented, what may be called the "organized international community" (at times expressions such as "family of nations" or "civilized nations of the world" were used instead), and inasmuch as this community is now regarded as being constituted, or represented, by the United Nations Organization, the League should be equated with the United Nations, and thus the way is paved for substituting an organ of the United Nations for the Council of the League as the supervisory body with respect to mandates [1].

The fallacies in reasoning along the line of the so-called "organized international community", with the object of establishing a contention that the mandate instrument embodied an implied term such as aforestated, are legion. It disregards firstly the fact that, although the expression "organized international community" and the other expressions mentioned may in certain contexts serve some useful purpose as being descriptive of a collectivity of States, they have no legal significance whatever. In particular such expressions are not to be understood as conveying that outside or independently of actual international organi-

[1] The contentions advanced by the Applicants on the basis of their so-called "organized international community theory" have not been consistent. At one stage in the course of the proceedings Applicants relied on an implication to be read into the Mandate Declaration, which by itself, and without any question of further consent on Respondent's part, caused the United Nations Organization to be substituted for the League as the supervisory body in respect of mandates (*vide* Reply, p. 320). For the present I am concerned with the "organized international community" theory only in this sense. I shall revert later to the different form which the argument took during the oral proceedings. It is, however, in my view, not without significance that in the ultimate event Applicants found it impossible to maintain the theory in its above sense, and in particular that they no longer contended that a substitution of supervisory organs occurred or could occur without fresh consent on the Respondent's part.

zations, constituted by agreement, there exists a legal *persona*, or an entity of legal significance, known as "the organized international community", etc. Such a notion would be entirely fallacious and misleading. Furthermore, the reasoning in question either disregards the legal principle that a party cannot be bound by a suggested term *to which it did not agree*, or it disregards the fact that the Respondent agreed to the supervision of a particular body only, *viz.*, the Council of the League—an organ composed in a particular manner and regulated by definite and binding rules of procedure—and not to the supervision of an organ of any other body, and would, in any event, almost certainly not have agreed to the supervision of an organ such as the General Assembly of the United Nations had it been asked to do so. It entirely disregards the important differences between the League and the United Nations, particularly the procedural provisions relating to the functioning of their organs, and it disregards the clear proof afforded by a mass of evidence that the parties to the relevant instruments *neither intended nor contemplated such a result*. The truth is that the authors of the mandates system did not contemplate the possibility that the League would cease to constitute or represent what in a sense may be regarded as the "organized international community" or "the family of nations" or "the civilized nations of the world"; and the question whether the League's functions would be transferred to some future organization constituting or representing what could then be described as the "organized international community", "the family of nations" or "the civilized nations of the world" did therefore not arise. If it should have arisen, the Respondent and many other States would clearly not have conceded that they were agreeing to supervision at some unknown date in the future by some unknown body with an unknown constitution.

(f) In this connection the differences between the League of Nations and the United Nations Organization, referred to above, are of particular significance. I shall deal with them later. At this stage I only wish to emphasize one of them. The obligation to report and account to the Council of the League was substantially different from what an obligation would be to report and account to any organ of the United Nations. By express provision in the Covenant, the Council of the League of Nations had, in respect of its functions concerning mandates, to be assisted by the Permanent Mandates Commission, which was a body of independent experts; whereas there is no corresponding body in the United Nations. The Trusteeship Council of the United Nations, like all other organs of that institution, consists of government representatives of member States. Moreover, whereas the unanimity rule prevailed in the Council of the League, the General Assembly of the United Nations can arrive at its decisions by a bare majority, or in important matters by a two-thirds majority, while in the Security Council seven votes

(including those of the five permanent members) out of 11 are sufficient [1]. This difference was acknowledged by this Court in *South West Africa—Voting Procedure, Advisory Opinion* of 7 June 1955 in the following passage:

> "The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity rule was one of the distinguishing features of the Council of the League of Nations. These two systems are characteristic of different organs, and one system cannot be substituted for the other without constitutional amendment. To transplant upon the General Assembly the unanimity rule of the Council of the League would not be simply the introduction of a procedure but would amount to a disregard of one of the characteristics of the General Assembly. Consequently the question of conformity of the voting system of the General Assembly with that of the Council of the League of Nations presents insurmountable difficulties of a juridical nature [2]."

(g) It is significant that no State which was a party to the Covenant of the League—or any other State for that matter—at any material time alleged that the mandate instrument must be interpreted as embodying an implied term to the effect that Respondent would upon the dissolution of the League become obliged to report and account to another body, such as, for example, the General Assembly of the United Nations. During the discussions concerning the future of the mandates by the founders of the United Nations in the years 1945-1946, and by the Members of the League at its final session in April 1946, there was ample opportunity, and every incentive, for representatives to refer to such an agreement, if one existed. As I shall show later it was common cause at the time of the dissolution of the League that no provision had been made in any instrument for the transfer of the League's activities relative to the mandates to the United Nations.

7. A finding that the functions of the Council of the League, under the Mandate Declaration, as read with Article 22 of the Covenant of the League, became vested in the organs of the United Nations by virtue of an implied provision in the said instruments would go beyond their declared scope and object, would involve radical changes thereto, and would not only do violence to their clear and express language but would amount to a total disregard of the evidence relating to the common

[1] Since the recent increase in the membership of the Security Council the requirement is nine votes (including those of the five permanent Members) out of 15.
[2] *I.C.J. Reports 1955*, p. 75.

intention of the parties. Such a finding would impose an obligation on the Respondent to which it did not agree, and to which it would not have agreed had it been asked to do so. It would constitute legislation by the Court disguised as interpretation. No court, including this Court, has the power to make a party's obligations different from, or more onerous than, those to which he has consented. *Judicis est jus dicere, non dare.*

8. In the preceding paragraphs I have dealt with the question whether there can be read into the Mandate Declaration an implied term which by itself brought about the result that upon the dissolution of the League an organ or organs of the United Nations were substituted as the supervisory authority in respect of mandates and that Respondent became obliged to report and account to such an organ or organs. It may be convenient at this stage to deal very briefly also with a related matter, to the extent that it also concerns the interpretation of the mandate instrument, and that is the suggestion that the obligation undertaken by Respondent in Article 6 of the Mandate was not an obligation to submit to the specific supervision of particular League organs, but an obligation to submit to "international supervision" generally, i.e., an obligation of "international accountability" [1]. Many of the reasons which I have mentioned as running counter to the proposition that an implied term of the nature and content aforestated must be read into the Mandate Declaration also militate against the suggestion that the Mandatory's obligation was one of "international accountability". Not only would such a reading of the Mandate Declaration, and of Article 22 of the Covenant, do violence to the clear and unambiguous provisions of the said instruments, but it would in effect go beyond the declared scope and object of such instruments. It would, moreover, be in conflict with the probabilities and the events and surrounding circumstances at the time of the framing of Article 22 of the Covenant and the Mandate Declaration.

It is also significant that for more than 25 years after the creation of the mandates system the authors thereof did not consider that the mandatories had bound themselves to "international supervision" generally (as opposed to supervision by the Council of the League),

[1] This contention was one of the links in the proposition into which Applicants finally transformed their "organized international community" theory in the oral proceedings on the merits. The contention is now to the effect: *(a)* that inasmuch as Respondent's obligation was one of "international accountability" this obligation could not, and was not, terminated as a result of the dissolution of the League but continued in existence; *(b)* the only effect which the dissolution of the League could have had was that the said obligation would have become inoperative for lack of a supervisory organ, unless a new supervisory organ was appointed to which the Mandatory would be obliged, through fresh consent on its part, to report and account, and that Respondent in fact gave the necessary consent to the substitution of the General Assembly of the United Nations as such new supervisory organ. (C.R. 65/2, pp. 40-60 and C.R. 65/30, pp. 52-53.)

and the possibility that this could be the meaning of the Mandate Declarations, as read with the Covenant, did not even occur to a single representative of any State during that period. There is accordingly no justification for transforming, under the guise of interpretation, the obligation to report and account to the Council of the League into an obligation to submit to "international supervision", or to supervision by "the international community" or the "family of nations" or the "civilized nations of the world", and thus to impose on Respondent an obligation to which it did not agree.

9. The next question is whether the Charter of the United Nations contains an implied term which effected a substitution of any of the organs of the said institution as the supervisory body, in the place of the Council of the League.

(a) The United Nations is not, and was not intended to be, the League of Nations under another name. It is a new international organization which came into existence six months before the League was dissolved. Some, but not all, the members of the League were founder members of the United Nations. Two of the major powers in the United Nations, the United States of America and the U.S.S.R., were not members of the League at its dissolution. The United States of America never was a member of the League and the U.S.S.R. was expelled from the League in December 1939. Both these States were opposed to any notion that the United Nations was to be the League under a different name, or was to be an automatic successor to the League's assets, obligations, functions or activities. The discussions in the Preparatory Commission of the United Nations, the resolutions adopted by the General Assembly of the United Nations pursuant to the Preparatory Commission's recommendations, and the formal treaties concluded between the League and the United Nations, as well as statements made by member States on numerous occasions, provide conclusive proof that there was no automatic succession. *Had it been the intention of the parties to the Charter to transfer the functions of the Council of the League with respect to mandates to an organ of the United Nations, such intention would have been expressed in positive terms.* Although the mandates were specifically referred to in the Charter of the United Nations, there is no reference in any of the provisions of the Charter, or in any of the discussions at the time of the drafting of the Charter, to any intended transfer.

(b) There can be no question but that the authors of the Charter must have realized that upon the dissolution of the League the provisions in the mandate instruments concerning reporting and accounting would become inoperative unless some arrangement was made to substitute a new supervisory organ to which the mandatories would be obliged to report and account; just as the said members realized that the dissolution of the Permanent Court of International Justice would render inoperable clauses in treaties or conventions providing for adjudication of disputes by the Permanent Court. But, whereas by Article 37 of the Statute of

the Court express provision was made for substituting this Court for the Permanent Court in all treaties and conventions in force [1], there is no corresponding provision substituting any organs of the United Nations for the Council of the League in respect of the supervision of mandates. Had it been intended that one or other of the organs of the United Nations should take the place of the Council of the League relative to the supervision of mandates, such a provision would undoubtedly have been inserted in the Charter.

(c) Apart from the sacred trust referred to in Chapter XI of the Charter, the founders of the United Nations contemplated only one form of trusteeship, namely that provided for in Chapters XII and XIII, and there was no contemplation of any organs of the United Nations supervising mandates concurrently with the existence of the trusteeship system [2]. Article 77 (1) of the Charter provides that the trusteeship system shall apply, *inter alia*, to such territories "now held under Mandate" as may be placed under the system by means of trusteeship agreements, and it must therefore follow that the trusteeship system could not automatically apply to a mandated territory. To place a mandated territory under the trusteeship system a formal agreement had to be concluded.

(d) I now proceed to consider Article 80 (1) of the Charter, and in particular its legal effect relative to Article 6 of the Mandate Declaration. Article 80 (1) reads as follows:

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

The ordinary grammatical meaning of the words commencing with "nothing in this Chapter" is that Chapter XII should not be construed as in or of itself (i) altering in any manner the rights whatsoever of any States, or (ii) altering in any manner the rights whatsoever of any peoples, or (iii) altering in any manner the terms of existing international instru-

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[1] At one stage in the proceedings the Applicants advanced a contention that Article 37 of the Statute of the Court was redundant inasmuch as, in their submission, the new Court would, by reason of a principle of automatic succession, have become vested with the powers of the old Court in respect of treaties and conventions in force even without any provision such as contained in Article 37. (Observations on Preliminary Objections, pp. 443-444). This Court in the 1962 Judgment on the Preliminary Objections did not accept the Applicants' automatic succession argument. The argument was not repeated in the subsequent proceedings, and is in my view without substance.

[2] *Vide* in this regard the Advisory Opinion of 1950 at p. 140.

ments to which members of the United Nations may respectively be parties. It is common cause that the Mandate Declarations were international instruments, and the aforesaid provision accordingly directs in express terms that Article 80 (which Article is part of Chapter XII) should not be construed in or of itself as altering *in any manner* the terms of existing mandate declarations. Apart from any other considerations, this clear and unequivocal instruction bars any interpretation of Article 80 (1) which would have the effect of amending Article 6 of the Mandate Declaration for South West Africa by substituting an organ of the United Nations as the supervisory body in the place of the Council of the League. This is in itself a complete answer to those who contend that Article 80 (1) was intended to safeguard the protection afforded to the peoples of the mandated territories by the provisions relative to supervision of the mandates until such time as trusteeship agreements were concluded. The truth is that the Article does not provide for, or "pre-suppose", the continuation of rights where such rights would otherwise have terminated either by reason of the provisions of the instrument containing them, or for some other valid reason. It merely safeguards rights in the sense that Chapter XII must not be construed as by itself changing any rights.

It is true that this Court, in effect, construed Article 80 (1) in 1950 in *International Status of South West Africa, I.C.J. Reports 1950*, page 128 at 133, as affording support for its conclusion that the functions of the organs of the League had been transferred to the General Assembly of the United Nations, and that Respondent's former duty to account to the organs of the League had been converted into a duty to account to the General Assembly of the United Nations. However, careful further attention was given to this Article during the hearing of deliberations on the preliminary objections in 1962. In the result not one of the judges in 1962 placed any reliance on the Article for the purposes of their opinions and judgment, and some of the minority opinions demonstrated very forcibly that it would be fallacious to regard the Article as affording support for any suggested transfer, devolution or "carry-over" of functions from the League and its Members to the United Nations and its Members. See *South West Africa, I.C.J. Reports 1962*, e.g., at pages 516, 615, and 646-650. In view of these developments one would have thought that no argument in support of the Applicants' contentions would again be sought to be based on Article 80 (1) [1].

[1] With regard to the significance and effect of the Article the Applicants themselves have adopted a vacillating attitude. In their Memorials Applicants placed strong reliance on Article 80 (1) without stating what the legal effect of the Article was (Memorials, p. 88). In the preliminary objections proceedings in 1962 they contended that the Court in its 1950 Opinion had interpreted Article 80 (1) as having a positive character of safeguarding and maintaining rights, and they asked the Court to reaffirm the 1950 Opinion. (Oral Proceedings on the Preliminary Objections, pp. 287-290.) In the oral proceedings on the merits, however, the Applicants submitted that the said Article did not establish, constitute or maintain

Article 80 (1) is clear and unambiguous. But even if it were not so, the relevant facts preceding the framing of the Charter as well as the subsequent conduct of the parties concerned, would sufficiently demonstrate the impossibility of inferring any implied term of "presupposition" to the effect that the General Assembly of the United Nations was substituted for the organs of the League in the mandate declarations.

The discussions at the time of the drafting of Article 80 (1) reveal no evidence that the natural and ordinary meaning of the words of the Article does not express the true common intention of the parties. On the contrary, they reveal that the Article states exactly what it was intended to state.

The representative of the United States stated in unequivocal terms that the proposed Article, which later became Article 80 (1), was not intended to increase or diminish any rights, and the final report of the Committee made it clear that the Article was not to be interpreted as altering the provisions of the mandates. Respondent had by then already intimated its claim that the Mandate for South West Africa should be terminated and that the territory should be incorporated as part of the Union of South Africa. This intimation was made at the San Francisco conference "so that South Africa may not afterwards be held to have acquiesced in the continuance of the mandate or the inclusion of the territory in any form of trusteeship under the new international organization" [1]. The provisions of Article 6 could not survive the League unless they were amended by substituting some other supervisory authority for the League to which Respondent had to report and account, and there is no evidence in the Charter, or in its history, of any intention to thus amend the said Article, or of any supposition that such amendment would automatically result from the provisions of any of the instruments in question.

The suggestion that Article 80 (1) served to confirm the understanding of the authors of the Charter that certain rights, including those under mandate, did continue to exist, has no bearing on the question in issue. Of course the authors of the Charter must have realized at the time when Article 80 (1) was drafted that rights under the Mandate were then in existence. But that was nearly a year before the dissolution of the League; and the Article does not, and was not intended to, reflect any understanding as to what would happen after the dissolution of the League with regard to mandates not converted to trusteeship.

10. I now proceed to examine the conduct of the Respondent and other States subsequent to the drafting of the Charter, and I do so with the

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any rights, but merely served to "confirm the understanding of the authors of the Charter that certain rights, including those under mandates, did continue to exist". This of course affords no help at all in the problem under discussion, as I shall show.

[1] Committee II/4 on 11 May 1945.

following purposes in mind; *firstly*, to ascertain whether such conduct reveals any evidence that the parties to the Covenant of the League or the Mandate Declaration ever thought at any material time that these instruments provided for the substitution of an organ such as the General Assembly of the United Nations, for the Council of the League in Article 6 of the Mandate Declaration; *secondly*, to ascertain whether there is any evidence of any understanding on the part of the authors of the Charter of the United Nations that any of the provisions of the Charter had brought about such a substitution and, *thirdly*, to ascertain whether the Respondent in any other manner tacitly consented to such a substitution[1].

11. As already stated, the United Nations was not an automatic successor in law of the League. It was, *inter alia*, for this reason that towards the conclusion of the San Francisco Conference a Preparatory Commission was established which was required, *inter alia*, to formulate recommendations concerning "*the possible transfer of certain functions*, activities and assets of the League of Nations which it may be considered desirable for the *new organization* to take over *on terms to be arranged*". (Italics added.)

As is shown in the next succeeding paragraphs, an examination of the discussions and recommendations of this Preparatory Commission reveals that its members (each founder Member of the United Nations was represented thereon) were not under the impression that the Covenant of the League, or the Mandate Declarations, or the Charter of the United Nations, or any other instrument, had the effect of transferring the functions of the Council of the League relative to mandates to any of the organs of the United Nations. The examination further reveals that Respondent did not, by conduct or otherwise, agree to such a substitution.

12. In the interim arrangements by which the Preparatory Commission was set up provision was made for an executive committee which would exercise the powers and functions of the Commission when the Commission was not in session. The Executive Committee, for the purpose of its functions, set up ten sub-committees. The terms of reference of Committee 4 of the Executive Committee included the following:

> "It should study the questions arising if the mandates system were to be wound up and examine the feasibility of providing for such interim arrangements as may be possible, pending the establishment of the Trusteeship Council [2]."

Committee 4, after lengthy deliberation, recommended to the Executive

[1] This enquiry will encompass both the question whether Respondent consented to a new obligation of accountability in the place of the obligation provided for in Article 6 of the Mandate and the question whether, assuming, for purposes of argument, that Applicants are correct in their contention regarding "international accountability" (as to which see para. 8, *supra*), Respondent consented to a substitution of a new supervisory organ in order to render the original obligation operable.

[2] Doc. PC/EX/113/Rev. 1, 12 Nov. 1945, p. 113.

Committee, and the latter body in turn recommended to the Preparatory Commission, that there should be established a temporary trusteeship committee to exercise certain functions in connection with the conclusion of trusteeship agreements and the administration of trust territories. The recommendation contemplated that, until such time as the Trusteeship Council could come into being, the temporary trusteeship committee would undertake the functions of the said Council regarding the supervision of territories submitted to the trusteeship system [1]. In its report the Executive Committee made no provision for the supervision of mandates not brought under trusteeship. The only function proposed for the temporary trusteeship committee relative to mandates was to—

> "advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the mandate system".

According to a further recommendation of the Executive Committee the tenure of the temporary trusteeship committee would cease when the Trusteeship Council could itself begin to function.

When the recommendations of the Executive Committee were discussed in the Preparatory Commission certain States took up the attitude that the establishment of the proposed temporary trusteeship committee would be unconstitutional. Various counter-proposals were made, including proposals for the appointment of an *ad hoc* committee of the General Assembly instead of a temporary trusteeship committee.

After lengthy discussions it was decided that no recommendation should be made for the creation of any temporary organ. The Preparatory Commission merely recommended that the General Assembly of the United Nations should call on the States administering mandated territories to undertake practical steps, in concert with the other States directly concerned, for the implementation of Article 79 of the Charter. This proposal was accepted by the General Assembly and was embodied in its resolution XI of 9 February 1946.

13. What is of importance in the present enquiry, is that throughout the discussions in the Preparatory Commission no State at any time suggested that the Mandate Declaration or the Charter made provision for the substitution of any organ of the United Nations, or any other organ, as the supervisory body in respect of mandates in the place of the Council of the League, or that Respondent or any other mandatory had in any other manner consented to such a substitution. That was so despite the facts that—

(a) Respondent had earlier in the same year made the statement mentioned in paragraph 9 *(d)*, *supra*, regarding possible termination of the Mandate and possible incorporation of South West Africa as part of the Union of South Africa, which intimation, as stated above, was made for the very reason that "South Africa may not

[1] Doc. PC/EX/113/Rev. 1, 12 Nov. 1945, p. 58.

afterwards be held to have acquiesced in the continuance of the Mandate or the inclusion of the territory in any form of trusteeship under the new international organization" [1], and

(b) that, as I will show hereinafter, attention was drawn to the fact that, in the absence of any specific arrangement to that end, there would, after the dissolution of the League, be no powers of supervision in respect of mandated territories not submitted to trusteeship.

It is significant that, with one exception to be dealt with hereinafter, not one of the mandatories even contemplated that the proposed temporary trusteeship committee, or any other organ of the United Nations, should have supervisory functions in respect of mandates not converted to trusteeship.

It is clear that the Executive Committee did not intend the temporary trusteeship committee to have such functions. The intention was that the said committee would merely "advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the mandates system".

14. At the time when the recommendations of the Executive Committee were under discussion in the Preparatory Commission, the United States of America filed a written proposal for amendment of the proposed functions of the temporary trusteeship committee.

This document (PC/TC/11) drew attention to the fact that the report of the Executive Committee made no provision for any organ of the United Nations to carry out the functions of the Permanent Mandates Commission, and suggested that—

> "In order to provide a continuity between the mandate system and the trusteeship system, to permit the mandatory powers to discharge their obligations, and to further the transfer of mandated territories to trusteeship, the temporary trusteeship committee (or such a committee as is established to perform its functions) and later, the Trusteeship Council should be *specifically empowered* to receive the reports which the mandatory powers are now obligated to make to the Permanent Mandates Commission." (Italics added.)

It was accordingly recommended that the powers of the temporary trusteeship committee (or such committee as was established to perform its functions) should be enlarged so that such committee could—

> ". . . undertake, following the dissolution of the League of Nations and the Permanent Mandates Commission, to receive and examine reports submitted by mandatory powers with respect to such

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[1] Statement by Respondent's representative at the San Francisco Conference on 11 May 1945.

territories under mandate as have not been placed under the trusteeship system by means of trusteeship agreements, and until such time as the Trusteeship Council is established, whereupon the Council will perform a similar function."

The United States of America, therefore, realized that unless specific provision was made to vest an organ or organs of the United Nations with powers of supervision over mandates there would, as from the dissolution of the League, be no supervision in respect of mandated territories not submitted to trusteeship: and it sought to provide for such supervision by recommending that until such time as the Trusteeship Council could start to function a temporary body should "be specifically empowered" to exercise supervisory powers over mandates not converted to trusteeship, and that the Trusteeship Council itself should "be specifically empowered" to perform a similar function once it came to be established.

It is significant that, although this document was duly filed on record and placed on the agenda of the Preparatory Commission, the matter was never raised by the United States in debate, and no reference was at any time made to it in any of the discussions.

It seems to me only reasonable to infer that the United States must, after the filing of the said document, have come to realize that the respective mandatories were not prepared to accept supervision by the United Nations of the administration of their mandated territories, save and except for the case where a mandatory specifically agreed to place its mandated territory under the trusteeship system of the United Nations.

In this regard it is interesting to note what attitude was adopted by the different mandatories.

(a) The United Kingdom, although supporting the proposal of the Executive Committee for the establishment of a temporary trusteeship committee [1]—a proposal which did not contemplate that the said committee would have any supervisory functions in respect of mandates not converted to trusteeship—also expressed itself in favour of the alternative proposal for the establishment of an *ad hoc* committee, but suggested that the only functions which such an *ad hoc* committee should have relative to mandates should be—

> "... to advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the mandates system [2]".

The United Kingdom therefore intended the same limited role for the proposed *ad hoc* committee relative to mandates as did the Executive Committee in its proposal for a temporary trusteeship committee.

[1] PC/TC/2, p. 4 and PC/TC/4, p. 7.
[2] PC/TC/25.

(b) Australia supported the recommendation of the Executive Committee for the establishment of a temporary trusteeship committee without making any suggestion that the Executive Committee should have provided for wider powers for the proposed temporary trusteeship committee so as to enable it also to supervise mandates not converted to trusteeship [1].

(c) Belgium expressed misgivings with regard to the establishment of a temporary body and made proposals which intended to avoid the establishment of any temporary or provisional body [2].

(d) New Zealand supported the proposal made by Yugoslavia, which included the appointment of an *ad hoc* body, subject, *inter alia*, to the amendments suggested by the United Kingdom (as to which see paragraph *(a)* above) but "hesitated to agree that a temporary committee of any kind was necessary [3]".

(e) France recommended the establishment of an *ad hoc* committee which was intended to have no mission other than that of helping to bring about as quickly as possible the establishment of the Trusteeship Council. This proposed body would have had no supervisory functions in respect of trust territories and would have had no function relative to mandates other than—

> "... to advise the Assembly on any matters arising out of the transfer to the United Nations of those functions and responsibilities which originated either in the mandates system, or in other international agreements or instruments [4]".

(f) South Africa, through its representative, Mr. Nicholls, took up the attitude that if there was doubt as to whether the establishment of the proposed temporary trusteeship committee was constitutional or not legal judgment should be sought. Mr. Nicholls stated further that—

> "... on the question of expediency, it seemed reasonable to create an interim body as the Mandates Commission was now in abeyance and countries holding mandates should have a body to which to report [5]".

It has been suggested that in making this statement Mr. Nicholls acknowledged that there was an obligation on the mandatory powers to subject their administration of the mandated territories to the supervision of the United Nations. In the first place, Mr. Nicholls did not say that the mandatories would be obliged to report to an interim body. He merely suggested that there should be a body to which they could report. In the second place, his statement must be read in proper context

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[1] PC/TC/2, pp. 2-3 and 5.
[2] PC/TC/24 and PC/TC/32, p. 25.
[3] PC/TC/32, p. 25.
[4] PC/TC/33.
[5] PC/TC/2, p. 4.

and against the surrounding circumstances, of which the following are of major importance.

(i) The statement made by the South African representative earlier in that very year at the San Francisco Conference when he warned that South Africa should not "afterwards be held to have acquiesced in the continuation of the Mandate or the inclusion of the territory in any form of trusteeship under the new international organization".

(ii) The statement made by Mr. Nicholls himself shortly thereafter in the Fourth Committee of the Preparatory Commission shortly after his first-mentioned statement, when he said that he—

> "... reserved the position of his delegation until the meeting of the General Assembly because his country found itself in an unusual position. The Mandated Territory of South West Africa was already a self-governing country, and last year its legislature had passed a resolution asking for admission into the Union. His Government had replied that acceptance of this proposal was impossible owing to their obligations under the Mandate. The position remained open and his Delegation could not record its vote on the present occasion if by so doing it would imply that South West Africa was not free to determine its own destiny. His Government would, however, do everything in its power to implement the Charter."

(iii) A further statement made by Mr. Nicholls only a few days later in a Plenary Meeting of the Preparatory Commission when he again stated a reservation and said that:

> "South Africa considered that it had fully discharged the obligations laid upon it by the Allies, under the Covenant of the League of Nations, on the advancement towards self-government of the territories under Mandate."

Having regard to these three statements—one made a few months before Mr. Nicholls addressed the Fourth Committee of the Preparatory Commission on 29 November 1945, and the two later statements made by Mr. Nicholls himself shortly thereafter—it cannot be contended that, in saying that "countries holding mandates should have a body to which to report", Mr. Nicholls intended his remarks to apply to territories such as South West Africa in respect of which the mandatory had clearly intimated that it was not prepared to have the territory included in any form of trusteeship under the United Nations. It would rather seem that Mr. Nicholls intended his remarks to apply to those territories in respect of which the mandatories were willing to enter into trusteeship agreements but in respect of which there would be no supervisory organ until the Trusteeship Council came into being.

In any event, regard being had to the attitudes adopted by the man-

datories in the Preparatory Commission, including Respondent, as well as the views expressed by other States at the time, there is no justification whatever for the suggestion that there was general agreement that the mandated territories should be under international supervision and that the mandatory powers wanted that supervision to be carried out by an interim or temporary body prior to the establishment of the Trusteeship Council [1]. The events in the Preparatory Commission show the very opposite, both as regards the attitudes of the mandatory powers (as set out above) and as regards the general agreement between the States concerned. It was realized that unless some specific arrangement was made to vest the United Nations with supervisory powers over mandates not converted to trusteeship, there would be no supervision of such mandates after the dissolution of the League. Nevertheless, although it was at one stage suggested by the United States of America that such arrangements should be made, the suggestion was not raised for discussion, and nothing at all was done to confer supervisory powers with respect to mandates not converted to trusteeship on any organs of the United Nations, or any other body. The general understanding must therefore have been that there would be no supervision of mandates not converted to trusteeship.

15. When the Preparatory Commission's report was considered at the First Part of the First Session of the General Assembly in the period January-February 1946, the mandatories each stated their respective intentions with regard to the future of the territories under mandate.

Australia, New Zealand and Belgium stated intentions to negotiate trusteeship agreements in respect of the mandated territories administered by them.

The United Kingdom intimated that in respect of Transjordan it intended to take steps for establishing the said territory as a sovereign independent State. With regard to Palestine it was considered necessary to await the report of the Anglo-American Committee of Enquiry before putting forward any proposals. And in respect of Tanganyika, the Cameroons and Togoland it was stated that the United Kingdom would proceed forthwith to enter into negotiations for placing these territories under the trusteeship system; but it was made clear that its willingness to place these territories under the trusteeship system depended upon it being able to negotiate satisfactory terms.

France intimated its preparedness to study the terms of agreements by which the trusteeship régime could be "defined" in respect of Togoland and the Cameroons. In respect of the Mandated Territory of South West Africa, Respondent's representative stated its attitude in the following terms:

> "Under these circumstances, the Union Government considers that it is incumbent upon it, as indeed upon all other mandatory powers, to consult the people of the mandated territory regarding

[1] C.R. 65/27, p. 46.

the form which their own future government should take, since they are the people chiefly concerned. Arrangements are now in train for such consultations to take place and, until they have been concluded, *the South African Government must reserve its position concerning the future of the mandate*, together with its right of full liberty of action, as provided for in paragraph 1 of Article 80 of the Charter.

From what I have said I hope it will be clear that South West Africa occupies a special position in relation to the Union which differentiates that territory from any other under a C Mandate. This special position should be given full consideration in determining the future status of the territory. South Africa is, nevertheless, properly conscious of her obligations under the Charter. I can give every assurance that any decision taken in regard to the future of the mandate will be characterized by a full sense of our responsibility, as a signatory of the Charter, to implement its provisions, in consultation with and with the approval of the local inhabitants, in the manner best suited to the promotion of their material and moral well-being." (Italics added.)

And a few days later:

"Referring to the text of Article 77, he said that under the Charter the transfer of the mandates régime to the trusteeship system was not obligatory. According to paragraph 1 of Article 80, no rights would be altered until individual trusteeship agreements were concluded. It was wrong to assume that paragraph 2 of this Article invalidated paragraph 1. The position of the Union of South Africa was in conformity with this legal interpretation.

He explained the special relationship between the Union and the territory under its mandate, referring to the advanced stage of self-government enjoyed by South West Africa, and commenting on the resolution of the Legislature of South West Africa calling for amalgamation with the Union. There would be no attempt to draw up an agreement until the freely expressed will of both the European and native populations had been ascertained. When that had been done, the decision of the Union would be submitted to the General Assembly for judgment."

None of the statements made by the mandatories on this occasion can be interpreted as evidencing an understanding that, in the case of mandated territories in respect of which no trusteeship agreements were concluded, the United Nations, or any of its organs, would, after

the dissolution of the League, have powers of supervision, or that the mandatories were prepared to submit to such supervision. Nor can it fairly be said that the Respondent's statement that it would submit the *question of incorporation* of South West Africa to the judgment of the General Assembly constituted a request to the United Nations to assume the supervisory functions of the Council of the League. In my opinion, it was obviously no more than an intimation of Respondent's desire of obtaining the approval of an important political act by the newly formed and important international organization. It must have been apparent to all concerned that, whatever the legal position might be, unilateral incorporation of South West Africa by the Respondent without consulting the United Nations could have led to serious criticism and harmful political results. This intimation was motivated solely by political wisdom and was not intended to have, nor was it understood to have, any bearing on the Respondent's obligations under Article 6 of the Mandate. This will become more apparent when subsequent events are considered.

16. Of major significance in the present enquiry are the texts of certain resolutions adopted by the General Assembly of the United Nations early in 1946, either with specific reference to mandates, or applicable, *inter alia*, to mandates.

In its resolution XI of 9 February 1946, the General Assembly expressed regret that the Trusteeship Council could not be brought into being at that session, and proceeded to state that it—

> "*Welcomes* the declarations, made by certain States administering territories now held under Mandate, of an intention to negotiate trusteeship agreements in respect of some of those territories and, in respect of Transjordan, to establish its independence.
>
> *Invites* the States administering territories now held under mandate to undertake practical steps, in concert with the States directly concerned, for the implementation of Article 79 of the Charter (which provides for the conclusion of agreements on the terms of trusteeship for each territory to be placed under the trusteeship system) in order to submit these agreements for approval, preferably not later than during the second part of the first session of the General Assembly."

Save for minor textual changes this resolution followed the precise wording of the draft resolution proposed by the Preparatory Commission [1], and it is significant that, like the draft, it makes no mention whatsoever regarding the future of mandated territories in respect of which no trusteeship agreements would come about.

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[1] *Vide* para. 12, *supra*.

General Assembly resolution XIV of 12 February 1946 dealt with the "Transfer of certain functions, activities and assets of the League of Nations". In its operative part this resolution, *inter alia*, contained the following declaration:

> "The General Assembly declares that the United Nations is willing in principle and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations, and adopts the following decisions, set forth in A, B and C below."

Sections A and B dealt with functions pertaining to the Secretariat and Functions and Powers of a Technical and Non-Political Nature.

Section C read as follows:

> "*Functions and Powers under Treaties, International Conventions, Agreements and other Instruments having a Political Character.*
>
> The General Assembly will itself examine, or will submit to the appropriate organ of the United Nations, *any request from the parties* that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having *a political character* . . ." (Italics added.)

Inasmuch as the mandate declarations were instruments having a political character, this section of the resolution was applicable to mandates. And it is the only resolution of the General Assembly in which provision was made for the possible transfer to the United Nations or its organs of the League's functions relative to mandates.

The part of the resolution in question is of considerable significance because it negatives the possibility of an implied agreement existing at that time in terms whereof the Respondent's obligations under the Mandate to report and account to the Council of the League would be transformed into an obligation to report and account to the United Nations. Judge Read aptly remarked, in *International Status of South West Africa, I.C.J. Reports 1950*, page 172: "The very existence of this express provision, however makes it impossible to justify succession based upon implication."

Insofar as this resolution was intended to provide a method for transferring to the United Nations supervisory powers in respect of mandates, such a transfer could, in terms of the resolution itself, effectively come about only by way of a specific request on the part of a mandatory and a decision by the United Nations to assume the function in question; and such an assumption had to be "subject to the provisions of, *inter alia*, the Charter".

Any assumption by the United Nations of supervisory powers in respect of mandates would have brought about a new or amended treaty obligation on the part of the Mandatory or mandatories concerned.

It follows that any such assumption by the United Nations of super-

visory functions in respect of a particular mandate pursuant to the request of the mandatory concerned had, in order to be valid and effective, to be registered in terms of Article 102 of the Charter. Failing such registration the arrangement could in terms of Article 103 not be invoked before any organ of the United Nations.

It is sufficient to say that Respondent never requested the United Nations to assume the exercise of the functions or powers entrusted to the League by Article 6 of the Mandate for South West Africa, and that those functions were neither expressly transferred to the United Nations nor assumed by that organization at any material time.

17. I deal next with the events at the final session of the League of Nations. It has been argued that the declarations made by the several mandatories at the final session of the League constituted undertakings or "pledges" to submit their administration of the mandated territories to the supervision of the United Nations until the conclusion of other agreed arrangements, and that the final resolution of the League of 18 April 1946 constituted an international agreement or treaty recording such undertakings or "pledges" [1].

In this regard strong reliance has been placed on the 1950 Advisory Opinion of this Court and on the Judgment of five judges of this Court in the 1962 Judgment on the Preliminary Objections. It accordingly seems necessary to make a detailed examination of the events at the final session of the League, of the League resolution of 18 April 1946 and of all other relevant facts, as well as a careful analysis of the said Opinion and Judgment. I shall deal first with the events at the final League session.

18. In pursuance of informal discussions between members of the League most directly concerned with mandates, the representatives

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[1] Applicants' argument, which was based on what they termed "Preparatory Commission procedures and the system of pledges", can be briefly stated as follows:

(a) there was general agreement that the mandated territories should be under international supervision;
(b) the mandatory powers, including Respondent, wanted that supervision to be carried out by an interim or temporary body prior to the establishment of the Trusteeship Council, i.e., the proposed Temporary Trusteeship Committee;
(c) other governments feared that this procedure would lead to delay in the establishment of the trusteeship system and pressed for pledges by the mandatory powers to place their territories under the trusteeship system;

(d) by way of a compromise it was agreed that pledges would be made, but not pledges to place the mandated territories under the trusteeship system, the pledges would be to carry out all the obligations of the mandate, including the obligation to submit to international supervision;
(e) the said pledges were duly made at the final session of the League.

The part of the argument set forth in paras. *(a)* to *(d)*, *supra*, has been dealt with in paras. 12-16, above.

of mandatory powers, in addressing the final plenary meeting of the Assembly of the League, made statements indicating the intentions of their governments with regard to their respective mandated territories. On 9 April 1946, the representatives of the United Kingdom and the Respondent made their statements.

The representative of the United Kingdom, after having mentioned that Iraq and Transjordan had already become independent sovereign States, and after repeating his Government's intention of placing Tanganyika, Togoland and the Cameroons under trusteeship, subject to the negotiation of satisfactory terms, stated:

> "The future of Palestine cannot be decided until the Anglo-American Committee of Enquiry have rendered their report but until the three African territories (Tanganyika, Togoland and the Cameroons) have actually been placed under trusteeship and until fresh arrangements have been reached in regard to Palestine—whatever those arrangements may be—*it is the intention of His Majesty's Government in the United Kingdom to continue to administer these territories in accordance with the general principles of the existing* mandates." (Italics added.)

Respondent's representative made the following statement:

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

19. After the above statements had been made the representative of China, Dr. Liang, raised the question of the future of mandates in the First Committee on the afternoon of 9 April 1946. At that time the Committee was considering a draft resolution concerning assumption

by the United Nations of League functions and powers arising out of agreements of a technical and non-political character. Dr. Liang wished to propose for discussion the following draft resolution which he read out:

> "The Assembly,
>
> Considering that the Trusteeship Council has not yet been constituted and that all mandated territories under the League have not been transferred into territories under trusteeship;
>
> Considering that the League's function of supervising mandated territories should be *transferred* to the United Nations, *in order to avoid a period of interregnum in the supervision of the mandatory regime* in these territories.
>
> *Recommends* that the mandatory powers as well as those administering ex-enemy mandated territories *shall continue to submit annual reports to the United Nations and to submit to inspection by the same* until the Trusteeship Council shall have been constituted." (Italics added.)

I pause here to remark that if it had been thought that the provisions of the Covenant of the League and the Mandate Declarations, or the Charter of the United Nations, or any provision in any other instrument, or any statements made by the Respondent had the effect of amending the mandatory's obligation to report and account by substituting in the Mandate Declaration an organ of the United Nations for the Council of the League, Dr. Liang's proposed resolution would have been unnecessary. If it was thought that provision had already been made (in the Covenant of the League, in the Mandate Declarations, or in the Charter, or elsewhere) for the transfer of the League's supervisory functions to the United Nations, there would have been no need for a resolution "*that the League's function of supervising mandated territories should be transferred to the United Nations*". Likewise, if it was thought that provision had already been made (in the Covenant of the League, in the Mandates, in the Charter, or elsewhere) that mandatories should render the annual reports previously submitted to the League Council to the United Nations, there would have been no point in a recommendation that "*the mandatory powers . . . shall continue to submit annual reports to the United Nations*".

The truth is that not a single member of the League nor a single Member of the United Nations at that stage thought that they were parties to any agreement which compelled the Respondent, or any other mandatory power to report and account to the General Assembly of the United Nations as the supervisory body in respect of mandates not converted to trusteeship. If there had been the requisite tacit meeting of minds to bring about an implied agreement to the said effect, one would have expected that the States which are now alleged to have been parties to such an agreement would have been aware thereof and

would have made some reference thereto. It cannot be denied that at the final session of the League it was common cause among all concerned that no such agreement existed (whether in the provisions of the Covenant, the mandates, the Charter, or elsewhere) and it does not seem possible that a court of law could today, in the face of these incontrovertible facts, find to the contrary.

20. When Dr. Liang had read his draft resolution the chairman ruled that the proposal was not relevant to the matter then under discussion, namely the assumption by the United Nations of League functions and powers of a technical and non-political character. The proposal was, therefore, not debated.

Following this incident informal discussions were renewed, the Chinese delegation participating therein. In the meantime further statements were made by the representatives of France, New Zealand, Belgium and Australia.

These statements were to the same effect as those made by the representatives of the United Kingdom and South Africa from which extracts have been quoted by me. Not one of them contained even a suggestion that the mandatories concerned would after the dissolution of the League report and account to, or otherwise submit to the supervision of, the United Nations or any of its organs with regard to the administration of their respective mandated territories. In effect each of the said statements merely intimated the intention of the mandatory concerned to continue with its *administration* of its mandated territory as before. And as I shall show later, the Australian statement intimated a clear contemplation that the mandate provisions for reporting and accounting would lapse.

21. The outcome of the informal discussions which had meanwhile taken place was that Dr. Liang on 12 April 1946 introduced a new draft resolution, which had been settled in consultation and agreement by all countries interested in mandates. In proposing the new draft resolution Dr. Liang-

> ". . . recalled that he had already drawn the attention of the Committee to the complicated problems arising in regard to mandates from the transfer of functions from the League to the United Nations. The United Nations Charter in Chapters XII and XIII established a system of trusteeship based largely upon the principles of the mandates system, but the functions of the League in that respect *were not transferred automatically* to the United Nations. The Assembly should therefore take steps to secure the continued application of the principles of the mandates system. As Professor Bailey had pointed out to the Assembly on the previous day, the League *would wish to be assured* as to the future of mandated territories. The matter had also been referred to by Lord Cecil and other delegates.
>
> It was *gratifying* to the Chinese delegation, as representing a

country which had always stood for the principle of trusteeship, that all the mandatory powers *had announced their intention to administer the territories under their control in accordance with their obligations under the mandates system until other arrangements were agreed upon. It was* to be *hoped* that the *future* arrangements *to be made* with regard to these territories *would* apply, in full the *principle* of trusteeship underlying the mandates system." (Italics added.)

The new Chinese draft contained what eventually became the League Assembly's resolution concerning mandates in the following form:

"The Assembly:

Recalling that Article 22 of the Covenant applies to certain territories placed under mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization:

1. Expresses its satisfaction with the manner in which the organs of the League have performed the functions entrusted to them with respect to the mandates system and in particular pays tribute to the work accomplished by the Mandates Commission;

2. Recalls the role of the League in assisting Iraq to progress from its status under an 'A' mandate to a condition of complete independence, welcomes the termination of the mandated status of Syria, the Lebanon and Transjordan, which have, since the last session of the Assembly, become independent members of the world community;
3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, *but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League*;
4. *Takes note* of the *expressed intentions* of the members of the League now administering territories under mandate *to continue to administer* them *for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective mandates* until other arrangements have been agreed between the United Nations and the respective mandatory powers." (Italics added.)

This resolution was adopted unanimously, the Egyptian delegate abstaining from the vote by reason of a reservation of his Government in regard to the Mandate for Palestine.

22. On the same day (18 April 1946) the Assembly of the League also adopted other resolutions, including one in respect of certain parts of the United Nations General Assembly resolution 14 of 12 February (erroneously described as dated 16 February), but significantly adopted

no resolution relative to section C thereof concerning the transfer to the United Nations of powers under treaties, international conventions, agreements and other instruments having a political character [1].

It appears to be an inescapable conclusion that the League Assembly took note of section C of the said resolution of the United Nations General Assembly, but did not consider it necessary for the League to pass any resolution in respect thereof.

I have already mentioned that, as applied to mandates, this section meant that the United Nations would not assume any powers entrusted to the League by a particular mandate declaration unless it received a request to do so from the mandatory concerned.

Had the Members of the United Nations (all but seven of the 36 members of the League who attended its April session in 1946 were founder Members of the United Nations) thought that the League resolution of 18 April 1946 concerning mandates in any way made provision for the transfer to the United Nations of supervisory powers in respect of mandates, without any formal request in that regard being directed to the United Nations by any of the mandatories, they would have realized that the League resolution ran counter to the resolution of the United Nations General Assembly of 12 February. And it is unbelievable that this matter would then not have been raised and debated in the League Assembly and subsequently in the General Assembly of the United Nations. The General Assembly would then either have adhered to their resolution of 12 February, or would have altered it to bring it into conformity with the League resolution. Nothing of the kind ever happened, and one is therefore compelled to conclude that the League resolution was not considered to be inconsistent with the resolution of the General Assembly of the United Nations.

Had the first draft proposal by China been adopted by the League the position would have been different. This draft proposal was directly opposed to the aforesaid United Nations resolution concerning the transfer of political functions. Whereas the latter provided, *inter alia*, for the *ad hoc* assumption by the United Nations, *at the request of the party concerned*, of the functions entrusted to the League under a mandate declaration, the first Chinese draft resolution envisaged a general transfer of these functions without any request by the parties concerned.

23. A League resolution required unanimous support, and it is obvious that Dr. Liang's original draft resolution would not have been carried. Respondent's representative could not, and would not, have supported this proposal, as Respondent had repeatedly stated that the Mandate for

[1] *Vide* para. 16, *supra*.

South West Africa should be terminated, and that Respondent was averse to the inclusion of the territory in any form of trusteeship under the United Nations. Nor would the proposal have had the support of the representative for Egypt. But the best proof of all that it would not have succeeded is the fact that it was not proceeded with, and that in its place came a watered-down resolution *omitting those provisions which related to the transfer to the United Nations of the functions of the League with regard to mandates, and to the suggested obligation of the mandatories to report and account to the United Nations.*

If the purpose of the final League resolution was to record, or to incorporate, an agreement in terms of which the mandatories were to submit annual reports to the United Nations, and to submit to the supervision of the United Nations, the provisions of the original Chinese draft would have been retained as expressing the intention of the parties. The fact that the express provisions in the first Chinese draft were deleted, can, in the circumstances, lead to no other conclusion than that no agreement embodying such provisions was arrived at. Any suggestion that the parties deliberately refrained from retaining the express provisions of the original Chinese draft because they preferred a tacit agreement to an express one in regard to this important matter, would be so nonsensical as not to merit any consideration. The omission of the said provisions in the later draft and in the resolution constitutes conclusive proof that that meeting of minds which was necessary to bring about an agreement concerning the transfer to the United Nations of supervisory powers in respect of mandates was lacking.

In this regard I respectfully wish to associate myself with the following remarks by Sir Percy Spender and Sir Gerald Fitzmaurice in their 1962 joint opinion:

> "The contrast between the original Chinese draft and the one eventually adopted constitutes an additional reason why we find it impossible to accept the view . . . that the functions of the League Council in respect of mandates had passed to the United Nations; for this was the very thing which the original Chinese draft proposed but which was not adopted."

24. A finding that the League resolution of 18 April 1946 relating to mandates constituted treaties defining the future obligations of the mandatories cannot be justified. It was not more than it purported to be: a resolution of a moribund League. The only "agreement" that existed was consensus as to the terms of the resolution. Two of its paragraphs (3 and 4) are relied upon for the contention that it constituted an agreement defining the mandatories' obligations with respect to their mandates. In paragraph 3 the *Assembly* "recognizes" that on the dissolution of the League its functions with respect to mandated territories "will come to an end". This was a legal fact which really required no recognition. *The Assembly* further "notes" the existence in the Charter of the United

Nations of "principles" corresponding "to those of Article 22 of the League Covenant". This "noting" cannot alter obligations, and what strikes one forcibly is that nothing is said about transfer to the United Nations of the League's functions with respect to mandates. In paragraph 4 *the Assembly* "takes note" of the expressed intentions of members of the League administering mandated territories—"*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 upon between the United Nations and the respective mandatory powers. Here again I fail to see on what legal principles one can base a conclusion that a recording in the League Assembly's resolution that it "takes note" of "expressed intentions" constitutes a treaty which gives the "expressed intentions" the force and effect of legal obligations.

25. The Board of Liquidation of the League (which consisted of representatives of nine ex-members of the League) were required by the League on its dissolution "to have regard in the performance of its task to all the relevant decisions of the League Assembly taken at its last session". The Board evidently did not regard the aforesaid League resolution of 18 April 1946 as embodying international agreements transferring the supervisory functions of the League to the United Nations. In fact, the Board quoted the said resolution in its final report, and then continued to state:

> "The mandates system inaugurated by the League has thus been brought to a close but the Board is glad to be able to record that the experience gained by the Secretariat in this matter has not been lost, the United Nations having taken over with the small remaining staff the mandates section archives which should afford valuable guidance to those concerned with the administration of the trusteeship system set up by the Charter of that organization."

This report was sent to every ex-member of the League who was present at its final meeting, and there is no record that any State ever questioned the correctness of this statement in the report of the Board. If any party to the League resolution in question had thought that it constituted a binding international agreement that in respect of mandated territories not converted to trusteeship the mandates system would continue to operate, with the United Nations as the supervisory authority, then their silence in these circumstances is inexplicable.

26. I have already drawn attention to the fact that, in terms of resolution 14 of the General Assembly of the United Nations, the assumption by the United Nations of any functions of the League was to be subject, *inter alia*, to the provisions of the Charter, and that any agreement in terms of which the United Nations assumed the supervisory functions

of the League relative to mandates would accordingly have had to be registered in terms of Article 102 of the Charter.

In this regard one should bear in mind that a unilateral declaration by a State which has been accepted by another constitutes an international agreement in terms of Article 102 of the Charter. If the declarations of the mandatories together with the resolution of the League Assembly of 18 April 1946 were considered to constitute international agreements —which is in effect what Applicants contend—it is inconceivable that no steps should have been taken to effect the necessary registration. This is the more significant when one has regard to the carefully worded agreements relative to the transfer to the United Nations of assets and certain other functions of the League entered into between the United Nations and the aforesaid Board of Liquidation pursuant to resolutions of the Assembly of the League of 18 April 1946, which agreements were duly registered and published in the United Nations *Treaties Series*. In these circumstances, there can be no doubt that if it had been considered that the declarations of the mandatories together with the League resolution concerning mandates constituted international agreements in terms whereof the mandatories' obligations to report and account to the Council of the League were transformed into obligations to report and account to an organ of the United Nations, proper steps would have been taken to have the necessary registrations effected in accordance with the provisions of Article 102.

It has been suggested that no registration was effected because the evidence of the agreements was contained in so many statements that registration would not have been practicable. It is, however, inconceivable that no attempt would have been made in such a case to reduce the agreements to a registerable form. I know of no reason why the States concerned should deliberately have refrained from taking such steps, when they knew that in terms of Article 103 such agreements, if not registered, could not be invoked before any organs of the United Nations. It has been suggested that Applicants' reliance on this suggested "treaty" does not amount to "invoking" it before this Court (which, of course, is an organ of the United Nations). I do not agree with this contention; but it is, in any event, no answer to the point that if the States concerned thought that they were entering into a treaty they would not have done so in such an ineffective and obscure manner.

Hall, in *Mandates, Dependencies and Trusteeship*, page 273, commented as follows on this League resolution:

> "The significance of this resolution of the League Assembly becomes clearer when it is realized that for many months the most elaborate discussions had been taking place between the governments as to the exact procedure to be adopted in making the transition between the League and the United Nations. It was the function of the Preparatory Commission and committees succeeding it to

make recommendations on the transfer of functions, activities, and assets of the League. All the assets of the League had been carefully tabulated. All its rights and obligations that could be bequeathed to the United Nations and which the latter desired to take over were provided for in agreements that were made. But in the case of mandates, the League died without a testament."

See also *South West Africa* cases, *I.C.J. Reports 1962*, pages 651-652.

27. It has also been suggested that the reason for not drafting a conventional treaty was that it was thought that all mandates would be placed under the international trusteeship system within a relatively short time. If this statement were correct, it would equally be a reason for not entering into any agreement at all as regards reporting to the United Nations. But the statement is not correct. There is no evidence in support thereof. On the contrary, the mandatories were not obliged to enter into trusteeship agreements, and the members of the League knew that a trusteeship agreement could only be concluded if the mandatory power concerned and the United Nations could agree on the terms thereof. The representative of the United Kingdom, for example, had stated clearly that the willingness of the United Kingdom to place its African mandated territories under the trusteeship system depended upon its being able to negotiate satisfactory terms. And with regard to South West Africa the Members of the League knew that Respondent was claiming incorporation, and that Respondent had no intention of placing South West Africa under the trusteeship system.

28. From what has been stated in the preceding paragraphs it follows that there is no justification for the suggestion that the League resolution in question constitutes a treaty in terms whereof the supervisory functions of the Council of the League in regard to mandates were transferred to the United Nations and the mandatories' obligations to report and account to the Council of the League were transformed into obligations to report and account to the United Nations. But even if the resolution can at all be regarded as being in the nature of a treaty, it cannot have the effects aforestated. It cannot embody more than the expressed intentions of the parties. At most it would (on the assumption that it is a treaty) constitute an agreement that the mandatories would continue to *administer* the territories for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective mandates. The aforesaid resolution does not refer to any undertaking to continue to report and account. As I have indicated this omission was not accidental but deliberate.

Not a single mandatory stated that it would continue to comply with the provisions relating to reporting and accounting. They could not have done so as they knew that those provisions depended for their fulfilment on the existence of the League of Nations. Had they undertaken to comply with those obligations after dissolution of the League

they would have stated the respects in which they thought the provisions of the mandates were being amended or superseded. The declarations of intention to continue to administer the mandated territories were of a general nature: "in accordance with the general principles of existing mandates" (United Kingdom), "to pursue the execution of the mission entrusted to it by the League of Nations" (France), "in accordance with the terms of the mandate for the promotion of the well-being and advancement of the inhabitants" (New Zealand), "in accordance with the provisions of the mandates, for the protection and advancement of the inhabitants" (Australia). The delegate of the Respondent, after stating its intention of applying to the United Nations for international recognition of South West Africa as an integral part of the Union of South Africa, proceeded to express an intention on Respondent's part to continue to comply with its obligations under the mandate after the dissolution of the League. The words he used (see paragraph 18 above) made it clear that these were the obligations concerning administration, which did not depend on the existence of the League for their fulfilment. The statement said in terms that the Respondent would continue to *administer* the Territory scrupulously in accordance with the obligations of the Mandate as she had done *during the six years when meetings of the Mandates Commission could not be held.* It is common cause that during those years there was no reporting or accounting to the Council of the League. The statement made express mention of the fact that the disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, would necessarily preclude complete compliance with the letter of the mandate. It did not say, and no fair interpretation can give it the effect of saying, that the Respondent was agreeable that the supervisory functions of the Council of the League and the Mandates Commission be transferred to the organs of the United Nations. As I shall show later, the subsequent conduct of Respondent, and of all the members of the League present at its final session, leaves no room for any doubt that they did not consider that the Respondent's statement and/or the League's resolution constituted an agreement in terms whereof Respondent became obliged to report and account to the United Nations as the supervisory body in respect of the Mandate for South West Africa. Nor can any such agreement be spelled out from the declarations made by the other mandatories.

29. The *Australian representative* made it clear that after the dissolution of the League it would be impossible to continue the mandates system in its entirety. Had the suggested transfer of the League Council's functions been contemplated, the Australian representative would simply have said that the supervisory functions of the League Council were being transferred to the organs of the United Nations.

The Australian representative also referred to the explicit international obligation laid down in Chapter XI of the Charter, being the duty of transmitting information as provided for in Article 73 *(e)* of the Charter, and said that there would be no gap, no *interregnum* to provide for. In this regard it is significant that the League resolution "notes" that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League. If the Members of the League thought that Chapter XI did not apply to territories under mandate surely no reference would have been made thereto in the resolution.

It does not matter whether Members were right or wrong in their assumption that Chapter XI applied to the mandates. They may well have been wrong. The important fact, however, is that they or at least some of them thought it did.

If it was thought that the duty to report under Article 22 of the Covenant and the Mandate Declaration would continue to exist after the dissolution of the League, no reference would have been made to Chapter XI of the Charter. The duty of transmitting information under Chapter XI is a much more restricted and less onerous one than that of reporting and accounting under the mandates. It would therefore not have been considered to be applicable to mandates, after the dissolution of the League, unless the contemplation was that the duty of reporting and accounting under the mandates had lapsed. The contemplation could not have been that there would be in operation two overlapping sacred trusts in respect of each mandated territory, both supervised by the United Nations, to which each mandatory had to render two reports, one in terms of the Mandate Declaration and the other in terms of Chapter XI. It was obviously thought by at least some of the delegates that Chapter XI would indeed supersede the more onerous reporting provisions of the Covenant and the Mandate Declaration, by reason of the lapse of such provision, until "other arrangements" were agreed to between the United Nations and the mandatory powers concerned. Such other arrangements could have included, *inter alia*, a trusteeship agreement, or the "assumption" by the United Nations, in terms of its Assembly's resolution XIV of 12 February 1946, of supervision in pursuance of a request to that end, or approval of incorporation by the mandatory of the mandated territory [1].

[1] Whether Chapter XI applies to South West Africa is not one of the issues in this case, and in any event this Court has no jurisdiction under the compromissory clause of the Mandate to give any judgment in respect thereof. I shall accordingly refrain from expressing my view on the question whether the said Chapter applies or not, and shall similarly remain silent on the further question that would arise if it applies, namely whether the United Nations organs' disregard of its provisions is tantamount to a breach or repudiation which entitles members affected thereby to refuse to comply with the reporting provisions of the Chapter.

30. *The United Kingdom's* intention was expressed as being "to continue to administer these territories in accordance with the general principles of the existing mandates". That this statement, in itself, or as read with the League Assembly's resolution, did not embrace, and was not understood to embrace, an agreement substituting an obligation to report and account to the United Nations for the obligation to report and account to the Council of the League, appears, apart from the other considerations already mentioned, from the report and deliberations of the United Nations Special Committee on Palestine [1].

All but two of the members of this Committee were Members of the League at the time of its dissolution, and were parties to the aforesaid resolution of the League, and all were founder Members of the United Nations. If the resolution in question was thought by these States to have had the effect of obliging mandatories to report and account to the United Nations, they would not have stated in their report concerning Palestine that on the dissolution of the League there was no international authority to which the mandatory power might "submit reports and generally account for the exercise of its responsibilities in accordance with the terms of the mandate". The report states that the mandatory's representative had this in mind when speaking of administration "in accordance with the general principles" of the mandate at the final League session. The report further states in terms that "the most the mandatory could now do . . . would be to carry out its administration in the spirit of the mandate . . .". In a special note to the report, the representative of India remarked, *inter alia*, that:

> "There are no means by which the international obligations in regard to the mandates can be discharged by the United Nations."

These States could not possibly have thought that the supervisory functions of the Council of the League had been transferred to the United Nations, whether by the provisions of the Mandate and the Covenant of the League, by the Charter of the United Nations, by the League resolution in question, by the declarations of intention by the mandatories, or by any other statement or instrument.

31. As will be indicated later, the aforesaid views of the above States reflected the general views of the Members of the United Nations, which included practically all States who were original Members of the League as well as the States present at the dissolution of the League. On what possible grounds could this Court now find the existence of tacit agreements, of which the States who are supposed to have been the parties thereto were unaware when practical situations

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[1] The members of this Committee were Australia, Canada, Guatemala, India, Iran, Netherlands, Peru, Sweden, Czechoslovakia, Uruguay and Yugoslavia.

arose in which agreements would have been invoked had they existed?

The fact that the United Nations eventually assumed responsibility for the division of Palestine is of no significance at all. It was done at the request of, and with the approval of, Great Britain, and accordingly has no bearing on the issue in this case, *viz.*, whether the Respondent has been a party to any agreement in terms whereof the United Nations was substituted for the Council of the League in Article 6 of the Mandate Declaration.

32. I proceed to deal next with events subsequent to the dissolution of the League.

Pursuant to an undertaking given earlier in that year, Respondent in November 1946 submitted to the United Nations, for its approval, the proposal to incorporate South West Africa into the Union of South Africa. This proposal was rejected by the United Nations. It has been submitted that by so doing Respondent clearly recognized the United Nations as the international body competent to supervise the administration of the Territory [1].

In my opinion there is no substance in this contention.

I have already indicated that Respondent's intimation that it intended making such a request to the United Nations did not mean, and was not intended nor understood to mean, that the United Nations was acknowledged to have supervisory powers in respect of the Mandate. It is similarly clear—as will appear from a consideration of subsequent events—that the request itself was neither intended, nor understood, to have such an effect. It was no more than an attempt to obtain the approval of the United Nations to an important political act. There are several instances where comparable requests were made to the United Nations, but no one ever suggested that such requests constituted implied consent to the substitution of the United Nations as the supervisory authority in respect of mandates not converted to trusteeship. Field-Marshal Smuts, when dealing with the incorporation proposal in the Fourth Committee of the United Nations, stated that:

> "It would not be possible for the Union Government as a former mandatory to submit a trusteeship agreement in conflict with the clearly expressed wishes of the inhabitants. The Assembly should recognize that the implementation of the wishes of the population was the course prescribed by the Charter and dictated by the interests of the inhabitants themselves. If, however, the Assembly did not agree that the clear wishes of the inhabitants should be implemented, the Union Government could take no other course than to abide by the declaration it had made to the last Assembly of the League of Nations to the effect that it would continue to

[1] C.R. 65/28, pp. 37 and 48.

administer the Territory as heretofore as an integral part of the Union, and to do so *in the spirit* of the principles laid down in the Mandate.

In particular the Union would, *in accordance with Article 73, paragraph* (e) *of the Charter*, transmit regularly to the Secretary-General of the United Nations 'for information purposes, subject to such limitations as security and constitutional regulations might require statistical and other information of a technical nature relating to economic, social and educational conditions' in South West Africa."

It will be noted that this statement was made only seven months after the League resolution of 18 April 1946, and yet at that time (and for a period of more than a year thereafter) not a single State contended that Respondent was obliged to report to the United Nations, not under Article 73 of the Charter, but under the provisions of the Mandate Declaration. This was the first time after the dissolution of the League that the Respondent had occasion to refer to its intentions with regard to South West Africa, and if any State had been induced to believe that the Respondent had agreed to such an amendment of the Mandate Declaration, Respondent's statement would surely have been challenged. The irresistible inference is that not a single Member of the United Nations who had been a party to the League resolution, and who was present when Field-Marshal Smuts made this statement could have thought that the League resolution constituted an agreement obliging the Respondent and other mandatories to account to the United Nations as the supervisory authority in the place of the Council of the League. Similarly no State could have been under the impression that the request for approval of the incorporation of South West Africa constituted an acknowledgement that the United Nations had been vested with such powers, by any process whatsoever.

33. During 1947 South West Africa was on several occasions the subject of discussion in the various organs of the United Nations—the Fourth Committee, the Trusteeship Council and the General Assembly. Respondent's representatives repeatedly made statements which could have left no doubt that Respondent's attitude was that, in the absence of a trusteeship agreement, the United Nations would have no supervisory jurisdiction over South West Africa, and that Respondent was under no duty to report and account to the United Nations in compliance with the obligations assumed under the Mandate.

In a letter to the Secretary-General of the United Nations dated 23 July 1947, Respondent referred to a resolution of the House of Assembly of the South Africa Parliament which, *inter alia*, recorded that the rights and powers of the League of Nations relative to mandates had not been transferred to the United Nations. The validity of this statement was not questioned. The aforesaid resolution also expressed the opinion that the Territory should be represented in the Union Parliament and

that the South African Government should continue to render reports "as it had done heretofore under the Mandate". The quoted words require some consideration. As at that stage, no report had yet been rendered to the United Nations by the South African Government [1]. The word "heretofore" must therefore have referred to reporting in the time of the League.

Consequently the words "under the Mandate" merely reflected the facts that *previous* reporting to the League had occurred under the Mandate. The resolution did not say that reporting to the United Nations should occur under the Mandate. That would in any event have been an impossibility, at least to the extent that the Mandate required reporting to the Council of the League to its satisfaction. There is also no justification for reading the resolution as urging that the reporting should in any other sense occur "under the Mandate", e.g., in the sense of accounting for performance by the mandatories of the substantive obligations prescribed in the mandates. The reasonable reading, and the one most in accordance with the probable intent of the House, is that the resolution merely urged an act of reporting, and did not express any view or desire as to the form and context of the suggested reporting. This is so particularly in view of the fact that Field-Marshal Smuts, who as Prime Minister was leader of the majority party in the House of Assembly, had only five months prior to the resolution informed the Fourth Committee of the United Nations that the reporting would consist merely of transmission, for information purposes, of statistical and other technical information in accordance with Article 73 *(e)* of the Charter. If the House had intended to go against the Prime Minister on this point, one would have expected it to have said so explicitly.

However, be that as it may, it should be remembered that the resolution by itself has no legal significance: it is a recommendation to the Government (i.e., the Mandatory) and not an act or utterance *by* the Government. The important question is therefore how the Government understood the resolution and what it conveyed to the United Nations on the point in question in the letter of 23 July 1947. The letter left no room for doubt: it stated explicitly that the Union Government had "already undertaken to submit reports on their administration *for the information of the United Nations*" (italics added). This was unmistakably a reference to Field-Marshal Smuts' above-quoted statement to the Fourth Committee in November 1946, regarding transmission of information in accordance with Article 73 *(e)*. The letter

[1] The date of submission of the only report was September 1947.

did not intimate that any different kind of reports would be submitted.

On 25 September 1947, Respondent's representative in the Fourth Committee repeated Respondent's previous assurance that it would continue to maintain the *status quo*, to administer the Territory in the spirit of the Mandate, and to transmit to the United Nations for its information an annual report on its administration of the Territory. Two days later he explained—in response to a request by the representative of Denmark for amplification of the letter of 23 July 1947, which was then before the Committee—that—

> "... the annual report which his Government would submit on South West Africa would contain the same *type of information on the Territory as is required for non-self-governing territories under Article 73 (e)* of the Charter. It was the assumption of his Government, he said, that the report would not be considered by the Trusteeship Council and would not be dealt with as if a trusteeship agreement had in fact been concluded. He further explained that, since the League of Nations had ceased to exist, the right to submit petitions could no longer be exercised, since that right presupposes a jurisdiction which *would only exist where there is a right of control of supervision and in the view of the Union of South Africa no such jurisdiction is vested in the United Nations with regard to South West Africa.*" (Italics added.)

Here again, there is no answer to the argument that, had it been considered that the Respondent was obliged to report and account to the United Nations, i.e., that supervisory functions of the League had been transferred to the United Nations, somebody would have challenged Respondent's contention that the United Nations had no right of control or supervision with regard to the administration of South West Africa. *The fact is that not a single State did so.* Denmark attended the final session of the League, and so did 30 other States who were Members of the United Nations in 1947. Once again I must emphasize that these facts constitute weighty evidence that as at 27 September 1947 the Respondent was not considered to be obliged in terms of any undertaking, agreement, or instrument to accept the supervision of the United Nations in respect of its administration of South West Africa or to account under the provisions of the Mandate to any organ of the United Nations.

34. No less than 41 Member States addressed one or more of the organs of the United Nations during 1947 on the matter of South West Africa. Of these 41 States, 38 States were founder Members of the United Nations and 20 were represented at the final session of the League Assembly in April 1946. Not one of these States (nor any other State) during that year alleged, or even suggested, that there existed an

agreement, express or implied, whereby the supervisory powers of the Council of the League over mandates were transferred to the United Nations, or whereby Respondent became obliged to report and account to the United Nations as the supervisory authority in respect of mandates. On the contrary, at least 14 States—ten of whom had attended the final meeting of the League—acknowledged that in the absence of a trusteeship agreement the United Nations would have no supervisory powers in respect of South West Africa. It is an accepted rule that when controversy arises as to whether a party to an agreement has assumed a particular obligation, resort may be had to the subsequent conduct of the parties. The weight to be attached to such conduct must necessarily depend on the circumstances of each case. Where for a relatively lengthy period after the execution of an agreement, *all* the parties by conduct accept the position that the agreement does not embody a particular obligation, then such conduct must bear considerable weight in a determination whether that obligation exists or not. If in addition it is at least doubtful whether the events relied upon were intended to constitute an agreement at all, and if in any event the alleged "agreement" does not contain any reference to the suggested obligation, not on account of any inadvertence but because it was deliberately omitted after being expressly raised, the inference that no such obligation was imposed is inescapable.

Both Applicant States are ex-members of the League of Nations. Their representatives and those of practically all other ex-members of the League who became Members of the United Nations, were present at meetings of the United Nations organs during 1946 and 1947 when the Respondent and many other States (including ex-members of the League)—repeatedly asserted that Respondent was under no obligation to report and account to the United Nations in respect of its administration of South West Africa. Not a single State challenged these assertions. If the Applicants or any other ex-members of the League thought that the Mandate, or any other instrument, or the events at the dissolution of the League, or the events subsequent thereto, imposed such an obligation on the Respondent, they would and should have said so. Their failure to speak affords conclusive proof of their acquiescence in Respondent's statements. Their duty to speak was even stronger if—as Applicants now contend—each ex-member of the League was meant to be an upper-guardian of the inhabitants of the Territory, each entrusted with the right and duty to demand and enforce compliance by the Respondent with all its obligations under the Mandate Declaration.

The cumulative weight of the evidence so far examined is overwhelming, and the inescapable inference is that not a single Member of the United Nations, nor a single State who was a Member of the League of Nations at its dissolution, was under the impression in, or at any time prior to, 1947 that any agreement had been concluded whereby the League Council's authority had been transferred to the United Nations, or whereby the Respondent became obliged to account to the United Nations, with regard to its administration of South West Africa. On the contrary, they either expressly or tacitly agreed that no such agreement was ever entered into.

35. The view that the League Council's supervisory powers had not been transferred to the United Nations was not expressed with reference to South West Africa alone. In respect of other mandated territories also similar views were expressed from time to time up to 1948 by representatives of member States in the United Nations.

In this regard reference has already been made to the United Nations Special Committee on Palestine. In its report the Committee recommended that the Mandate for Palestine be terminated at the earliest practicable date and expressed, *inter alia*, the following unanimous comment:

> "Following the Second World War, the establishment of the United Nations in 1945 and the dissolution of the League of Nations the following year opened a new phase in the history of the mandatory régime. The mandatory power in the absence of the League and its Permanent Mandates Commission, had *no international authority to which it might submit reports and generally account* for the exercise of its responsibilities in accordance with the terms of the Mandate. *Having this in mind*, at the final session of the League Assembly *the United Kingdom representative declared* that Palestine would be administered '*in accordance with the general principles*' of the existing Mandate until 'fresh arrangements had been reached'." (Italics added.)

In a subsequent debate in the Security Council regarding Palestine the representative of the United States of America stated that:

> "The record seems to be entirely clear that the United Nations did not take over the League of Nations mandates system."

With regard to the Mandate for Western Samoa, the representative of New Zealand stated in the Fourth Committee on 22 November 1946 that if acceptable terms could not be negotiated for the placing of this territory under the trusteeship system—

> ". . . New Zealand would have to carry on [its administration of the Territory] without the privilege of the supervision by the United Nations, which it desired".

A statement very much to the same effect was made by the representative of the Soviet Union when a draft trusteeship agreement for the former Japanese Mandated Islands was discussed in the Security Council during April 1947.

36. It was only as from the end of 1948 that certain States (five in number) voiced a contradiction to the view repeatedly expressed up to that time, namely that the United Nations had no supervisory powers in respect of mandates not converted to trusteeship.

Not one of the dissenting States, however, based their contentions on implied or tacit agreement. Some relied on Article 80 (1) of the Charter, and others considered that the United Nations had replaced the League as the "organized international community", or as the "civilized and organized international collectivity", without explaining by what principle of law the supervisory powers of the League became vested in the United Nations.

In the same year Respondent, while submitting to the United Nations certain information in amplification of the report which it had lodged in the previous year—

> ". . . re-iterate[d] that the transmission to the United Nations of information on South West Africa, in the form of annual report or any other form, is on *a voluntary basis and is for purposes of information only. They have on several occasions made it clear that they recognize no obligation to transmit this information to the United Nations*, but in view of the wide-spread interest in the administration of the Territory, and in accordance with normal democratic practice, they are willing and anxious to make available to the world such facts and figures as are readily at their disposal . . ." (Italics added.)

At no time thereafter did Respondent, either expressly or by implication, acknowledge that it was under any obligation to report and account to the United Nations in respect of its administration of South West Africa. On the contrary, it persisted in the attitude that the United Nations had no supervisory powers in respect of its administration of the Territory and, in fact, for reasons set out in a letter dated 11 July 1949, refused to submit any further reports to the United Nations, not even reports for information purposes.

37. The aforegoing analysis of historical events can lead to only one conclusion and that is that the supervisory powers of the League Council were not transferred to the United Nations either by express or by tacit consent of Respondent, or in any other manner.

This conclusion is in conflict with the majority opinion of this Court in *International Status of South West Africa, I.C.J. Reports 1950*, and it has been suggested that it is also in conflict with the reasoning in one passage in the majority judgment (five judges) in *South West Africa* cases, *I.C.J. Reports 1962*. A careful examination of the said opinion

and judgment is therefore necessary, and I will in the succeeding paragraphs proceed to make such an examination.

38. In the 1950 Advisory Opinion the Court recognized that the supervisory functions of the League with regard to mandated territories not placed under the trusteeship system "were neither expressly transferred to the United Nations nor expressly assumed by that organization". From this it must follow that the Court's finding that such transfer did take place could, in the absence of any international principle or rule of succession, have been based only on a tacit or implied agreement. There does not appear to be any dispute that a term can be implied only if the admissible evidence reveals that it was contemplated by the parties, in the sense that they either actually intended it to operate, or would *all*, had their attention been directed thereto, have acknowledged that it fell within the scope of their agreement. It has been suggested that the Opinion of 1950 rests on the principle of effectiveness. This principle embodies the rule that treaties, etc.,

> "... are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text".

(See article by Sir Gerald Fitzmaurice in the *British Year Book of International Law*, 1957, XXXIII, p. 33.) The principle of effectiveness can never be divorced from the basic object of interpretation, *viz.*, to find the true common intention of the parties, and it cannot operate to give an agreement a higher degree of efficacy than was intended by the parties. It cannot, therefore, be invoked to justify a result which is not in harmony with the intention of the parties as expressed by the words used by them, read in the light of the surrounding circumstances and other admissible evidence. See Lord McNair's *The Law of Treaties*, 1961, page 484, and other authorities quoted in *South West Africa* cases, *I.C.J. Reports 1962*, pages 582-584.

39. The Court in 1950, after stating that the object of the Mandate far exceeded that of contractual relations regulated by "mandate" in national law, and that the Mandate was created as an international institution with an international object (p. 132), for the Respondent to claim rights derived from the Mandate while denying the obligations thereunder could not be justified (p. 133). We have been urged to interpret this statement as meaning that, because the Respondent claims rights in respect of South West Africa, therefore all its obligations under the Mandate, including those under Article 6, must still be in force, and that therefore the Assembly of the United Nations must be deemed to have been substituted for the Council of the League as the

supervisory authority. If this is what the Court's statement was intended to convey, it is obviously wrong. On what basis in law can a claim to rights by the Respondent today have any effect on the legal situation resulting from events which occurred in 1920 and 1945-1946?

If the Respondent's rights and obligations under the Mandate in law lapsed on the dissolution of the League, a subsequent claim by the Respondent that it has rights under the Mandate cannot revive either the rights or the obligations that have lapsed. In any event, the Respondent does not claim any rights under the Mandate Declaration, which it contends has lapsed.

Respondent bases its claim to administer the Territory on the events which preceded the Mandate, and on the fact that it has at all material times been in *de facto* control of the Territory. If the Mandate has lapsed this Court has neither the right, nor the duty, to decide upon the validity of the Respondent's aforesaid contentions and I shall accordingly not express any opinion on the correctness thereof or otherwise. It is only in the alternative that Respondent says that if the Mandate should be held to be in force, it would have rights and obligations under the Mandate, but that these would no longer include an obligation of report and accountability. If the true position should indeed be that the Mandate is still in force, either because Respondent can be said to claim rights thereunder or for any other reason, that would still afford no justification for a Court to amend the mandate provisions by imposing on the Respondent obligations to which it did not agree, and which, in any event, are more onerous than those imposed by the Mandate Declaration.

40. A study of the 1950 Opinion shows that the Court first found that, since the administrative provisions of the Mandate (Articles 2 to 5) did not depend for their fulfilment on the existence of the League, they have survived the League (p. 133). The Court next considered the procedural provisions of the Mandate (Articles 6 and 7), which in the Court's view depended for their fulfilment on the existence of the League. After remarking that the authors of the Covenant considered that the performance of the sacred trust required international supervision, and that the authors of the Charter had in mind the same necessity when they created the international trusteeship system the Court found that the necessity for international supervision remained after the dissolution of the League, and that—

> "... it cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions" (p. 136).

It is difficult to perceive on what legal principles the Court based

its conclusion that it "could not be admitted" that international supervision had disappeared. Throughout its Opinion the Court purported to be searching for the common intention of the parties to the Covenant, the Mandate Declaration and the Charter, and I think it is fair to say that what the Court intended to convey was that it inferred that the parties to the Mandate and the Charter had a common intention that "international supervision" of the administration of the mandated territories should continue after the dissolution of the League, and that inasmuch as the Assembly of the United Nations was competent to perform the functions of the Council of the League, the parties must, in the light of the evidence then before the Court, be assumed to have intended that the General Assembly should in future perform the said functions, and that the Respondent is therefore now obliged to report and account to this organ of the United Nations. If the Court did not find such a common intention, the only alternative is that it must have decided to legislate, which would mean that it exceeded its authority. This Court's function is laid down in Article 38 of its Statute, which requires it to decide disputes submitted to it in accordance with international law, and international law does not authorize the Court to legislate.

In this regard I wish to repeat what I said in *South West Africa* cases, *I.C.J. Reports 1962*, page 591:

> "The rules of construction authorize what has been termed the 'teleological approach' only to the limited extent indicated above. This approach, in its more extreme form, assumes that this Court has the power to disregard or amend the terms of an instrument in order to achieve an object, or presumed object, albeit in a manner different from that provided for and intended by the parties; but this approach disregards the basic rule that the purpose of construction is to determine the common intention of the parties and in any event it has not been recognized by this Court or its predecessor. No court has the power to make a party's obligations different from, or more onerous than, what it has agreed to. If this Court has the power to disregard or amend the provisions of a treaty or convention, it has legislative powers and such powers have not been entrusted to it by its Statute or any of the sources of international law referred to in Article 38 of its Statute. As Sir Gerald Fitzmaurice rightly remarks in the article in the *British Year Book of International Law*, 1957, XXXIII, quoted above, at page 208: 'The Court has shown plainly that, in its view, the performance of such a function cannot properly form part of the interpretative process'."

It cannot be assumed that members of this high tribunal would deliberately ignore the elementary and basic principle that the intention of the parties must rule, and I shall accordingly, as already stated, assume that the Court in 1950 based its conclusion on what it considered to have been the common intention of the parties. But, in doing so, the Court, in my opinion, arrived at a wrong conclusion, mainly because

it did not have regard to all the relevant facts, many of which were apparently not brought to its attention. Before dealing with the facts to which the Court did not have any or proper regard in 1950, I wish to refer to one or two further aspects of the 1950 Opinion.

40 *(a)*. In 1950 the Court relied exclusively (p. 137) on Article 10 of the Charter of the United Nations for its finding of competence on the part of the Assembly to supervise Mandates; but there can be no doubt that neither this Article or any other article of the Mandate contains any provision to this effect. The provisions of Article 10 are confined to matters which are already within the scope of the Charter; they do not bring any new matters within it—see my dissenting opinion of 1962, pages 652-653. In any event as will appear more fully *infra*, this Court's jurisdiction is confined in this case to disputes relating to the interpretation and application of the provisions of the Mandate for South West Africa, and the Charter of the United Nations is not a part of that Mandate.

41. In its 1950 Opinion, the Court, as I have already stated, first found that the administrative provisions of the Mandate survived the League because they (unlike the so-called procedural provisions) did not depend for their fulfilment on the existence of the League (p. 133). It thereupon, in effect, held that because the administrative provisions were still in force, therefore the necessity for the procedural provisions remained (p. 136). But inasmuch as the latter provisions stipulated for reporting and accounting to the Council of the League, they could not after the dissolution of the League be operable in their original form, the League Council having ceased to exist.

They could therefore only have survived the League if they were amended by the substitution of some organ to function in the place of the defunct Council of the League.

The Court, having found that Article 6 must have survived the League, therefore had to find that it survived in an amended form, i.e., that the Assembly of the United Nations had been substituted for the Council of the League (p. 136). If this analysis of the Court's reasoning is correct, it would seem, with respect, to expose a fallacy. When deciding that the administrative provisions had survived the League, the Court proceeded on the assumption that they could survive separately from the procedural provisions which depended on the existence of the League for their fulfilment. This must be so, for the Court reached its conclusion in regard to the survival of the administrative provisions without having devoted any discussion at all to the problems pertaining to survival or otherwise of the procedural provisions. But when it came to consider whether Article 6 had survived, the Court seems to have held, in effect, that the administrative provisions could not survive without Article 6, and that inasmuch as it had already found that the administrative provisions still applied, it found that Article 6 must therefore also have survived. In other words the Court seems to have

relied on two irreconcilable premises, *viz.*, by assuming severability for the purposes of the first step in its reasoning, and by assuming inseverability of the same provisions for the purposes of the second step, which depended upon the first. On the premise of inseverability, the question whether the administrative provisions survived would depend on the question whether Article 6 had been appropriately amended so as to secure *its* survival.

Having reasoned along this line the Court then found what it regarded as confirmation of the conclusion that Article 6 had survived in an amended form, i.e., with the Council of the League being replaced by the General Assembly of the United Nations as the supervisory body.

Such an amendment could, however, have come about only with the consent of the Respondent, and the evidence establishes that not only was there no agreement that the mandatory's duty to report and account to the Council of the League would become a duty to report to an organ of the United Nations, but, that, on the contrary, it was common cause at all material times that no such change had taken place.

If the provisions of Article 6 were so essential that without them the rest of the mandate provisions could not exist, then the disappearance of Article 6 must mean that the whole Mandate has lapsed. On the other hand, if the said other provisions can still apply even though Article 6 has lapsed, then the disappearance of Article 6 can have no bearing on the survival or otherwise of the said other provisions.

42. Apart from what has been stated above, the Court referred to no specific evidence which can justify a finding that the Respondent agreed to an obligation to submit to the supervision and control of the General Assembly of the United Nations and to render annual reports to it. The Court, however, found "confirmation" for what it termed "these general considerations" in Article 80 (1) of the Charter of the United Nations, and in the resolution of the Assembly of the League of Nations of 18 April 1946, of which the Court said that it "presupposed that the supervisory functions exercised by the League, would be taken over by the United Nations". I have already dealt with the said Article and the said resolution, and have shown that neither can serve as support for the Court's conclusion.

43. Whether due to the fact that all the relevant information was not placed before the Court, or whether due to an oversight on its part, it is nonetheless clear that the Court did not have regard to the significance of some important events which occurred during the period 1945-1947. Thus the 1950 Opinion makes no reference to the first Chinese proposal with regard to mandates, which proposal was not proceeded with, and the only inference that can be drawn from this omission is that

the Court was either unaware thereof or did not appreciate its vast significance. Nor is any reference made in the Opinion to the discussions and proceedings in the Preparatory Commission, which reveal the absence of any presupposition that the United Nations would automatically, and without specific provision, become heir to the supervisory powers of the League, or that the Respondent's duty to account to the League would become a duty to account to the United Nations. Similarly, there is no reference in the Opinion to the proposal made by the United States of America to the Preparatory Commission that specific provision should be made for vesting certain organs of the United Nations with supervisory powers in respect of mandates not converted to trusteeship, or to the fact that the proposal was dropped and not even raised in the discussions before the Preparatory Commission. Nor is there any reference in the Opinion to the report of the Liquidation Committee of the League.

The Opinion also contains no reference to the findings of the United Nations Committee on Palestine, which so clearly reveal that there was no agreement to the effect that an organ or organs of the United Nations would after the dissolution of the League perform the functions of the League Council in respect of mandates, and in particular that the duty to report and account to the Council of the League had not been converted into a duty to report and account to any organ of the United Nations. The Court also made no reference to the numerous statements by the Respondent and a large number of Members of the United Nations (most of them also ex-members of the League) in the years following the dissolution of the League to the effect that the Respondent was not under a duty to report and account to the United Nations as a supervisory authority in respect of mandates.

43 *(a)*. The Court, in referring to the Respondent's letter of 23 July 1947, stated that this letter drew attention to a resolution of the Union Parliament (in fact it was a resolution of the House of Assembly only) in which it requested "that the Government should continue to render reports to the United Nations Organization as it has done heretofore under the Mandate". The Court found that this declaration constituted—

> "... recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument..."

I am aware that the above remarks were made by the Court when it was considering the question whether the substantive or administrative

provisions of the Mandate had survived the dissolution of the League. It would, however, appear from the minority opinions of 1956, in which several judges participated who had been parties to the 1950 Opinion, that the Court in 1950 was under the impression that the Respondent had undertaken to report to the United Nations in compliance with the provisions of Article 6 of the Mandate. It therefore seems as if the Court in 1950 overlooked the fact that Respondent's undertaking to report was not intended to be in compliance of Article 6, but was limited to *reports of the kind provided for in Article 73 of the Charter*, a fact which is apparent from the wording of the very letter itself, in which, as indicated above, mention is made of Respondent's undertaking to "submit reports on their administration for the information of the United Nations". The Court also apparently did not appreciate that the resolution referred to in the letter was not a resolution of Respondent's Parliament but a resolution of only one of the Houses of Parliament, and that it had no legal effect other than that of a recommendation to the Union Government, i.e., the Mandatory, as to what should be done in future. As I have shown above, when the letter is read with the statements which were made by Respondent's representatives at the United Nations, both before and after the date of the letter, it becomes explicitly clear that Respondent was neither agreeing to submit to the supervision of the United Nations nor offering to supply any information, other than information of the nature contemplated in Article 73 of the Charter. I may add that if the aforesaid resolution is analysed with a view to ascertaining what the contemplation of the House of Assembly was regarding obligations under the Mandate, it seems evident that the following paragraph thereof should not be ignored:

> "Whereas the League of Nations has since ceased to exist and was not empowered by the provisions of the Treaty of Versailles or of the Covenant to transfer its rights and powers in regard to South West Africa to the United Nations Organization, or to any other international organization or body, *and did not in fact do so.*" (Italics added.)

44. Not only were cogent reasons advanced in 1950 by Sir Arnold McNair and Judge Read for dissenting from the majority judges in respect of this issue, but the majority opinion has elicited strong criticism from highly qualified publicists. I refer in this regard to George Schwarzenberger, *International Law* (3rd ed.), Volume I, pages 101-102; Manley O. Hudson, "The Twenty-ninth Year of the World Court", in *American Journal of International Law*, Volume 45, pages 1-36 at pages 13-15; and Joseph Nisot, "The Advisory Opinion of the International Court of Justice on the International Status of South West Africa", in *South African Law Journal*, Volume 68, Part 3 (August 1951), pages 274-285. In my opinion there is, for the reasons which I have advanced, complete justification for such criticism.

45. Although the soundness of the Court's 1950 Opinion in regard to Article 6 of the Mandate Declaration did not necessarily require decision when the preliminary objections of the Respondent were considered by this Court in 1962, it was certainly a fundamental issue in respect of the main one of the alternative contentions advanced by the Applicants, i.e., the contention, not acceded to by any member of the Court, of a succession by the United Nations and its Members of the functions of the League and its members regarding mandates. Consequently several judges expressed views on the matter. In a joint dissenting opinion Sir Percy Spender and Sir Gerald Fitzmaurice remarked:

> "... we think that the view expressed by the Court in its 1950 Opinion, to the effect that the supervisory functions of the former League Council passed to the Assembly of the United Nations which was entitled to exercise them, was definitely wrong". (See *South West Africa* cases, *I.C.J. Reports 1962*, p. 532, footnote 2.)

The said judges based their conclusion, *inter alia*, on two facts which were not before the Court in 1950, namely firstly, the content of the proposal of the Executive Committee of the Preparatory Commission of the United Nations, which proposal was rejected, and, secondly, the fact that the Chinese representative was compelled to amend his original draft resolution by omitting all reference to reporting by mandatories to the United Nations.

The effect of the opinion of Judge Bustamante in 1962 is that in the absence of a trusteeship agreement, the United Nations could not exercise control over South West Africa. Sir Louis Mbanefo's opinion also appears to support the view that administrative supervision of the Mandate had disappeared on the dissolution of the League. He quoted with approval an extract from the separate opinion of Judge Read in *Status of South West Africa, I.C.J. Reports 1950*, page 165, which included the following passage:

> "The disappearance of the obligations included in the first and the second classes would bring the mandates system to an end. *The disappearance of the régime of report, accountability, supervision and modification, through the Council and the Permanent Mandates Commission, might weaken the mandates system; but it would not bring it to an end. As a matter of fact, the record shows that the paralysis of those agencies during the six war years had no detrimental effect upon the maintenance of the well-being and development of the peoples.*" (Italics added.)

And Sir Louis Mbanefo came to the conclusion that on the dissolution of the League—

> "... rights and obligations embodied in it [the Mandate] were

maintained at the level at which they were on the dissolution of the League".

The obligation to report to a non-existing Council of the League could not be "maintained" at any level.

46. It has been submitted that some passages in the Judgment of the Court in *South West Africa* cases, *I.C.J. Reports 1962*, could be interpreted as supporting the Court's majority opinion of 1950 in regard to the transfer to the United Nations of the supervisory powers of the League in respect of mandates. There are, however, no express findings to this effect, and the impression gained from the Judgment as a whole is that as far as possible this issue was deliberately avoided, and that the Court did not intend expressing any opinion thereanent. What is, however, of considerable significance is that both the conclusion and reasoning in the said Judgment regarding the survival of the compromissory clause in Article 7 of the Mandate Declaration support the view that transfer of supervisory powers did not take place.

The reasoning of the 1962 Judgment compels one to infer that the Court thought that, as a result of the dissolution of the League, Article 6 of the Mandate no longer applies.

Reference has already been made to the three reasons advanced in the said Judgment for holding that the words "Member of the League of Nations" in Article 7 (2) of the Mandate have since, and by reason of the dissolution of the League, come to mean, for the purposes of the said Article, ex-member of the League. The first reason was that, inasmuch as a mandatory could during the lifetime of the League by the exercise of its rights under the unanimity rule, have frustrated the wishes of the Council of the League relative to the administration of the mandated territory, the role of the Court was a very essential one.

With regard to this suggested essentiality of the adjudication clause, the Court's attention had been drawn to the fact that three of the trusteeship agreements concluded in respect of former mandated territories do not contain any compromissory clause, and the argument had been advanced that the Members of the United Nations (and they included practically all the ex-members of the League) could therefore not have considered the adjudication clause to be an essential provision.

The Judgment deals as follows with this argument:

> "The point is drawn that what was essential the moment before was no longer essential the moment after, and yet the principles under the mandates system corresponded to those under the trusteeship system. This argument apparently overlooks one important difference in the structure and working of the two systems and loses its whole point when it is noted that under Article 18 of the Charter of the United Nations, 'decisions of the General Assembly on important questions shall be made by a two-thirds majority of the

members present and voting', whereas the unanimity rule prevailed in the Council and the Assembly of the League of Nations under the Covenant. Thus legally valid decisions can be taken by the General Assembly of the United Nations and the Trusteeship Council under Chapter XIII of the Charter without the concurrence of the trustee State, and the necessity for invoking the Permanent Court for judicial protection which prevailed under the mandates system is dispensed with under the Charter.

For the reasons stated, the First and Second Objections must be dismissed."

The effect of this statement is that the adjudication clause is not an essential provision in the trusteeship system inasmuch as the unanimity rule which applied to proceedings of the Council of the League does not apply to the organs of the United Nations, with the result that the General Assembly and the Trusteeship Council of the United Nations can take valid decisions without the concurrence of the trustee State. The authors of the Judgment considered the adjudication clause to be essential only as long as the unanimity rule applied to the organ entrusted with administrative supervision, or if such organ should for some reason or another cease to function. If it should be held that Article 6 of the Mandate was amended by the substitution of the General Assembly of the United Nations (functioning with an ordinary two-thirds majority) for the Council of the League, there would be no real difference between the administrative supervison of the mandated territory and that of a State under the trusteeship system; which of course would mean—in terms of the Court's 1962 reasoning—that the reasons advanced for regarding the adjudication clause as an essential clause of the Mandate would no longer apply, and that the construction placed by the Court on the words "another Member of the League" in Article 7 (2) of the Mandate would not be justified. In other words, the adjudication clause could have survived on the grounds of its essentiality only if the unanimity rule which applied to the proceedings of the League Council also applies to the proceedings of the Assembly of the United Nations when that body is concerned with the administration of the Mandate, or if administrative supervision as provided for in the Mandate has come to an end. In this Court's Advisory Opinion of 1955, it was held that the unanimity rule cannot apply in any proceedings of the General Assembly of the United Nations, and this view was confirmed by the 1962 Judgment. If the said Opinion is sound, then a finding that the supervisory powers of the Council of the League were transferred to the General Assembly of the United Nations would be in conflict with the reasoning in the 1962 Judgment.

The inescapable conclusion accordingly is that the reasoning of the 1962 Judgment cannot be reconciled with a contention that the supervisory functions of the Council of the League became vested in the General Assembly of the United Nations.

47. There is also another aspect of the reasoning of the 1962 Judgment which negatives the possibility of the General Assembly of the United Nations having succeeded to the supervisory functions of the League Council. The Court relied upon what it found to be an agreement among the members of the League in April 1946 to continue the mandates "as far as it was practically feasible or operable with reference to the obligations of the mandatory powers". It was held that the purpose of this agreement was to make up for the "imperfections as far as was practicable" and "to maintain the *status quo* as far as possible in regard to the mandates". At page 341 of the Judgment the agreement is described as follows:

> "It is clear from the foregoing account that there was a unanimous agreement among all the Member States present at the Assembly meeting that the Mandates should be continued to be exercised in accordance with the obligations therein defined *although the dissolution of the League, in the words of the representative of South Africa at the meeting, 'will necessarily preclude complete compliance with the letter of the Mandate', i.e. notwithstanding the fact that some organs of the League like the Council and the Permanent Mandates Commission would be missing.* In other words the common understanding of the Member States in the Assembly—including the Mandatory Powers—in passing the said resolution, was to continue the Mandates, *however imperfect the whole system would be* after the League's dissolution, and *as much as it would be operable*, until other arrangements were agreed upon by the Mandatory Powers with the United Nations concerning their respective Mandates." (Italics added.)

Had the Court considered that Article 6 of the Mandate had been amended by the substitution of the General Assembly of the United Nations for the Council of the League, the above-quoted expression would not have been used. There would have been no "imperfections" which could only be made up for "as far as was practicable". The agreement to continue "as much as . . . would be operable" must have presupposed that Article 6 would not be operable, because if it were operable and if, as the Court had held, Article 7 still applied, there would have been nothing that could not be operable and the words "as much as . . . would be operable" would have been meaningless. In any event, the purpose could not have been "to maintain the *status quo*" and at the same time to bring about radical amendments. There could be no question of maintaining the status quo if the supervisory powers were transferred to a body the membership of which was not the same as that of the League, and which functioned in a manner substantially different from that which applied in the League Council. The status quo could not be maintained if by the suggested substitution Respondent's rights under the unanimity rule would be abolished.

48. As I have already mentioned, the Court did not base its finding

on any principle of succession. The Court based its finding on its interpretation of the mandate instrument and on acts which it considered constituted an agreement to the effect that the expression "Member of the League" in Article 7 of the Mandate Declaration should be construed as meaning "ex-Members of the League, who were Members at the time of its dissolution". In other words, it found that the rights of the members of the League under the Mandate were not transferred to the members of the United Nations, but that States which were members of the League at its dissolution retained their rights to invoke the adjudication clause in Article 7 of the Mandate. If this view is sound, it could surely not have been the intention of the parties that the administrative supervision provided for in Article 6 of the Mandate would be transferred to the United Nations, because if such a transfer took place it would mean that States which are not members of the United Nations, and which would therefore have no say in the "administrative supervision", would nonetheless have competence in the "judicial supervision", and that, likewise, many States entitled to take part in the "administrative supervision" would have no competence in the "judicial supervision". Such an anomalous result could not possibly have been contemplated by the Court. For the above reasons the 1962 Judgment cannot be reconciled with a contention that the supervisory powers of the Council of the League were transferred to the United Nations.

49. My conclusion, therefore, is that Respondent is not under any obligation to report and account to the United Nations relative to its administration of South West Africa. Article 6 of the Mandate Declaration and the corresponding provisions of Article 22 of the Covenant of the League ceased to apply on the dissolution of the League. Applicants' Submissions 2, 7 and 8 should accordingly be dismissed.

50. It has been suggested that the Respondent is estopped from denying an obligation to report and account to the United Nations. In my opinion it is not estopped. Not only has Respondent at all material times consistently denied such an obligation, but also no State has at any material time alleged that it was induced by Respondent's word or conduct into thinking that the Respondent had acknowledged such an obligation. The Applicants cannot suggest anything of the kind, because they would not be able to reconcile such a suggestion with their silence and acquiescence during 1945, 1946, 1947 and 1948.

ARTICLE 73 OF THE CHARTER OF THE UNITED NATIONS

1. It may be contended that if Article 6 of the Mandate ceased to apply, the reporting provisions of Article 73 of the Charter of the United Nations (although far more limited in scope and effect) now apply to the territory of South West Africa. This raises two major

questions: firstly, whether this matter is part of the Applicants' claim, i.e., has it been referred to the Court for decision by the Applicants, and secondly, whether the Respondent has consented to the Court's jurisdiction in respect thereof [1].

2. The Applicants not only deliberately did not refer this issue to the Court, but strenuously contended that Article 73 has no application as far as South West Africa is concerned.

3. In their Applications they alleged that—

> "... the Union has violated, and continues to violate Article 6 of the Mandate, by its failure to render to the General Assembly of the United Nations annual reports containing information with regard to the territory and indicating the measures it has taken to carry out its obligations under the Mandate".

Submissions B, C and J in the Applications equally leave no room for any doubt that the claim was based on Article 6 of the Mandate as read with Article 22 of the Covenant. In the Memorials the Applicants relied solely on this Court's 1950 Opinion, which held that Article 6 of the Mandate survived the dissolution of the League, but that the applicability of Article 73 was irrelevant—despite the fact that argument thereon was heard. Submissions 2 and 7 of the Memorials, and as finally drafted, similarly leave no room for any doubt that the claim embraced by them was based on Article 6 of the Mandate. In the Reply Applicants' contention was defined as follows: "Respondent's obligation, as *stated in Article 6* of the Mandate, is in effect, and Respondent is accountable thereunder to the United Nations, as 'the organized international community' ". It was stated in express terms that "Applicants' *submissions do not allege* violations by Respondent of such obligations" (i.e., obligations under Article 73 of the Charter). In the oral proceedings, Applicants were at great pains to demonstrate that they did not rely on Article 73 *(e)*, and emphasized that the claim was based on Article 6

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[1] A judge is of course at all times free to express his views on a matter falling outside the competence of the Court if he considers it relevant to an issue validly under consideration, but such views are obviously *obiter dicta*. I find it unnecessary (as in 1962) to make even an *obiter* statement on this complicated matter which has not been argued as an issue by either Party. If the matter was relevant it would have been necessary to consider the difficulties raised by Dr. Steyn in his argument before this Court in 1950 (*Status of South West Africa, I.C.J. Pleadings*, pp. 273-317), and to investigate such matters as the legal effect of the consistent denial by the United Nations organs of the applicability of Article 73 to South West Africa, the alleged abuse of the provisions of this Article by the Assembly of the United Nations referred to by Respondent's counsel during the oral proceedings, etc. It would furthermore entail a consideration of the alleged non-compliance by the United States with the provisions of this Article with regard to those Pacific Islands which were formerly subject to a League of Nations mandate held by Japan, and which have not been placed under a trusteeship agreement.

of the Mandate. They consistently resisted any suggestion that Article 73 *(e)* might be applicable.

4. It has been repeatedly laid down by this Court that only matters raised in the final submissions of the parties will be considered and that the Court will abstain from deciding issues not raised in such submissions. The Court certainly has no power to depart from a submission in order to decide an issue not included therein and not intended to be so included.

5. In any event this Court has no jurisdiction to pronounce on this issue. The only provision on which jurisdiction could be based is Article 7 (2) of the Mandate Declaration, and this limits the Court's jurisdiction to disputes between the Respondent and another member of the League relating to the interpretation and application of the provisions of the Mandate which cannot be settled by negotiation. The Respondent has never had any dispute with the Applicants relating to the interpretation or application of the provisions of Article 73; there has accordingly never been any attempt to settle such dispute, and these provisions are in any event provisions of the Charter of the United Nations, and not provisions of the Mandate. Even if Article 73 should apply to South West Africa, it does not therefore become a provision of the Mandate, just as the provisions of any other instrument entered into by the Respondent with regard to South West Africa could not be regarded as provisions of the Mandate. The preamble of the Mandate tells us what its provisions are.

6. In any event, Article 73 conferred no legal rights or interest on Applicants, and for the reasons *mutatis mutandis* stated in the Judgment, they would have no legal right or interest in any claim based on this Article.

THE ALLEGED BREACHES OF ARTICLES 2, 4 AND 7 (1)

Even if Article 7 (2) as well as the provisions of the conduct clauses of the Mandate are still in force and even if the Applicants have substantive legal rights in respect thereof their submissions relating to alleged breaches of Articles 2, 4 and 7 (1) should nonetheless, in my opinion, be dismissed for reasons which I am about to state.

The main complaints relate to Article 2 (2) and they will be considered first.

Article 2 (2)

(Submissions 3 and 4)

History of the Submissions

1. Article 2 of the Mandate reads as follows:

> "The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.
>
> The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate."

For a full appreciation of the issues before the Court regarding alleged contraventions of this Article, it will be necessary to give some consideration to the history of Applicants' relevant submissions, starting with the Applications.

2. In compliance with Article 32 (2) of the Rules of Court, Applicants stated the precise nature of their claims relative to Article 2 (2) of the Mandate Declaration in paragraphs E, F and G of the submissions included in their Applications. In effect these claims were based on allegations:

(a) that the Respondent had failed to achieve the results contemplated by Article 2, paragraph 2, of the Mandate;

(b) that the Respondent had "practised apartheid, i.e., [had] distinguished as to race, colour, national or tribal origin, in establishing the rights and duties of the inhabitants of the territory"; and

(c) that the Respondent had adopted and applied legislation, regulations, proclamations and administrative decrees which were, by their terms and their application, arbitrary, unreasonable, unjust and detrimental to human dignity.

3. In the Memorials the relevant submissions were drafted rather differently. After setting out the facts and the legal contentions upon which the Applicants relied, the following summaries appeared in paragraphs 189 and 190 of Chapter V:

> "189. As the Applicants have previously pointed out, the policy and practice of *apartheid* has shaped the Mandatory's behavior and permeates the factual record. The meaning of *apartheid* in the Territory has already been explained hereinabove. The explanation warrants repeating. Under *apartheid* the status, rights, duties, op-

portunities and burdens of the population are fixed and allocated arbitrarily on the basis of race, color and tribe, without any regard for the actual needs and capacities of the groups and individuals affected. Under *apartheid*, the rights and interests of the great majority of the people of the Territory are subordinated to the desires and conveniences of a minority. We here speak of *apartheid*, as we have throughout this Memorial, as a fact and not as a word, as a practice and not as an abstraction. *Apartheid*, as it actually is and as it actually has been in the life of the people of the Territory, is a process by which the Mandatory excludes the 'Natives' of the Territory from any significant participation in the life of the Territory, except in so far as the Mandatory finds it necessary to use the 'Natives' as an indispensable source of common labor or menial service.

190. Deliberately, systematically and consistently, the Mandatory has discriminated against the 'Native' population of South West Africa, which constitutes overwhelmingly the larger part of the population of the Territory. In so doing, the Mandatory has not only failed to promote '*to the utmost*' the material and moral well-being, the social progress and the development of the people of South West Africa, but it has failed to promote such well-being and social progress in any significant degree whatever. To the contrary, the Mandatory has thwarted the well-being, the social progress and the development of the people of South West Africa throughout varied aspects of their lives; in agriculture; in industry, industrial employment, and labor relations; in government, whether territorial, local or tribal, and whether at the political or administrative levels; in respect of security of the preson, rights of residence and freedom of movement; and in education. The grim past and present reality in the condition of the 'Natives' is unrelieved by promise of future amelioration. The Mandatory offers no horizon of hope to the 'Native' population." (Memorials, pp. 161-162.) [Then follows a summary of the specific matters dealt with in the Memorials.]

Then followed submissions which included the following:

"3. the Union, in the respect set forth in Chapter V of this Memorial and summarized in Paragraphs 189 and 190 thereof, has practised *apartheid*, i.e., has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory;

4. the Union, by virtue of the economic, political, social and educational policies applied within the Territory, which are described

in detail in Chapter V of this Memorial and summarized at Paragraph 190 thereof, has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in the second paragraph of Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfil its duties under such Articles."

It will be noted that the submissions as formulated in the Memorials were narrower than those in the Applications. In the Memorials Applicants' whole case amounted and was confined to an allegation of deliberate oppression, which had been only one of several elements relied upon in the Applications. In view of subsequent developments this feature does not, however, appear of any great significance, and it is merely noted in passing.

4. In its Counter-Memorial the Respondent dealt in detail with Applicants' allegations, many of which were denied including those contained in paragraphs 189 and 190 of Chapter V of the Memorials.

5. Apparently in an attempt to limit the factual enquiry which would have been necessitated by the conflicting averments in the Memorials and Counter-Memorial, Applicants in the Reply added a further cause of action, which rested on an alleged norm of non-discrimination or non-separation, defined as follows at page 274 of the Reply:

"In the following analysis of the relevant legal norms, the terms 'non-discrimination' or 'non-separation' are used in their prevalent and customary sense: stated negatively, the terms refer to the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential: stated affirmatively, the terms refer to governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such."

They also relied upon an undefined concept referred to as "standards", but, in view of later definition and explanation of Applicants' case in this regard, it is not necessary to analyse the relevant parts of the Reply. The nature of the standards ultimately relied upon by Applicants will be considered hereafter.

6. Despite the introduction of the new cause of action based on the alleged "norm of non-discrimination or non-separation" and the undefined standards, Applicants in their Reply persisted with contentions which could be reconciled only with a case based on alleged oppression

(*vide*, e.g., Reply, pp. 53-55). The position at the commencement of the oral proceedings then was that Applicants' submissions were in the form stated in the Memorials and quoted above (in which allegations of oppressive conduct featured prominently) but in addition some reliance was placed on the existence of the alleged "norm of non-discrimination or non-separation" and undefined standards.

7. In the course of the oral proceedings Applicants' case was further defined and narrowed down. It is not necessary or desirable to trace in detail the manner in which this happened. However, some reference has to be made to the main aspects of the process by which Applicants' case came to be narrowed down.

The first aspect to which attention should be directed is that, by agreement between the Parties, the extent of the factual dispute between them was first whittled down, and subsequently reduced to negligible proportions.

The virtual elimination of disputes as to fact occurred gradually over a period, but there would appear to have been two main steps, the record of each of which may usefully be quoted. The first was an agreement reached between the Parties prior to the commencement of the oral proceedings, which agreement was communicated to the Court in the following terms:

> "*South West Africa Cases*
> *Agreement Regarding Factual Averments*
> Subject to reserving their right to contest the relevance of facts contained in Respondent's pleadings, including the oral proceedings, Applicants agree that such facts—as distinct from inferences which may be drawn therefrom—are not contested except as otherwise indicated, specifically or by implication, in Applicants' Written Pleadings or in the oral proceedings.
> This agreement pertains also to factual averments in respect of which no documentary proof has been filed, including statements made upon Departmental Information.
>
> Any denial of averments made in the Rejoinder will be intimated by Applicants at the earliest convenient stage in the oral proceedings."

The further intimation foreshadowed in this agreement was given by Applicants' Agent on 27 April 1965. The effect thereof was that no averments or denials of fact by Respondent were contested by Applicants. For convenience I quote the relevant passage in the oral proceedings. It reads as follows:

> "All facts set forth in this record, which upon the Applicants, theory of the case are relevant to its contentions of law, are undisputed. There have been certain immaterial, in our submission,

allegations of fact, data or other materials which have been controverted by the Respondent and such controversion has been accepted by the Applicants and those facts are not relied upon. The Applicants have gone further in order to obviate any plausible or reasonable basis for an objection that the Applicants have not painted the whole picture in their own written pleadings. The Applicants have advised Respondent as well as this honourable Court that all and any averments of fact in Respondent's written pleadings will be and are accepted as true, unless specifically denied. And the Applicants have not found it necessary and do not find it necessary to controvert any such averments of fact. Hence, for the purposes of these proceedings, such averments of fact, although made by Respondent in a copious and unusually voluminous record, may be treated as if incorporated by reference into the Applicants' pleadings." (C.R. 65/22, at p. 39.)

The effect of these admissions was to reduce and to alter the content and ambit of the dispute(s) between the Parties. The admissions constitute *pro tanto* a settlement of the dispute or disputes of which they formed a part. I know of no reason in law, logic or justice why full effect should not be given to them.

8. But the change in Applicants' case was not confined to the admissions to which reference has just been made. Amongst the most vigorously contested factual averments in the Memorials and Reply were those constituting or bearing upon the allegations that Respondent's policies were oppressive in intent or effect—allegations which were incorporated by reference in Submissions 3 and 4. It was therefore logically impossible for Applicants to accept as correct Respondent's averments or denials of fact whilst persisting in submissions based upon contested allegations of oppression. The logic of this situation (frequently commented on by Respondent's Counsel) eventually compelled Applicants to amend their Submissions 3 and 4 so as to delete all references to paragraphs 189 and 190 of Chapter V of the Memorials (in which the disputed allegations of oppressive conduct appear with particular vigour) as well as references to the said Chapter V generally, and to make it clear that Applicants relied solely on the alleged "norm of non-discrimination or non-separation" as defined at page 274 of the Reply (quoted above) as well as on "standards" [1]. As regards the latter, I pointed out above that they had not been defined in the Reply. In the course of the oral proceedings, Applicants' Agent rendered it clear that the "standards" on which he relied were rules legally enforceable against Respondent in its capacity as Mandatory, and having exactly the same content as the "norm", i.e., as defined at page 274 of the Reply. I shall later deal with the differences between the concepts of "norm" and

[1] Text of amended submissions is given in para. 10 below.

"standards". At present I would emphasize only that as regards content they were alleged to be identical.

9. Both prior to the amendment of Applicants' submissions, and subsequently, Applicants made it clear that their whole case as regards alleged contraventions of Article 2 (2) was based on the existence of the alleged norm or standards of non-discrimination or non-separation. This occurred in the course of argument on the inspection proposal as well as on the merits, in reply to questions from the Court as well as to comment by Respondent's counsel. Applicants' final attitude was that there existed no dispute of fact between the Parties, inasmuch as Applicants had accepted all Respondent's averments and denials, and had stated clearly their whole case was based on the existence of the alleged norm or standards. In the words of the Applicants' Agent:

> "The issue before the Court, accordingly, is whether the processes of the organized international community have or have not eventuated in international standards or an international legal norm, or both." (C.R. 65/31, p. 32.)

Whereas the Applicants originally defined apartheid as constituting wilful oppression and unjust discrimination, they ultimately emphasized that it was merely used in the sense defined in Submission 3.

10. The actual amendment of Applicants' Submissions Nos. 3 and 4, bringing them into conformity with the earlier admissions of fact and informal definitions of Applicants' case, occurred on 19 May 1965, just before Applicants' Agent rested their case. The amended submissions read as follows:

> "Upon the basis of allegations of fact, and statements of law set forth in the written pleadings and oral proceedings herein, may it please the Court to adjudge and declare, whether the Government of the Republic of South Africa is present or absent, that:
>
> . . . . . .
>
> 3. Respondent, by laws and regulations, and official methods and measures, which are set out in the pleadings herein, has practised apartheid, i.e., has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations

as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that Respondent has the duty forthwith to cease the practice of apartheid in the Territory:

4. Respondent, by virtue of economic, political, social and educational policies applied within the Territory, by means of laws and regulations, and official methods and measures, which are set out in the pleadings herein, has, in the light of applicable international standards or international legal norm, or both, failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant; and that Respondent has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfil its duties under such Articles." (C.R. 65/35, 19 May 1965, pp. 69-70.)

In addition the following "formal ... and explanatory comments with respect to the foregoing submissions" were presented to the Court:

"*(a)* The response to the question addressed to the Applicants by the honourable President during the course of the proceedings of 28 April 1965, C.R. 65/25, page 31, is hereby reaffirmed in the following respects, in particular:

1. The formulation of Submission 4 is not intended in any manner to suggest an alternative basis upon which the Applicants make or rest their case, other than the basis which the Applicants present in Submission No. 3 itself (reference is made to the verbatim record 65/24, 30 April, p. 11); the distinction between Submissions 3 and 4 being verbal only, for reasons which have been set out in the cited section of the verbatim record.

2. The reference in Submission 4 to 'applicable international standards or international legal norm, or both' is intended to refer to such standards and legal norm, or both, in the sense as described and defined in the Reply at page 274, and solely and exclusively as there described and defined." (C.R. 65/35, 19 May 1965, pp. 71-72.)

11. It will be observed that all references to Chapter V of the Memorials, and in particular paragraphs 189 and 190 thereof, have been deleted. Submission 4, however, even without these references could still have been interpreted as a general allegation that the Respondent's policies, etc., fail to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory. To avoid this possibility the Applicants resorted to two methods. The first was to qualify the general allegation of failure to promote well-being and progress to the utmost by the words "in the light of the applicable international standards or international legal norm or both". The second

method was to add the formal interpretations and explanatory comments, so as to make it abundantly clear that Submission 4 did not rest upon an alternative basis to that of Submission 3, and that both Submissions rested exclusively on the norm or standards defined at page 274 of the Reply.

12. If one now compares the final submissions with the original statement of the precise nature of Applicants' claims in the Applications, it appears that the claims based upon allegations of arbitrary, unreasonable, and unjust actions, and on conduct detrimental to human dignity, have disappeared from the final submissions. The same applies to claims based on allegations that Respondent had in fact failed to achieve the results contemplated by Article 2 (2) of the Mandate. Indeed it appears quite clearly that the allegation of failure on the part of the Respondent to perform its duties has been narrowed down to breaches of an alleged international norm and/or standards as defined at page 274 of the Reply. As I have noted, the amended submissions in all these respects correspond entirely with informal explanations repeatedly given by Applicants' Agent during the course of the oral proceedings. I shall deal more fully with the legal effect of the amended submissions presently.

Legal Principles Applicable to the Interpretation of Submissions

13. Rule 42 requires that a Memorial shall contain a statement of the relevant facts, statements of law, and the submissions. These submissions define the issues which the Court is asked to determine, i.e., they state concisely and precisely the conclusions the Court is asked to draw from the facts and the law, and the relief asked for.

Just as in municipal systems, where the statement of claim (which broadly corresponds to the submissions) may omit an issue included in the writ (which broadly corresponds to the Application commencing an action in this Court), so also in proceedings in this Court submissions may omit issues mentioned in the Application. Such an omission constitutes an abandonment of whatever is omitted, and cannot constitute a part of the issues before the Court.

It follows therefore, that only matters included in the final submissions will be considered, i.e., the Court will abstain from deciding issues not raised in such submissions.

14. Where two or more parties have decided to refer a particular dispute to the Court, and the submissions or special agreement fail to

define such dispute satisfactorily, it would appear that the Court may depart from the strict wording of the submissions or special agreement in order to decide the true issues which the parties intended to refer to it. Such action on the part of the Court of course postulates that there exists an actual intention of the parties which is not properly expressed in the submissions or special agreement. In the present case the proceedings are before the Court, not by *ad hoc* agreement between the Parties, but by Application in terms of a general compromissory clause, *viz.*, Article 7 (2) of the Mandate. Consequently there can be no question of the existence of any common desire or intention on the part of both Parties to place a particular issue before the Court—it is the Applicants alone which invoke the Court's jurisdiction and the Court can at most enquire as to which issues *they* (i.e., the Applicants) wish to refer to it. It is of course obvious that a party is not compelled to invoke the assistance of the Court for each and every dispute which would be cognizable by it.

Where a particular provision in an instrument may be breached in more than one respect, the Applicant is not bound to allege that it was breached in all these possible respects. The Applicant may choose to allege a breach in one respect only, and deliberately formulate its submissions accordingly. Such a formulation would narrow the issue, and this Court would have no power to enquire whether some of the evidence placed before it might or might not constitute proof of a breach in a respect not alleged in the submissions. This is the more so when the Court knows that such other respect was deliberately deleted from the submissions, and for this reason all the evidence relative thereto that could have been placed before it has not been produced. If, e.g., Submission 5 was the only submission relative to Article 2, this Court would have had no authority to enquire into, say, the issues raised in the original Submissions 3 and 4, even if it has competence to deal with such issues if properly raised.

15. Where the particular respect in which a provision is alleged to have been breached is pin-pointed in the submissions, such particularization has the effect of narrowing the issues. Such particulars do not constitute the *reasons* for the allegation that the provision has been breached, but they serve to qualify or circumscribe such allegation so as to reduce the issue to breaches falling within the ambit of such qualification or circumscription. In other words such particulars are still bare *averments* by the parties presenting them, their purpose and effect being, *inter alia*, to indicate a precise limit to the factual allegations which the other party or parties are called upon to meet. They must be distinguished from arguments. Arguments do not define the alleged breach, but advance reasons why the Court should hold that a breach has occurred in the respects alleged in the submissions. Arguments consequently go beyond bare assertions. They provide the logical links between premises and conclusions—often the suggested links between facts (admitted, established or alleged) and the conclusions averred in the submissions. The Court is not bound by the *arguments* of the

parties in support of the averred conclusions in their submissions, whether such arguments are advanced or outside of the formulation of the submissions, but it is bound to confine itself to the dispute as particularized therein. It is only arguments, as distinct from particulars which narrow the issue, that the Court may disregard when construing the submissions. This is also the reason for the rule that the parties cannot force the Court to choose between two suggested interpretations of an instrument, since obviously the Court may find both interpretations unacceptable. However, this power of the Court is relevant only in so far as its interpretation may be a link in reasoning leading to acceptance of the submissions of either of the parties, or, possibly to a result of *non possumus* with reference to the submissions and issues before it. The Court is not entitled to proceed from its own interpretation to the making of an order not requested by either party.

16. In short, in a case like the present (assuming jurisdiction and admissibility), the Applicants are entitled to place any dispute falling within a defined category before the Court. To ascertain the nature of the dispute, reference must *prima facie* be had to the submissions. The Court may, in my view, depart from the submissions only where it is satisfied that they do not accurately reflect the intention of the Applicants, and where, in addition, the Court is satisfied that the Respondent had adequate knowledge or notice of the actual case sought to be made by the Applicants. It goes without saying that no court would decide an issue against a party who has not had proper and fair notice thereof.

17. If a question arises as to the actual intendment of the Applicants, or the sense in which Applicants' submissions were understood by the Respondent, the Court must in my view necessarily have regard, *inter alia*, to the statements of the respective parties. Of course, the Court is not bound by the parties' interpretation of the submissions. But where clarifications are incorporated in the final submissions as formal explanations and definitions they must be regarded as part and parcel thereof.

There also appears to be no reason why, in the case of any doubt as to the true meaning of a submission, the Court, or a member thereof, should not obtain an explanation by means of a question directed to the party concerned. In fact Article 52 of the Rules expressly authorizes the Court or a judge to ask for explanations, and there is no proviso excepting submissions from this provision. If the Court is not to have any regard to such explanations, there would be no point in putting any questions.

Where submissions are amended the Court, in construing such amended submissions, may, in case of doubt, have regard to the history of the case that led to or culminated in such amendments.

18. Applying the above principle, I now turn to a consideration of the meaning and effect of Applicants' amended Submissions Nos. 3 and 4.

The Meaning and Legal Effect of Submissions Nos. 3 and 4

19 *(a)*. It may be convenient to preface my discussion of this topic with some general remarks about the provisions of Article 2 (2), and the type of issues which could arise thereunder. For the purposes of these remarks I shall assume, contrary to the view expressed above, that the Court has jurisdiction to adjudicate on alleged contraventions of the Article. An applicant may, hypothetically, ask the Court to decide as a fact that a particular policy or measure does not promote well-being and progress, or is likely to harm well-being and progress. This does not appear to me to be the type of issue which could properly be determined by a court of law, or which the authors of the mandates system could have intended to be referable to a court of law. But, be that as it may, such an issue would at the very least necessitate a very full enquiry into the facts and circumstances pertaining to the policy or measure, or its field of operation.

(b) Alternatively, an applicant may ask the Court to hold that no attempt whatever has been made to promote well-being and progress, or that the mandatory's policies were directed towards some ulterior purpose. In my view, if the Court were to have jurisdiction at all in respect of alleged violations of Article 2 (2) of the Mandate, its powers would be limited to investigating only questions such as these. The Mandate conferred on Respondent "full power of administration and legislation over the Territory subject to the present Mandate as an integral portion of the Union of South Africa", and provided that Respondent might "apply the laws of the Union of South Africa to the Territory, subject to such local modifications as circumstances may require."

(c) These wide powers were of course limited by the general objectives of the Mandate. However, these objectives were embodied in expressions such as "the well-being and development of the inhabitants", and "promote to the utmost the material and moral well-being and social progress of the inhabitants". The effect of these provisions is—and this interpretation is confirmed by the French text—that the Respondent was placed under a duty to do its best to achieve the aforesaid objectives having regard to the resources available in the Territory and the realities as they existed both in South Africa and in the Territory, the latter having been contemplated as forming, or as capable of being treated as, "an integral portion" of the former.

(d) Quite clearly the grant of such extensive powers of government, coupled with such a broadly stated trust purpose, had the effect of vesting in the Mandatory a discretion to determine the methods and measures whereby it would endeavour to give effect to the trust. Such

a discretion is, indeed, a normal incident of powers of government. Thus in *Lighthouses case between France and Greece, Judgment, 1934, P.C.I.J., Series A/B, No. 62*, page 22, the Court remarked that:

> ". . . any grant of legislative powers generally implies the grant of a *discretionary right* to judge how far their exercise may be necessary or urgent; . . . It is a question of appreciating political considerations and conditions of fact, a task which the Government, as the body possessing the requisite knowledge of the political situation is *alone qualified* to undertake." (Italics added.)

Similar conclusions were reached, specifically with reference to 'C' mandates generally, and South West Africa in particular, by eminent lawyers and commentators on the mandates system (*vide* Counter-Memorial, Book IV, pp. 387-389 and Rejoinder, Vol. I, pp. 176-177, where reference is made to comments by Chief Justice Latham of Australia, M. Orts, Lord Hailey, Quincy Wright and Norman Bentwich).

(e) The essence of a discretionary power is that the holder of the power is entitled by law to choose between two or more alternative courses of conduct. When he so chooses, he does no more than he is entitled to, and a court of law, unless specifically granted powers of appeal, cannot interfere merely because it does not agree with the decision of the person exercising the discretion. In the absence of special provision, a court of law is not an appellate authority over the holder of such a power, and the court cannot substitute its own decision for his. The most a court of law could do by virtue of its normal powers is to enquire whether the acts in question were illegal; and it follows from the very nature of a discretionary power that an act is not illegal merely because a court considers that, had it been the holder of the power, it would have acted differently.

(f) Illegal conduct by the holder of a discretionary power occurs where he does not exercise his power at all, or where he exercises the power in a manner contrary to express or implied limitations, prohibitions or injunctions relating to such power. These limitations, prohibitions or injunctions may take a variety of forms. There may, for instance, be provisions regarding procedure or form, or limitations regarding the subject-matter to which the power relates or regarding the objects for which the power may be exercised. Failure to comply with such limiting or regulatory provisions may of course occur in complete good faith (e.g., by reason of a wrong interpretation of the provisions of the instrument) or it may be due to improper motives or some other form of bad faith.

(g) In the case of the Mandate, the limitations upon the Mandatory's powers were laid down in Articles 3, 4 and 5 of the Mandate Declaration (with which we are not concerned at the moment) and in Article 2 (2) thereof. The latter Article in effect lays down the objective to be pursued by the Mandatory. It follows, therefore, that an exercise of the Man-

datory's discretion would be declared illegal in terms of Article 2 (2) only where the Mandatory did not pursue the authorized purpose. Such a failure on the part of the Mandatory could, in practice, hardly arise from a bona fide misinterpretation of the Mandate. It is consequently difficult to imagine a case where a purported exercise of discretion by the Mandatory could contravene Article 2 (2) unless some element of bad faith were present. However, be that as it may, it seems clear that if the Mandatory as a fact attempts to achieve the prescribed result, its conduct could not be illegal merely because a particular method selected by it in the exercise of its discretion is not successful, or not as successful as another would have been. Of course, failure to adapt or discontinue an unsuccessful policy might well be some evidence of failure to exercise a proper discretion, but that is another matter.

(h) An improper purpose or motive may be proved in a number of ways, such as by direct statements of the person concerned. However, a more frequent source of proof is circumstantial evidence, including the nature of the act itself. If an act is so unreasonable that no reasonable person placed in the position of the holder of the power would have performed it, one may deduce that such act was motivated by some improper motive or consideration. Of course, such a conclusion can only be arrived at after considering all relevant facts including the purported purposes and effects of the act in question.

In a simple case the actual effect of a measure may constitute sufficient proof of an improper purpose. In the present case, however, the purposes to be achieved are the promotion of the material and moral well-being and social progress of peoples consisting of various ethnic groups differing widely in many important respects, and the methods adopted by the Mandatory were varied and complex. In these circumstances there is no practical method of determining whether or not the prescribed purposes have been achieved over any given period.

(i) Where a measure is part of an inter-related group of measures, such measure should obviously not be considered *in vacuo* but with due regard to its context. This context is affected, in the present case, by the circumstance that South West Africa was expected by the authors of the Mandate to be administered as an integral portion of South Africa. Consequently any appraisal of a measure applying to South West Africa must have regard to the over-all realities and exigencies of a largely integrated economy and administration.

(j) In the above discussion I considered various possible cases which an applicant might seek to institute under Article 2 (2) of the Mandate. I distinguished between the instances where the Mandatory is sought to

be called to task for failing to achieve the result of promoting well-being and progress, and where the allegation is that it is not properly exercising a discretion to pursue the objective of well-being and progress. I concluded that, if the Court could have dealt with the matter at all, the latter case was the only one which could possibly be brought. I would also add that this indeed appears to have been the type of case set out in the Memorials, *viz.*, one based on allegations that Respondent had deliberately misused its powers for the purpose of oppression.

One further possible case under Article 2 (2) still remains—an applicant could conceivably adopt the attitude that the concept of promotion of well-being and progress had been authoritatively defined in one or more respects in a manner binding on Respondent and on the Court.

20. As now worded, the final submissions restrict the issues to a case falling within the last-mentioned category. Thus Applicants contend that conduct contrary to their norm and standards is, by a legal fiction, to be deemed incapable of promoting well-being and progress. Applicants have indeed rendered it clear that they do not rely on any of the other conceivable causes of action mentioned above. There is no allegation of omission, i.e., of a failure to exercise powers. This was emphasized by Applicants' Agent who repeatedly stated that the Applicants' case was not based on complaints that too few houses, schools, hospitals, irrigation schemes, roads, etc., were built. Furthermore, the final submissions as now worded do not allege improper purposes, wilful oppression, arbitrary or unreasonable conduct, or unfair discrimination, nor do they allege that Respondent's policies in fact failed to promote the material and moral well-being or social progress of the inhabitants. Applicants' Agent repeatedly stated that these were not the issues submitted to this Court, that the dispute between the Parties was a legal one, which did not require the Court to investigate either the Respondent's purposes, motives, state of mind or the effects of its policies. The Court was not asked to weigh the beneficial effect of a measure against the hardships imposed by that or another measure. Such references as were made in the Applications and the original submissions to improper purposes and harmful effects of Respondent's policies were later deliberately omitted. Similarly such references as were made in the original submissions to unreasonable, unjust and arbitrary conduct, deliberate oppression, etc., were intentionally deleted from the final submissions. If regard is had to the history of the matter, particularly the oral proceedings, and Applicants' apparent desire to avoid at all costs an examination of the facts by this Court, the reason for these amendments becomes clear. In any event, the numerous statements by the Applicants' Agent, and particularly his explanations in reply to questions by members of the Court at about the time the amendments were made, leave no room for any doubt that the Applicants did not intend to raise, in their final submissions, any issue relating to breaches of Article 2 (2) on the grounds

of alleged unreasonable, arbitrary or unfair conduct, deliberate oppression, *mala fides* or any other improper purposes or unsatisfactory results. The submissions were therefore subjectively intended to include no more than their clear and unambiguous language conveys, i.e., that this Court should hold that a policy which allots rights, burdens, status, privileges and duties on the basis of membership in a group, class or race, rather than on the basis of individual merit, capacity or potential, is illegal in terms of Article 2 (2) of the Mandate.

21. The effect of the submissions, read together with Applicants' formal definitions and explanations, is consequently that the norm and standards upon which the Applicants rely are contended to be absolute rules of law in terms of which measures which distinguish in the manner described are *per se* invalid, no matter what the facts and circumstances may be. Such policies of differentiation (i.e., discrimination or separation as defined) are in Applicants' Agent's own words "impermissible . . . at all times, under all circumstances, and in all places". The alleged norm and standards apply, according to Applicants' Agent, irrespective of whether or not the policies in question in fact promote the progress and well-being of the population as a whole. For this reason he contended that no evidence relative to purpose, motive, effect, etc., would be relevant or admissible.

22. Respondent has never disputed that its policies do in important respects allot rights, duties, etc., on the basis of membership in the various ethnic groups in the Territory, and has indeed contended that the circumstances in the Territory are such as to render such policies desirable if not inevitable. Nothing need now be said about the merits of Respondent's policies. For present purposes it is important to note only that if the norm or standard as defined at page 274 of the Reply did exist and were applicable to South West Africa, at least a substantial number of Respondent's measures or policies would be in conflict therewith. The effect of this is that the issue before the Court, which is presented as being whether Respondent's policies violated Article 2 (2) of the Mandate, in reality turns only on whether Respondent is bound to conform to the alleged norm or standards in its administration of the Territory.

23. The phrase "in the light of applicable international standards or international legal norm" in Submission No. 4 is not part of the argumentation of the case. It was inserted with the deliberate object of

modifying and pin-pointing the issue, and constitutes an integral and vital part of the definition of the dispute submitted to this Court. In Applicants' Agent's own words it constitutes the "heart and core" of Applicants' case, on which they stand or fall.

The Court's Jurisdiction Relative to the Amended Submissions 3 and 4

24. I have now paved the way to demonstrate further reasons for dismissing Submissions 3 and 4.

25. As demonstrated above, the dispute embraced in the final submissions relates solely to the question whether or not a norm and/or standards of non-discrimination or non-separation exist and are applicable to the Mandate. As I have already noted, this issue was first raised during the Reply, and was elevated to the position of the sole issue some time after the commencement of the oral proceedings. No averment has ever been made by Applicants that this issue was at any time the subject of negotiation between the Parties prior to institution of proceedings, or that it could not be settled by negotiation. Indeed, the record creates the impression that Applicants themselves did not at any stage prior to the preparation of the Reply contemplate the possibility of the existence of such a norm and/or standards—an impression which is strengthened, not only by the fact that the norm was evidently raised in the Reply in an attempt to escape the factual enquiry necessary for a determination of the dispute originally raised, but also by the consideration that among the alleged sources of the norm are found a number of instruments which came about after the institution of these proceedings. (*Vide*, e.g., some of the United Nations resolutions quoted in the Reply at p. 284; the Draft Covenant on Civil and Political Rights, quoted in the Reply, pp. 285-286; the Draft Covenant on Economic, Social and Cultural Rights, quoted in the Reply, p. 286; the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, quoted in the Reply at pp. 286-288 and the Draft International Convention on the Elimination of All Forms of Racial Discrimination, quoted in the Reply, pp. 288-289.) Alternatively, if we assume that Applicants had at an early stage, e.g., when filing the Applications in commencement of this action, considered the possibility of basing a claim on the alleged existence of the norm or standards, they refrained from setting out such a claim in the Memorials in the manner required by Article 42 of the Rules of Court, and thereby prevented the jurisdictional questions pertaining to such a claim from being raised and considered at the preliminary objections stage. In either event it is clear that the dispute has not been shown to be one which, in the words of Article 7 (2) of the Mandate, "cannot be settled by negotiation". Consequently, for this reason also, the Court in my view has no jurisdiction to consider the issues raised by Submissions 3 and 4.

26. I now turn to a further jurisdictional question which arises in regard to this part of the case. Article 7 (2) limits the Court's jurisdiction to disputes "relating to the interpretation or the application of the provisions of the Mandate". It would consequently not be enough for Applicants to show that the alleged norm or standards exist, and are binding on Respondent. Before the Court could make any order it would have to be satisfied in addition that the norm or standards have some bearing on the provisions of the Mandate. It may be helpful therefore to consider whether any rule having the content of Applicants' alleged norm or standard can at all be read into the Mandate. In this regard I wish to mention the following considerations:

(a) If it was intended that differentiation on the basis of membership of a group, class or race should be prohibited, express language to that effect would have been used in the Mandate.

(b) The very contrary is the position—the Mandate expressly authorized differentiation on the said basis in the provisions relating to military training and the supply of intoxicating spirits and beverages.

(c) The Mandate furthermore authorized the application of Respondent's existing laws to the Territory. It was generally known at the time that policies of differentiation were applied in the Union of South Africa, substantially similar to those employed in the Territory.

(d) Policies of differentiation were being applied when the Mandate came into force in comparable territories by several of the more important members of the League.

(e) The conduct of all the parties to the Mandate at all material times reveals that there was general acquiescence in the policy of differentiation.

(i) *Practically all the specific policies objected to in the Memorials were applied in South West Africa during the lifetime of the League.* Many of these policies were expressly approved by the League organs. At no time was any objection made on the grounds of a norm or standards as now contended for by the Applicants.

(ii) Policies of differentiation (many of them similar to those applied by the Respondent) were applied throughout the lifetime of the League by other mandatories. No objection was raised on the grounds now advanced by the Applicants.

(f) As will be shown, the undisputed statements in Respondent's pleadings and the uncontradicted evidence of the expert witnesses strongly support the policy of differentiation: these witnesses all agree that, if the alleged norm or standards were to be applied, the promotion of well-being and social progress would not be advanced. This underlines the unlikelihood that the Mandate would at its inception have included such implied provisions, and shows that the subsequent incorporation thereof into the Mandate would have constituted a material amendment thereto.

27. It has not been, and in my view could not be, suggested that the Mandate has been amended to include the norm or standards relied upon by Applicants. It is clear that no amendment could have been effected without the consent of the Respondent, and it is common cause that Respondent has always vigorously resisted the imposition upon it of any rule of the sort relied upon by Applicants. It follows, therefore, that even if the alleged norm or standards were to exist, this Court would have no jurisdiction to consider alleged violations thereof, inasmuch as they do not constitute provisions of the Mandate.

28. In attempting to establish jurisdiction, Applicants contended, firstly, that the alleged standards were binding on Respondent by reason of an implied agreement in the Mandate itself, in terms of which the Mandatory was bound to submit to standards laid down by the supervisory authority. This contention, if accepted, would partly solve Applicants' jurisdictional problems, but, for reasons to be dealt with later, it is in my view completely unsound.

29. As regards their norm contention, Applicants argued that Respondent was under an obligation in terms of the Mandate to govern in accordance with law, and that consequently any legal norm binding upon Respondent as the administering authority in respect of South West Africa would be enforceable under Article 7 (2) of the Mandate.

The argument rests on fallacy. The Mandate carried within itself no obligations other than those expressly or impliedly falling within its terms. Any other legal norms, rules or obligations that might be binding upon Respondent, as the governing authority in respect of South West Africa, would be so binding because of the particular considerations from which their binding legal force was derived, and not by reason of any provision, express or implied, of the Mandate. Such norms, rules or obligations might conceivably be derived from municipal law, customary international law, or treaty, and a violation of such a norm, rule or obligation would be unlawful not because of the provisions of the Mandate, but because of the relevant municipal law, international customary law or treaty. The point seems so axiomatic as hardly to

warrant discussion. If, for example, a ship belonging to a foreign government were to be damaged in a South West African harbour, and a dispute should arise in regard to possible liability on the part of Respondent as the harbour authority, such a dispute could surely not be said to relate to the interpretation or application of the provisions of the Mandate. The same would apply to a dispute arising under, say, a commercial treaty between Respondent, as governing authority for South West Africa, and another State or States. It should be remembered that such a treaty could quite conceivably have been entered into with a State or States that were not parties to the Mandate—e.g., the United States of America, which never became a member of the League. Even as regards disputes between Respondent and another member of the League of Nations, Article 7 (2) clearly envisaged a distinction between those disputes concerning the provisions of the Mandate and those concerning some other norm, rule or obligation. If this were not so, the words "relating to the interpretation or application of the provisions of the Mandate" in Article 7 (2) would have been redundant and meaningless. Those words were clearly intended to have a limiting effect on the disputes which would be justiciable under Article 7 (2). And if Applicants' contention were correct, they would have no limiting effect at all, and should be regarded as *pro non scripto*.

Consequently it is evident that no rule or obligation could be justiciable under Article 7 (2) unless it was specifically rendered a provision of the Mandate, either by the legal processes whereby the Mandate came into existence or by legal processes of amendment of the Mandate.

30. In a final attempt to establish jurisdiction, Applicants relied on the League resolution of 18 April 1946 as rendering Chapters XI, XII and XIII of the United Nations Charter relevant to the interpretation of the Mandate. This contention also bears on the merits of Applicants' case, and can be dealt with more conveniently at a later stage. At present it will suffice to say that none of Applicants' arguments have convinced me that this Court has jurisdiction to determine the issue raised by the reformulated Submissions 3 and 4, and for this reason alone I think these Submissions should be dismissed.

31. I do not wish to rest my opinion on these jurisdictional points only. I shall consequently now turn to an examination of the sources suggested for the norm and standards in order to determine their validity or otherwise.

At the commencement it might be convenient to clarify a matter of terminology. I pointed out earlier that in Applicants' usage of the terms, the norm and the standards were legally enforceable rules both

possessing an identical content, i.e., as defined at page 274 of the Reply [1]. The sole difference between the two concepts was that standards were said to be binding only on Respondent as Mandatory, whereas the norm was said to be binding on all States, including Respondent in its capacity as a sovereign State. Bearing in mind the suggested distinction between the two types of rules, I now turn to the sources alleged to have given rise to them.

The Sources of the Standards

32. I shall deal with the alleged sources of the standards first, and thereafter with the alleged sources of the norm, including sources which are said to be common to both the standards and the norm.

33. The Applicants contended firstly that the Mandate provides by implication that the organized international community in general, and the competent supervisory organ referred to in Article 6 of the Mandate Declaration in particular, were empowered to enact legal rules relative to the administration of the Territory (called "standards" by the Applicants) to which the Respondent was obliged to give effect. Secondly, the Applicants contended that, inasmuch as the Respondent was a Member of the United Nations Organization and the International Labour Organisation, it was not only bound by the constitutions of these institutions but also by "the authoritative interpretation thereof" by the organs of these institutions, and that, therefore, the provisions of the constitutions of these institutions, thus interpreted, constituted standards binding on the Respondent in its administration of South West Africa. The Applicants further contended that in any event the legal effect of the League resolution of 18 April 1946, which referred to Chapters XI, XII and XIII of the Charter, is that the Mandate "must be read in the light of the Charter".

(a) *The Supervisory Authority under Article 6*

34. It is of course basic to Applicants' argument regarding the alleged standard-creating competence of the supervisory authority that there still exists an authority vested with supervisory powers in respect of South West Africa as a mandated territory. In an earlier part of this opinion I expressed the view that Article 6 of the Mandate had lapsed on the dissolution of the League and that Respondent was no longer subject to any duty of accountability to any authority whatsoever. If this view is correct, it would by itself dispose of Applicants' con-

[1] It is idle to turn to other definitions of standards and norms. Applicants have given explicit definitions of the sense in which they use them. To adopt other definitions would be tantamount to changing the case the Respondent was called upon to meet.

tention with which I am dealing at present. The same result may, however, also be reached in different ways. In this regard the question arises whether any supervisory authority in respect of Mandates ever possessed competence to impose binding rules of conduct upon the Mandatory. To this enquiry I now turn.

(i) *The Council of the League*

35. I shall commence by first considering whether the supervisory organ referred to in Article 6 of the Mandate itself was clothed with competence to establish such legal rules. (It would appear that if the *specific* supervisory authority was not assigned such competence, the whole basis of the Applicants' further submission relative to the competence of the organized international community *in general* also collapses.)

What strikes one forcibly when examining the provisions of the Covenant and the mandate instrument, is that no express provision in support of Applicants' contentions is to be found therein. If it was indeed the intention of the authors of these instruments that the League Council would have the legislative powers now contended for by the Applicants they would have said so in clear and unmistakable terms. In those exceptional cases where a decision of the Council had a law-creating effect, i.e., could bind members of the League who had not assented thereto, explicit language was used. See, e.g., Articles 5 and 15 of the Covenant. In addition, all decisions relative to mandate administration required unanimity, and if indeed, as assumed by the Court in 1962, the Mandatory was given the right to vote where its Mandate was concerned (a matter to which I alluded above), no unanimity could be obtained without its co-operation. It follows that the Mandatory would then not have been bound by any resolutions not acceptable to it.

36. Be that as it may, an examination of the scheme set out in Article 22 of the Covenant by itself reveals the untenability of Applicants' contentions. Paragraph 2 states in terms that the "*best method*" of giving practical effect to the principle that the well-being and development of the peoples of the territories concerned form a sacred trust of civilization, is that the tutelage of such peoples *should be entrusted* to *advanced nations*, who by reason of their resources, their *experience*, or their geographical position could *best* undertake this *responsibility*. This tutelage was entrusted to certain countries as mandatories on behalf of the League: it was not entrusted to the League. The tutelage became the responsibility of the mandatory. In the case of South West Africa, paragraph 6 of Article 22 provided in express terms that it "can best be administered under the laws of the Mandatory as integral portions of its territory". The only qualification of this wide statement was that such administration was to be subject to the safeguards mentioned in the interests of the indigenous population, i.e., provisions relating to

freedom of conscience and religion, the slave trade, arms traffic, liquor traffic, military training of Natives, etc. If it was intended that the Council of the League could without the Respondent's concurrence prescribe the standards upon which the legislative measures applicable to the Territory should be based, the Respondent's legislative and administrative powers would hardly have been expressed in such wide and unqualified terms.

37. This conclusion is confirmed by the events which took place before and during the drafting of the Covenant. Earlier proposals that the League itself should be vested with complete authority and control and that it should be entitled to govern the territories which eventually became mandated territories by delegating its powers to States or "organized agencies", were abandoned, and the final outcome was that the League's functions were to be limited to examining the mandatories' annual reports with a view to ascertaining whether they had performed their duties, and to assist and advise them. *No right or duty was conferred upon the League to prescribe from time to time standards binding upon the mandatories in general, or upon any particular mandatory.*

The supervisory powers of the Council were accordingly stated in the following terms in Article 22, paragraph 7, of the Covenant: "In every case of Mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge." This can clearly not be read as providing that the Council was empowered to lay down legislatively (i.e., without the mandatory's consent) standards binding on the mandatory. It is true that, in terms of paragraph 8 of Article 22, the Council was authorized to define the degree of authority, control or administration to be exercised by the mandatory. But this power is not relevant to the present discussion since it was obviously intended to be exercised only once, i.e., for the purposes of framing the mandate instruments. That this is so, appears not only from the provisions in paragraph 8, which made the Council's function in this respect dependent on whether or not such degree of authority, etc., had not previously been agreed upon by the members of the League, but also from the mandate declarations themselves which in effect provided that the mandates would not be amended without the consent of the mandatory and the Council. Paragraph 9 of Article 22 provided for the creation of a "permanent Commission" which was to advise the Council on all matters relating to the "*observance*" of the mandates. If it was intended that the Council would have legislative powers in respect of the mandates, the functions of this expert commission would not have been confined to advising on the "*observance*" of the mandates, but would also have related to the enactment and amendment of standards from time to time.

38. An examination of the provisions of the Mandate Declaration leads to the same conclusion. This Declaration could not amend Article 22 of the Covenant, and must therefore always be read subject thereto.

Full power of legislation and administration, subject only to the provisions of the Mandate, was granted to the Respondent. No such power was vested in the Council of the League. The obligation to promote well-being and progress to the best of its ability, having regard to the resources available to it, was imposed on the Mandatory; and the Mandate provided that the Mandatory would have the discretionary powers required for the effective discharge of such an obligation. These powers were in no way fettered by an obligation to comply with standards imposed by the organs of the League.

It will be recalled that the Mandate was issued as a formal act of the League Council. If the Council had thought that it could lawfully prescribe standards from time to time it would not have been necessary to include the provisions of Articles 3 to 5 in the Mandate. The Council could then, if it so desired, have prescribed these provisions as standards, which it could have amended, repealed or added to from time to time without the Mandatory's consent.

39. The Hymans report—it was issued even prior to the completion of the Mandate Declarations—in dealing with the obligations falling upon the League of Nations under the terms of Article 22 of the Covenant, made no reference to a contemplation that the supervisory organs of the League would lay down binding standards of government upon the mandatories. On the contrary it stated, *inter alia*, that "the Mandatory will enjoy in my judgment a full exercise of sovereignty in so far as such exercise is consistent with the carrying out of the obligations in paragraphs 5 and 6". Under a section headed "*The extent of the League right of control*", one also finds no reference to this alleged legislative power. On the contrary it was emphasized that the Council's power was limited to ascertaining whether the mandatory had remained within the limits of its powers under Article 22 of the Covenant and the Mandate Declaration, and whether good use had been made of such powers.

40. The conclusion that the Council possessed no competence to lay down binding standards is confirmed by an examination of the view which the League organs themselves took of their powers. At no time did they claim the power to lay down general rules in the nature of the standards contended for by the Applicants. On the contrary, the generally accepted view of their functions was that they consisted of co-operation with the mandatories and of determining how far the principles of the Covenant and the mandates had been truly applied. See Quincy Wright, *Mandates Under the League of Nations*, 1930, page 197. Bentwich, page 116, states:

> "The Commission . . . has been at pains to make it clear that it is not concerned itself, and that the Council of the League is not concerned, with the administration of the Mandated territory, which is the exclusive function of the Mandatory power."

41. For the above reasons, I find that the Council had no power to

lay down binding standards for the administration of the mandates.

(ii) *The Permanent Mandates Commission*

42. I now proceed to examine a specific contention of the Applicants, namely that the Permanent Mandates Commission had established certain standards which are binding on the Respondent. They allege that these standards are reflected in pronouncements of general principles or were "developed through continuous application of general criteria to concrete factual situations". The truth is that the Mandates Commission had no legislative powers. Indeed, it possessed no independent powers at all. Its function was limited to advising the Council. It is true that an interpretation of the mandate by the Permanent Mandates Commission which was accepted by the Council became a precedent to which a prudent mandatory would have had due regard; but this is something quite different from saying that such a precedent became binding law which had to be applied by each and every mandatory, irrespective of its particular circumstances.

The nature of the twofold task of the Commission was contrasted by Quincy Wright as follows:

> "In supervising the mandates the Commission has felt obliged to limit its criticism by law. It does not censure the mandatory unless the latter's orders or their application are in definite conflict with the mandate or other authoritative text, but if such a conflict is reported by the Commission and the report is adopted by the Council the mandatory is bound to recognize it. It becomes an authoritative interpretation of the latter's obligations ...
>
> In co-operating with the mandatories, however, though the League's powers are more limited, the scope of its suggestions is infinitely wider. It has not considered itself limited by authoritative documents but has formulated standards of good administration from the widest sources, and suggested whatever practical steps it deems expedient to give them effect. Such suggestions, however, even when endorsed by the Council, never have more than the character of advice. The Mandatory is free to differ from them though if based on an adequate understanding of the situation he will do well to consider them."

It is true that the Commission laid down certain standards for its own guidance but these standards were standards in the ordinary sense of the word—not standards in the sense of legal rules. Quincy Wright states at page 220:

> "The Commission has found it necessary to establish certain standards for its own use on full realisation that these are in no sense binding but subject to modification by experience."

In any event, although the Mandates Commission on one occasion, and individual members thereof on a few occasions, appeared to have been critical of certain aspects of some of the Respondent's policies of differentiation, the over-all impression gained from a detailed study of the Mandatory's and the Commission's reports is not only that the general principles of the Respondent's policies were not objected to by the Commission, but that in basic and important respects they were actually approved of. However, the point that I wish to stress at the moment is that neither the Mandates Commission nor the Council of the League ever attempted to lay down any standards which purported to constitute legal rules binding on the mandatories. No doubt they would have been extremely surprised to hear it suggested that they possessed such powers.

(iii) *The General Assembly of the United Nations*

43. If the League organs could not lay down standards in the sense contended for by the Applicants, it follows that, even if the General Assembly of the United Nations has been substituted for those organs, it similarly has no such power. Indeed, as far as I am aware, it has never been suggested that the United Nations possesses wider powers in respect of the Mandate for South West Africa than those formerly held by the organs of the League.

Thus this Court in 1950 expressed the opinion that the United Nations had supervisory powers under the Mandate relative to the Respondent's administration of South West Africa, but held that the degree of supervision should not exceed that which applied under the mandates system, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. This was interpreted in 1955 by this Court (p. 72) "to relate to substantive supervision", and "to the *measure* and *means of supervision*", and meant that "the General Assembly should not adopt such methods of supervision or impose such conditions . . . as are inconsistent with the terms of the Mandate or with a proper degree of supervision measured by the *standards and the methods applied by the Council of the League*".

At page 74 of the 1955 Opinion it was repeated that the 1950 Opinion "must be interpreted as relating to substantive matters".

In 1956, in his separate opinion, Judge Winiarski said: "I believe that the maintenance of the previously existing situation constitutes the dominant theme of the Opinion and that the decisive test is to be found in what was formerly done" (p. 33).

Judge Klaestad in his separate opinion in 1955, at pages 87 and 88, stated expressly that decisions of the United Nations organs concerning reports and petitions relating to South West Africa have no binding force. It should be borne in mind that this statement was made on the assumption that the United Nations had succeeded to the powers of

the League relative to the Mandate. It also appears from the Opinion of the Court in 1955 that, on its view of the 1950 Opinion, the authority of the General Assembly to take decisions in respect of reports and petitions concerning South West Africa was derived from Article 10 of the Charter. *This section authorizes the General Assembly to make recommendations and nothing more.*

44. It is also significant that no legislative powers were given to the supervisory organs of the United Nations in respect of trust territories. See Kelson, *Law of the United Nations*, page 630. This also appears from Judge Lauterpacht's separate opinion in 1955, page 116.

Several examples are given in the aforesaid Opinion of States administering trust territories who asserted their right not to accept recommendations of the General Assembly or of the Trusteeship Council. It seems unlikely that the authors of the Charter would have granted lesser powers to the United Nations relative to trusteeship territories than had been held by the League relative to mandates—or that in the case of the one mandate not converted to trusteeship the United Nations should have greater powers than in respect of trusteeships.

(b) *The Charter of the United Nations and the Constitution of the International Labour Organisation*

45. The next contention to be considered is to the effect that by becoming a Member of the United Nations Organization and the International Labour Organisation, the Respondent as Mandatory became bound to give effect to the standards embodied in the constitutions of these Organizations as interpreted by their respective organs. As regards the United Nations Charter, Applicants relied mainly on Article 56 read with Article 55 *(c)*. Assuming that these Articles created legal rights and/or obligations (a matter which is not free from doubt) it seems clear to me that they do not contain the standards relied upon by Applicants. The combined effect of the two Articles (in respects relevant to the present enquiry) is that Members of the Organization pledge themselves to take joint and separate action in co-operation with the Organization to achieve universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. It is to be noted that these Articles deal with distinctions as to race, sex, language or religion only in one context, *viz.*, the context of "human rights and fundamental freedoms". At the same time the Charter does not purport to lay down or define these rights and freedoms, and, as is well known, subsequent attempts at drafting comprehensive and legally effective instruments for this purpose have not proved successful. In the result the whole concept of "human rights and fundamental freedoms" is as yet an undefined and uncertain one with no clear content. It is not, however, necessary

to consider this matter any further, since what *is* abundantly clear is that Articles 55 *(c)* and 56 cannot operate *beyond* the field of respect for, and observance of, "human rights and fundamental freedoms", whatever such concepts might mean. The Articles do not in terms deal with the subject of allotments of rights, burdens, privileges, etc., and they certainly do not, either in their wording or effect, prohibit all such allotments on the basis of race, sex, language, religion, group or class. That this is so, appears not only from the provisions of the Articles themselves, but from the Charter as a whole. Thus Article 73 of the Charter, dealing with "territories whose peoples have not yet attained a full measure of self-government", prescribes "due respect for the cultures of the *peoples concerned*" and that "due account should be taken of the political aspirations of *the peoples*" and that they should be assisted in the development of their "free political institutions according to the particular circumstances of each Territory *and its peoples* and *its varying stages of advancement*". Article 55 must be read with due regard to the provisions of Article 73 referred to above, and can accordingly not be interpreted to mean that a governing authority is prohibited from having regard to the political aspirations of different peoples inhabiting parts of the same territory, or to their varying stages of advancement, in selecting the criteria or measures to be adopted in promoting their well-being and social progress. On the contrary, Article 55 itself incorporates the principle of "self-determination of peoples" as one of its main objects.

46. Much the same situation exists with regard to the Constitution of the International Labour Organisation. The provision there relied upon (C.R. 65/34 at p. 57) was the following passage from the Declaration of Philadelphia which read:

> "... all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity ...".

Here again the wording does not support the existence of a general prohibition of the allotment of rights, burdens, privileges, etc., on the basis of group, class or race. And this conclusion is strengthened by the express sanctioning of such differential allotments, at least in certain spheres, in the following passage from the same instrument:

> "The Conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilised world."

This passage clearly indicates that the Declaration of Philadelphia

did not purport to establish, and cannot even be reconciled with a standard of the content relied upon by Applicants.

47. Possibly because they realized that the wording of these instruments did not support their thesis, Applicants relied mainly upon so-called "interpretations" of the instruments by the organs of the respective organizations. This was so particularly with reference to the United Nations Charter. Since the whole question of the weight and effect of resolutions and reports of agencies and organs of the United Nations has a wider relevance than purely with reference to so-called standards, it might be better to postpone a fuller discussion thereof to a later stage. At the present juncture I shall consequently confine myself to one aspect, *viz.*, that no such resolution or report could lawfully add to or subtract from the meaning of the Charter in such a way as to bind the Court, which must necessarily give its own interpretation of any texts relevant to its judgment. Indeed, in the case of the International Labour Organisation Constitution this principle was expressly laid down in the following words of Article 37:

> "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."

48. It is necessary to revert briefly at this stage to a matter already dealt with, *viz.*, the jurisdiction of the Court to entertain disputes regarding alleged violations of the standards and/or norm. I expressed the view earlier in this Opinion that the Court would have no such jurisdiction inasmuch as such as dispute would not be one "relating to the interpretation or the application of the provisions of the Mandate".

It will be recalled that Applicants sought to overcome their difficulties in this regard, *inter alia*, by arguing that the Mandate itself contained an implied provision empowering the supervisory authority to lay down standards binding upon the Mandatory. I have given my reasons for regarding this contention as untenable, but even if it were sound, it provides no basis upon which alleged violations of the Constitution of the International Labour Organisation or of pronouncements of its organs could become justiciable in terms of Article 7 (2) of the Mandate. It surely cannot be said that the International Labour Organisation is in any sense a supervisory authority in respect of mandates.

49. It may also be convenient at this stage to deal with the merits of a further contention advanced by the Applicants which relates mainly to the question of jurisdiction, to which reference was made earlier in this Opinion. The contention is that the provisions of the Charter referred to in the League resolution on 18 April 1946 must, by reason of such reference, be regarded as being *in pari materia* with Article 2

of the Mandate, and consequently relevant to its interpretation. Now as regards interpretation *stricto sensu*, i.e., the ascertainment of the meaning of a document, this contention is clearly untenable. I cannot see how the United Nations Charter, executed in 1945, could throw any light on the intentions of the authors of the Mandate, a document executed in 1920. What *is* possible, of course, is that the parties in 1946 could have agreed to attach a particular meaning to the earlier document, irrespective of what the intentions of the parties to such an earlier document might have been. It is clear, however, that the aforesaid resolution embodied no such agreement. It did no more than to note that Chapters XI, XII and XIII of the Charter embodied "principles" "corresponding" to those declared in Article 22 of the Covenant. It did not purport to attach an agreed meaning to the mandates, and, indeed, it could hardly do so with the blanket reference to Chapters XI, XII and XIII—Chapters which deal with classes of territories differing among themselves and from the mandated territories.

In passing it may be noted that this resolution, even if relevant in the sense contended for by Applicants, cannot serve to render applicable Articles 55 and 56 of the Charter, since these Articles are found in Chapter IX of the Charter, and not in Chapters XI, XII or XIII, which were the Chapters referred to in the resolution.

The Sources of the Alleged Norm

50. I now proceed to consider the Applicants' submission that the rule of non-discrimination or non-separation had ripened into a legal norm binding even upon sovereign States. I have already expressed my view that, even if such a norm were to have been created, this Court would not possess jurisdiction to determine disputes as to its observance. However, it may be as well also to consider the merits of Applicants' contentions in this regard.

Applicants contended that the norm had its origin in each or all of the sources of international law enumerated in Article 38 (1) of the Statute of this Court. I propose dealing with the various paragraphs of the Article in turn.

(a) *Article 38 (1)* (a)

51. The contention is that this paragraph, which authorizes this Court to apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting States, has relevance, inasmuch as "the provisions of the United Nations Charter and the Constitution of the International Labour Organisation as interpreted by these organizations respectively bind the Respondent".

In essence, therefore, the argument is the same as dealt with above in regard to standards. There I expressed the view, which is equally applicable in the present context, that the instruments concerned cannot

be interpreted to lay down the rule relied upon by Applicants, that the organs of the organizations do not have the power to lay down such a rule by way of "interpretation", and that in any event, this Court has no jurisdiction to determine disputes arising from alleged violations of these instruments.

At the later stage I will deal somewhat more fully with United Nations resolutions and reports and will give my reasons for concluding that these pronouncements in fact did not even purport to lay down rules or standards of the content relied upon by the Applicants.

(b) *Article 38 (1)* (b)

52. The next contention relies on the provisions of Article 38 (1) *(b)* and is to the effect that through the collective processes of the organized international community, including mainly the resolutions of the United Nations relative to discrimination, and particularly those condemning the policies pursued by the Respondent in South West Africa and in the Republic of South Africa, there has arisen a norm of customary international law of the content contended for by Applicants. In this connection Applicants did not contend that they could satisfy the traditional tests applied by this Court in determining the existence or otherwise of "international custom, as evidence of a general practice accepted as law"; and indeed, it is clear that they could not. Applicants did not even attempt to show any *practice* by States in accordance with the alleged norm, but relied on statements of States relating, not to the practice of those or other States, but to criticism of the Respondent's policies. More attention will be given to this topic later, but at present I would like to mention that Applicants did not even seek to show that such criticism was in some way related to the creation, or existence, of a norm with a content as relied upon by them.

Indeed, the evidence before the Court, with which I shall deal later, showed that the alleged norm played no role at all in the United Nations activities relied upon.

53. Evidence as to actual State practice in regard to differential allotments of rights, privileges, burdens, etc., was indeed presented to the Court, but by the Respondent. In this regard reference may be made particularly to Professor Possony, who, after a long and careful survey of official measures and methods throughout the world, concluded:

> "Mr. President, from what I have indicated to the Court with relation to the practice all over the world, there is no general observance of such a rule or norm."

Professor Possony's review and conclusion were not challenged and certainly not in the least shaken in cross-examination.

54. As I have said, Applicants did not seek to apply the traditional

rules regarding the generation of customary law. On the contrary Applicants' contention involved the novel proposition that the organs of the United Nations possessed some sort of legislative competence whereby they could bind a dissenting minority. It is clear from the provisions of the Charter that no such competence exists, and in my view it would be entirely wrong to import it under the guise of a novel and untenable interpretation of Article 38 (1) *(b)* of the Statute of this Court.

55. In an alternative contention the Applicants suggested that even if the Respondent's opposition to the attempted imposition of a norm may prevent the norm being binding on the Respondent as a sovereign State, such opposition has no relevance to applicability of the norm to South West Africa. This contention is in my view devoid of substance. The authorities are agreed that no treaty can apply to South West Africa without the Respondent's consent, and it follows that since acquiescence is a prerequisite to the creation of a new norm, it is the Respondent's acquiescence that is required in so far as South West Africa is concerned.

(c) *Article 38 (1)* (c)

56. The Applicants next invoked the provisions of Article 38 (1) *(c)* to justify their alleged norm, which they contended should be distilled from the general principles of law recognized by civilized nations. The first fallacy in this contention is that this subsection does not authorize the application of the laws of civilized nations, it limits the Court to "the general principles of law" of these nations. It certainly does not mean that by legislating on particular domestic matters a majority of civilized nations could compel a minority to introduce similar legislation. If, for example, every State but one were to enact a law prohibiting the manufacture of atomic weapons, or enforcing the enfranchisement of women, the remaining State would not be obliged to bring its laws into conformity with the rest. In any event, the evidence of Professor Possony, Professor van den Haag and Professor Manning proves that such a rule is not universally observed, and that laws and official practices to the contrary exist in a large number of States, including the Applicants'. The fact that neither of the Applicant States observes this alleged norm or standards in their respective countries indeed reveals the artificiality of their cases.

(d) *Article 38 (1)* (d)

57. Although the Applicants also purported to rely on the provisions of Article 38 (1) *(d)* as a source of their norm, they did not refer to a single judgment, opinion or author confirming the existence thereof.

Reports and Resolutions of United Nations Organs and Agencies

58. Since the first introduction of the alleged norm of non-discrimination or non-separation in the Reply, Applicants have relied heavily on reports and resolutions of United Nations organs and agencies. In their final argument these pronouncements indeed constituted the very basis of their case—they were the method whereby standards were said to be created, and provided the raw material for the attempted invocation of Article 38 (1) *(a)* and 38 (1) *(b)* of the Statute of the Court as providing the sources of the norm. For the reasons I have given, I find that these various pronouncements cannot in law create any rules of conduct binding upon Respondent. In addition, as I have noted, the United Nations reports and resolutions did not purport to apply or create any norm of the content relied upon by Applicants. I would, in concluding this part of my opinion, elaborate somewhat on this aspect, dealing particularly with the resolutions relating specifically to South Africa and South West Africa.

59. The detailed and uncontradicted evidence placed before this Court reveals that these resolutions were mainly the result of concerted action, by a large number of African States, assisted by many others, designed to bring about the immediate independence of South West Africa as a single unit to be governed by the indigenous peoples on the basis of universal adult franchise. Inasmuch as the Respondent's administration stands in the way of this objective, schemes were evolved in an attempt to have it terminated. Hence these proceedings, brought nominally by the Applicants only, but in fact by all these African States. As part of their campaign to achieve their aforesaid objective these States worked in close collaboration with certain so-called petitioners from South West Africa at the United Nations.

60. These petitioners have at all times asserted that they represent the Natives of South West Africa—assertions which were apparently generally believed at the United Nations. The uncontradicted evidence placed before us, however, reveals that their claims are false. Some of the organizations which some of them allegedly represent exist on paper only, and apart from the representatives of the Herero nation they do not represent the majority of any one of these Native groups. Even those who claim to represent the Herero nation do not always correctly represent the views of those people. Thus, whereas the Herero leaders in South West Africa apparently favour a system of regionalism whereby the Territory is to be divided on a federal basis between certain groups (but excluding the White group), some petitioners at the United Nations create the impression that what is desired by these people is that the Territory should be governed as a single unit.

A large number of petitions and statements by these petitioners,

containing numerous false and grossly distorted allegations relative to the Respondent's policies and practices in South West Africa, have been placed before the organs of the United Nations from time to time. The cumulative picture painted by them is one of oppression of the worst possible kind including genocide, slavery, concentration camps; that Respondent's policies were rooted in concepts of racial superiority and in racial hatred and animosity; that the best lands were being taken from Natives and given to White farmers, the Natives being driven to the desert or herded like animals; that education for the Natives either did not exist or merely prepared them for slavery; that there was large-scale militarization of the Territory and terrorization of the Natives, etc. Unfortunately these falsehoods were apparently accepted as true by a large number of States who voted in favour of the resolutions condemning Respondent's policies. Often these alleged acts were included in the term apartheid, and it seems clear that when Respondent's policies of apartheid were condemned it was in the belief that the petitions had painted a true picture. (One need merely have regard to the hundreds of false statements in the Applicants' Memorials—statements proved and admitted to be false—to appreciate the proportions of the technique that has been applied.) These resolutions patently did not purport to condemn Respondent's policies merely because rights, duties, status and privileges were allotted on the basis of membership of a group, class or race rather than on the basis of individual merit or capacity, as is sufficiently shown by the briefest reference to the relevant debates. It accordingly follows that there could not have been any intention of either creating, applying or confirming a norm or standards such as are contended for by the Applicants. Furthermore, even if these resolutions could for any purpose be regarded as laying down rules, their value is nil inasmuch as they are demonstrably based on untruths and gross distortions.

61. Even the resolutions dealing with the institution of these present proceedings against the Respondent did not mention this alleged norm or standards. The case to be brought against the Respondent was one of wilful oppression, and this was in truth the case originally stated against the Respondent in the Applications and the Memorials. As noted above, the case based on the breach of a norm or standards as defined by the Applicants first made its appearance, in the Applicants' Reply, and was embodied in the Applicants' submissions only shortly before their Agent closed his case. If the United Nations had intended to create, apply or confirm such a norm or standards it seems strange that the Members of the United Nations including Applicants were unaware thereof at all material times.

62. For all the reasons I have set out above, it is my view that this Court has no jurisdiction to entertain Applicants' case as now formulated, and that, in any event, it is unsound.

The Effect of the Alleged Norm or Standards

Introductory

1. I now proceed to consider what effect the application of the alleged norm or standards would have on the well-being and progress of the inhabitants of South West Africa. If, as the Respondent contends, the effect would be manifestly detrimental to all concerned, this would be an additional factor militating against the proposition that compliance with such a norm or standards forms part of Respondent's obligations under the Mandate.

My treatment of this subject will inevitably have to touch upon important and indeed fundamental aspects of Respondent's policies originally described by Applicants as unfair, arbitrary, unjust or wilfully oppressive, and therefore also upon certain of the items in Applicants' so-called catalogue. In the course of the discussion some light will be thrown on the question whether it would have been possible for Applicants to substantiate their original charges, had they attempted to do so. However, this would be merely incidental to my purpose, which is solely to consider the probable effect of the application of the suggested norm or standards [1].

The History of the Territory and Its Peoples

2. The effect of any policies applied or suggested for application in South West Africa cannot be appreciated without a thorough knowledge of the salient facts concerning the Territory, its history and its peoples.

It is not possible to deal with these matters in detail in this opinion but some reference to the more important facts seems unavoidable.

3. South West Africa is a vast territory of 317,727 square miles, but in 1920 its total population was probably less than 250,000. At present the population is just above 500,000. The Namib desert stretches along its entire coast-line and constitutes more than 15 per cent. of the total land area. The bulk of the rest is semi-desert and subject to severe periodical droughts. Only a relatively small area in the north-eastern part has a high rainfall. Large portions of the Territory were never occupied

[1] In view of the fundamental change in Applicants' case to which I have referred earlier, the original charges are no longer submitted to the Court for adjudication. It is therefore unnecessary to deal with them or to discuss systematically each and every measure of differentiation in the light of the original charges. As a result of Applicants' admission of all the facts set out in Respondent's pleadings, it seems that the original charges would have had to fail quite obviously in respect of Respondent's policies as a whole, and also quite obviously in respect of a considerable number of the specific measures referred to. In the case of any specific measures in respect of which such result might not be obvious, it would be impossible for the Court to adjudicate on the original charges with fairness and accuracy, inasmuch as the amendment of Applicants' submissions had the natural result that Respondent at the oral proceedings refrained from canvassing fully all the questions of fact which would have been relevant for such purpose.

by any of the indigenous groups. They had no means of sinking boreholes or building dams, and were accordingly confined to areas where water was naturally available. Their numbers were in any event so limited in some parts that there was no need to occupy large areas. In the circumstances, coupled with the effect of ravaging internal wars during the nineteenth and early twentieth centuries, considerable portions of the Territory were vacant lands when the Mandate commenced.

4. At the inception of the Mandate the inhabitants of the Territory consisted of at least nine major population groups, occupying, to a large extent, distinct portions of the Territory, and differing widely as to physical appearance, ethnic stock, culture, language and general level of development. These groups (and even some sub-divisions of these groups) have at all material times considered themselves to be, and were generally regarded as, separate peoples or national groups. The European or White group (mainly of German and South African origin) was by far the most advanced. The remaining groups were all non-White and were, with the exception of a few individuals, entirely illiterate and primitive. Constant warfare between some of these groups had resulted in indelible hatreds. The main non-White groups were:

(i) the Eastern Caprivi peoples;
(ii) the Okavango peoples;
(iii) the Ovambo;
(iv) the Bushmen;
(v) the Dama (also known as Bergdama or Bergdamara or Damara of the Hills or Klipkaffir);
(vi) the Nama (also known as Khoi or Hottentots);
(vii) the Herero (also known as Cattle Damara, or Damara of the Plains);
(viii) the Rehoboth Basters and the Coloured group.

Groups (iv) and (vi) are Khoisan (colour brown), No. (viii) are half-caste groups, mainly mixture between White and non-White (light coloured), and all the others are Negroid.

5. It is due entirely to circumstances over which they had no control that the members of these national groups came to be the subjects of a single mandate.

The northern areas (which were never under effective German control) resemble four different countries, *viz.*, the Kaokoveld, Ovamboland, the Okavango and the curious appendage known as the Eastern Caprivi. Each of them is inhabited, from historic times to this day, by its own people or peoples. The peoples of the Eastern Caprivi are ethnically related to those of Zambia and Bechuanaland. They have no ethnic relationship with any of the other peoples of South West Africa, have

never had anything in common with them, and are geographically separated from them by hitherto inaccessible swamps. Ovamboland is inhabited by a group of ethnically related tribes speaking, however, at least two different languages and various dialects. They form 45 per cent. of the total population of South West Africa. The Okavango and the Kaokoveld are each inhabited by smaller groups of ethnically related tribes. But whereas the Okavango group is ethnically linked with the Ovambo, the Kaokoveld group forms part of the Herero people, who immigrated from central Africa towards the end of the eighteenth century, and are ethnically, linguistically and in their social organization entirely distinct from all other groups or peoples in South West Africa.

6. Save for the Bushmen, who are in a sense dispersed all over the wilds of South West Africa, the other non-White groups live in various portions of the central and southern parts of the Territory—the parts which were patrolled by the German police and for that reason came to be known as the Police Zone. These groups include sections of the Herero, who were as from about 1830 engaged in almost continual warfare with various sections of the Nama, until the advent of German rule in the 1880s, and even thereafter. They include also the Bergdamara, yet another distinct Negroid group, who had arrived very early but were subsequently enslaved by the Nama and later also by the Herero, and who in course of time adopted the Nama language. The Rehoboth Basters arrived in the Territory from the Cape Province in about 1870 and settled in the Rehoboth Gebiet, where they governed themselves.

Wars by which the German régime was marred, shattered the tribal organizations and economics of the Herero and the Nama, and reduced their numbers by 1912 to less than 20,000 and less than 15,000 respectively. I refer later to efforts of the South African Government to restore their tribal organizations and to settle them, and also the Damara, in reserves or homelands.

7. Apart from the activities of a few explorers, missionaries, hunters, traders, etc., the advent of the White man to South West Africa was delayed until late in the nineteenth century.

In 1870 Walvis Bay and a small surrounding area became British territory. It became part of the Cape Province, and as such became part of the Union of South Africa. At present it is part of the Republic of South Africa but is administered as part of South West Africa.

The German reign over other portions of South West Africa commenced in 1884 and lasted till 1915.

During this period European soldiers, farmers, technicians, miners, traders and missionaries came to the central and southern portions of the Territory (the Police Zone) with the result that when the Mandate came into existence the White population was about 20,000. In 1913

White farmers owned 134,000 square miles of land, and in addition very large areas were held by companies owned by Whites. A modern economy was developed by the White population, resting mainly on diamond mining, and to some extent on livestock farming, though progress in the latter field had been limited. An extensive railway system was provided, which was during the First World War (after the conquest of the Territory) joined to that of South Africa. The revenue of the Territory, also largely dependent on the production of diamonds, was prior to the Mandate never sufficient to pay the costs of administration.

8. It seems obvious that it must have been realized by all concerned that in determining its policies relating to the administration of the Territory the Respondent would have due regard to the realities of the situation. These realities include the existence of the four distinct northern territories and peoples. The Respondent did not create these separate homelands, or the distinct nationalities living in them; they were there at all material times. In regard to the Police Zone the realities included the facts that the tribal economies of the Native peoples had been shattered, but that the Natives, undeveloped and illiterate, lacked the skills required for modern economic and administrative activities. They included also the under-populated state of the Police Zone, and the existence of the European population and the struggling modern economy established by it. The Territory, vast, mostly undeveloped, and poor, needed White leadership and initiative.

White immigrants were needed to maintain law and order, to manage and administer the mines, railways, harbours, hospitals and the civil service. Moreover, additional sources of income were desperately needed, and at that time the only practical way in which this could be obtained was through the introduction of more White capital, initiative and entrepreneurial skill. In particular the skill and initiative of progressive farmers were badly needed. The only role the Natives could initially play in the money economy was by providing unskilled labour.

Policies of differentiation such as, e.g., separate schools, separate residential areas, reserves for the different ethnic groups, influx control, etc., were applied by the Germans, and were being applied by the Respondent in the Territory at the time the Mandate came into existence. The vast differences between the different groups made this both natural and inevitable.

9. The way has now been paved for giving more specific consideration to some of the major aspects and implications of the policies and measures actually applied by Respondent after accepting the Mandate. I propose to do so under the sub-headings which follow.

White Immigration

10. As has been indicated above, the resources of the Territory at the commencement of the Mandate were inadequate to pay for its administration. Circumstances compelled the Respondent to concentrate upon development of the modern economy already operative inside the Police Zone in order to obtain funds for the development of the whole Territory. There was no alternative, if stagnation was to be avoided. As was stressed by Professor Krogh in his expert evidence before this Court, the Respondent only recently became a capital exporting country, and when the Mandate was conferred upon it there could have been no contemplation that it would be expected to provide funds on a substantial scale for the development of the Territory. Nor were any international funds available for the purpose. The character of the rather limited natural resources of the Police Zone, and the problems attached to economic development thereof, were such as to require modern technology and entrepreneurship far beyond the capabilities of the indigenous inhabitants, considering their under-developed state and the indications provided by their past records of achievement. Add to these circumstances the shattered condition of the tribal economies and the underpopulated state of the Police Zone, and a policy of White immigration will be seen to have been natural and almost inevitable.

11. Such a policy was certainly foreseen by the powers concerned. The British Prime Minister, Mr. Lloyd George, in introducing the Peace Treaty to the House of Commons on 3 July 1919, stated, *inter alia*:

> "There is no doubt at all that South West Africa will become an integral part of the Federation of South Africa. *It will be colonized by people from South Africa.* You could not have done anything else [1]." (Italics added).

12. In these circumstances White farmers were encouraged to settle in the Police Zone area, and most Crown land not required for Native reserves was sold to these immigrants. The result was that within the first years of the administration 4,885,000 hectares of land were allocated to White farmers.

Scientific attention was given to agricultural development and to overcoming the various problems set by the natural conditions: e.g., the provision of water, where possible, through the drilling of boreholes and through appropriate forms of storage; the combating of stock diseases through methods such as inoculation, dipping, quarantine measures, selective breeding, etc.; the establishment of worthwhile farming in the very arid southern parts, through development, by research and scientific breeding, of a specially adapted strain of Persian Lamb (Karakul), producing an exceptionally high-grade type of pelt, etc. And thus the basis was laid for the development of a more diversified economy, as came about after the Second World War, when the fishing

[1] Temperley, *History of the Peace Conference*, Vol. VI, p. 502.

industry was added (also through application of a high degree of technology) to the Territory's sources of production. All this naturally stimulated growth in commercial and professional activity, as well as in various minor forms of secondary industry, with the result of constant increases in the sources of revenue for the administration of the Territory and particularly for the upliftment and advancement of the indigenous peoples and the development of their homelands.

13. The fruits of the policy, particularly the benefits accruing to the non-White peoples, are spectacularly demonstrated by the extensive plans for further development as proposed by the Odendaal Commission and already in the course of implementation by the South African Government. But the fact is that no less important, though perhaps less spectacular, fruits and benefits have been enjoyed by the non-White peoples over all the years of progression to the present stage, as will appear in due course.

The achievement of the progress has taken time, having been delayed and set back through various factors such as the general economic depression of the early 1930s, exceptionally severe periodical droughts, the Second World War, etc. But it is generally accepted, significantly, that had it not been for the policy of encouraging White immigration and stimulating the growth of a modern farming industry, the Territory would have been reduced to irreparable bankruptcy during the world depression, when hardly any income was derived from mining.

14. The policy in question was applied with full knowledge of the organs of the League, who raised no objection thereto. And I may also refer to the confirmation yielded by two independent investigations, *viz.*, by the van Zyl Judicial Commission in 1936 and by Lord Hailey in 1946, of the soundness of, and virtually inevitable necessity for, the policy. (See quotations in Counter-Memorial, Book IV, pp. 420-421.)

Recognition of the Diversity in the Non-White Population

15. I have referred above to the diversity of non-White ethnic or national groups in the Territory; to the differences between them as regards language, culture, political, social and economic organization, ways of life and standards of development; and to the extent to which they traditionally lived as distinct national entities in separate portions of the Territory. These matters form part of the admitted facts of record. They may sound commonplace when merely referred to in terms of broad generality; but they were made to live by the more detailed descriptions and illustrations given by the expert witnesses, particularly Dr. Eiselen, Professor Bruwer, Professor Logan and Mr. Pepler, in their uncontested testimony.

16. That the various groups wish to maintain their separate identity and to develop as distinct national entities is not only another one of the admitted facts, but was demonstrated so clearly by the above wit-

nesses, particularly Professor Bruwer, who had made special investigations as a member of the Odendaal Commission, and also by Mr. Dahlmann, who described the futile attempts that had been made within the modern political movements with a view to crossing the ethnic barriers.

17. In the light of these realities it is small wonder that expert after expert stressed the positive values involved in the various cultures and group solidarities, and the importance of granting due recognition thereto in any attempts at promoting the well-being of the individuals comprising the groups.

South African experts emphasized these matters on the basis of thorough knowledge and experience gained in southern Africa itself, particularly in South Africa and in South West Africa. Their conclusions were very forcibly confirmed by experts from other parts of the world—i.e., by Professor Logan, on the basis of thorough field research in South West Africa itself, and by Professors Possony, van den Haag and Manning, on the basis of knowledge and experience gained by mankind all over the world. Particularly the last-mentioned witnesses gave examples of the tragic consequences that had resulted in so many instances, in all parts of the world, from overlooking the importance of such matters.

18. The above considerations show that also this aspect of the policies which have actually been pursued by the South African Government since the inception of the Mandate flowed naturally and almost inevitably from the facts with which it found itself confronted. It did not create the diversity or the sociological phenomena concerned; these matters existed as realities which required recognition if attempts at promotion of well-being and progress were to stand any chance of success at all.

Implications of White Immigration and Population Diversity

19. Respondent's policy of encouraging the pre-Mandate White community to remain in the Territory, and of encouraging White immigration, gave recognition to the White group as an established part of the population of South West Africa. This was entirely within the provisions and contemplation of the Mandate. Having remained and come at the special invitation of the Mandatory, with the concurrence of the international supervisory organs, and having admirably fulfilled its intended function of developing a modern economy in the Territory for the benefit of the whole population, the White group undoubtedly has a moral right to remain and to be treated with at least the same consideration as any other group. The implications of this aspect of the situation required to be recognized by the Mandatory from the very inception of the Mandate, while it was encouraging the people concerned to remain and to come, and while those people were settling about the task intended for them.

20. The implications were of considerable importance. For illustration I shall mention some that come readily to mind.

Had policies of separation and differentiation not been applied by the Respondent, the probability is that many of the White people who were already in the Territory would not have remained, and the badly needed immigrants would not have come. White technicians, professional people, farmers, miners, etc., would not have immigrated to the Territory unless they knew that their children would receive an education comparable to that obtainable elsewhere, and unless they could maintain their standard of living. There can be no doubt that cultural background and language problems would have made it completely impracticable to place White children and the children of the indigenous groups in the same schools. The evidence shows that where such differences exist both groups would suffer if they attended the same schools.

Without additional teachers the children of the immigrants could not be taught. Unless White teachers—and only White teachers were available—were offered remuneration commensurate with what they could earn elsewhere, their services could not have been obtained.

21. In all the above respects the circumstances and needs of the indigenous groups were vastly different. They were at a stage of development where it was necessary to begin to instil in them some realization of the desirability of having education at all, in the sense as known to Western civilization. The problem of their initial hostility and apathy towards education was aggravated by factors such as nomadic habits and scattered populations, the vastness of the Territory and its low density of population, the large number of languages, the poverty of the Territory, the shortage of teachers and the difficulties encountered in training suitable teachers.

The approach of educationalists—not only in regard to South West Africa, but generally in regard to the similar problems of African education everywhere—was that under such circumstances there were certain prerequisites before much progress along the lines of formal education could be expected. One of these was that mission societies should be encouraged to inculcate some appreciation of Christian and civilized principles and standards in the indigenous communities, and in connection therewith to foster some interest in education. Another was that wage-earning employment could in itself be regarded as an educational process, stimulating interest in formal education particularly because of the utilitarian values thereof. A further factor was that Native languages required study and development into written languages in order to serve the requirements of mother-tongue education, especially for the very young.

Due to the language factor and the shortage of teachers generally, it was inevitable that teachers in Native education would mainly have to be Natives. Training sufficient Native teachers to a satisfactory

level unavoidably took a long time. Furthermore, the absence of direct contributions of any substance by Native communities to the costs of education, and the struggle of the territorial economy for a long time to balance its budget, were factors which tended to limit the funds available for Native education. In the circumstances, and considering the vast differences in social and economic levels between the White community and the various Native communities, it would have been most inappropriate to insist on exact parity as between these communities, e.g., in the quality of school buildings or in salaries paid to teachers. Such a requirement would have introduced a further artificial and unnecessary retarding factor in the pursuit of the objective of bringing education as soon as possible to as large a number of Native children as possible, and the sufferers would have been the Native communities themselves. The comparisons, in order to be appropriate, should not be with levels in the White community, but with comparable things in the particular Native community (or other African communities). Thus the quality of school buildings should compare favourably with other buildings utilized by that particular community and to which it is accustomed. Teachers' salaries again should compare favourably with salaries, wages or income commanded by other members of the same community in comparable forms of employment or activity. As Dr. van Zyl pointed out, Native teachers often enjoy very valuable privileges, e.g., subsidized housing, not accorded to White teachers. The levels concerned could and should, of course, rise with time, as they have in fact done, considerably, up to the present. But this should be in keeping with the general advancement of the particular group, otherwise internal balances become disturbed.

22. In brief, the point is that with the advent of the White group the Native groups did not cease to be indigenous African communities, comparable with similar communities elsewhere. The mere fact that there was now a White community living beside them, did not mean that their needs and circumstances had come to be identical with those of the White community. On the contrary, this brief discussion with regard to education provides a very clear illustration of the vast differences, confronting the Mandatory, in the social and economic circumstances and standards of development of the White group, on the one hand, and the various indigenous groups on the other, of the resultant vast differences in their respective needs, and of the necessity to minister to each group in accordance with its particular needs. In other words, the discussion demonstrates how inevitable it was for the Mandatory to differentiate if it were to seek the well-being and progress of all concerned.

23. The same result emerges from a consideration of other aspects of life, of which I wish to mention very briefly the political and the economic spheres.

In the political sphere, the members of the White group were derived from countries in which they had been accustomed to share in the process of parliamentary self-government. Where they now formed a community with interests of its own in the Police Zone of South West Africa, it was a natural need on their part to enjoy a measure of such self-government within that Territory, on an appropriate, quasi-provincial basis, as was in fact extended to them in 1925. The Native groups had no tradition, experience or knowledge of parliamentary government, and at that stage no interest in it (as was the case throughout Africa). Each group (save for the Bushmen) had its own traditional political institutions, each with considerable intrinsic value. The need of each group was to have such institutions respected—and in the case of the southern groups restored—and to have them suitably developed and adapted in course of time, under the control and guidance of the Mandatory, in accordance with changed circumstances and with advancement within the group itself. Again this was exactly the purport of the policies applied by the Mandatory.

24. In the economic sphere the needs of the groups again differed substantially, and in many respects were diametrically opposed. This necessitated reciprocal protections in order to ensure what Professor Krogh so aptly described as "social peace", a factor which is obviously essential for economic progress.

The indigenous groups required certain fundamental protections against the capital, the know-how and the exploiting ability, of the White man engaged in private enterprise. This meant the reservation of homelands for their exclusive ownership, use and occupation—save in so far as a small number of White men might be required to assist them, for such time as might be necessary, in essential services. It meant also the reservation of preferential opportunities for them in commerce and industries within these homelands and even within Native towns in the White area. It meant control over recruitment of labour, labour contracts and conditions of service. Eventually it came to mean also legislation compelling employers of Native labour in the urban areas to combine with the local authorities and the central administration in the provision of fit and proper housing for their employees on a subsidized basis, in properly planned townships. In addition to such protections the indigenous groups needed assistance of varying kinds within their respective homelands, with a view to advancing and improving their subsistence economies and to transforming them gradually into money economies. Mr. Pepler in his testimony gave a very vivid description of the tremendous variation in the needs of the various groups in these respects, depending on their customs, their stages of development and their local circumstances; and he emphasized the necessity of adapting one's methods in each case to the needs and the peculiarities of the particular group.

Members of the White group engaged in entrepreneurial activities needed fairly obvious protections against vagrancy, trespassing and similar or attendant activities on the part of members of an underdeveloped Native population.

Others, required for employment in skilled or semi-skilled capacities, could only be attracted upon wages and conditions of employment keeping pace with those available elsewhere. The importance of competitive remuneration has been stressed by numerous authorities. It is not surprising that in certain limited fields of employment some of these employees demanded and were given special privileges, protecting them against the danger of eventual competition from members of non-White groups who might be offering their services at lower levels of remuneration.

Respondent's Land Policy

25. Basic to the implementation of the above policies has been Respondent's land policy, of which the main feature is the provision of separate areas of land for each of the population groups mentioned above. This policy was approved of by the Permanent Mandates Commission, which was—

> ". . . of opinion that the soundness of the views which have prompted the Administration to adopt a system of segregation of Natives in reserves will become increasingly apparent if there is no doubt that, in the future, the Administration will have at its disposal fertile land for the growing needs of the population and that the reserves will be enlarged in proportion to the progressive increase in the population".

The undisputed facts show that provision of sufficient land to the indigenous groups has indeed been the concern of the Mandatory, and that there has in course of time been extensive increases in the reservations in their favour, both outside and inside the Police Zone.

26. Outside the Police Zone large areas of land were unoccupied at the inception of the Mandate. This is not surprising if regard is had to the relatively small population of this vast area at the time and the fact that the Natives could not augment their water supplies by sinking boreholes and building dams. As the populations of the different groups increased substantial increases were made in the land reserved.

In Ovamboland the Natives at the inception of the Mandate occupied only about one-half of the area which was later proclaimed as a Native reserve for the Ovambo people. Similarly a very much larger area than the strip along the Okavango River, originally occupied by the Okavango tribes, has been reserved for this group. In the Kaokoveld the area originally set aside for the tribes of this region has been increased from 418,500 hectares to more than 5,500,000 hectares. In the Caprivi

500,000 hectares were added in 1939 to the area originally occupied by the Caprivians. An area of 350,433 hectares set aside in 1952 for Native occupation is to be added in part to Ovamboland and in part to the Okavango. There has been no reduction in the extent of land included in the reserves in the northern territories outside the Police Zone. On the contrary, these areas have been increased considerably as appears from what has been said above and as appears more fully from the review and tables provided in the Odendaal Commission Report of the availability of land in the various non-European home areas. (Report, pp. 67-71.)

27. Inside the Police Zone, as I have mentioned, the Herero and the Nama had shortly before the inception of the Mandate been reduced in numbers to less than 20,000 and less than 15,000 respectively. Tribal economies had been shattered, and in 1913 approximately 80 per cent. of the total non-White adult male population in the Police Zone were employed as wage-earners in the modern economy established by the White group.

In the case of the Herero, the German régime had confiscated all tribal lands and abolished all chieftainships, and had prohibited them from owning cattle. They were, after a century of warfare, dispersed over the Territory, and their traditional institutions, founded basically on the possession of cattle, were largely broken up.

The Nama were also largely dispersed, although some groups were permitted by the Germans to use defined pieces of land and to keep limited numbers of cattle.

The Damara were released from their bondage to the Herero and the Nama after the 1904-1907 wars. A Damara reserve was established at Okombahe, where some of them settled.

On the assumption of the Mandate Respondent found it desirable to restore, as far as possible the tribal life and social organizations of the various Native groups in the Police Zone. This policy was clearly in accordance with the wishes and best interests of the groups concerned, and nobody doubted its wisdom. For this reason it was considered necessary to establish reserves for the Herero, as well as the other groups, and to extend such reserves from time to time as circumstances might require. From the above-mentioned review in the Odendaal Commission Report, it will be seen that the reservations in favour of Native groups (i.e., excluding the Rehoboth Gebiet for the Basters, to which there have been no additions) were increased from a total of about 1 million hectares to a total of over 6 million.

28. The Odendaal Commission has recommended further very substantial increases in the Native reserves, both inside and outside the Police Zone, together with certain consolidations in the Police Zone. The proposals have been accepted in principle by the South African Government, and full implementation is awaiting the decision in this case. The over-all gain is about 50 per cent. (from 21,600,000 hectares to 32,600,000 hectares). In the Police Zone where more than 3,400,000 hectares presently owned or occupied by White persons are being

acquired for the purpose, the total increase will be more than 110 per cent.

29. The present land allocations involve that about 45 per cent. of the Territory's total land area is occupied by White farmers, whereas the reserves amount to about 27 per cent. This ratio, as well as the exact areas of allocation, has been the product of the historical and economic considerations dealt with earlier in this opinion. This situation is not intended to be a permanent one, as is shown by the Odendaal Commission's recommendations above referred to. The adjustments now proposed will make the total area of the reserves nearly as large as the area of White occupation. It must of course be borne in mind that the areas occupied by the Natives in the north have far superior possibilities for agriculture. Only 20 per cent. of the present European farming area receives an annual rainfall of 400 or more millimetres, which is the minimum for dry-land farming, whereas the figure for the non-White areas is 48 per cent. The area of the land in the latter areas, receiving an annual average rainfall exceeding 500 millimetres, is nearly two-and-a-half times larger than the corresponding White areas. The livestock-carrying capacity of the northern and north-eastern regions is eight or less hectares per large stock unit, whereas in the areas occupied by European farmers the capacity decreases progressively from north to south from nine to 45 hectares per large stock unit. Seventy per cent. of the total non-European population, and only 20 per cent. of the Whites, are to be found in the most favourable region.

It must further be borne in mind that because of the superior use made by the White group of the land available to it, and of the economic opportunities presented thereby, very large numbers of non-White persons in fact make a livelihood within the White area, either as wage-earners or in business or professional occupations. This is likely to be the case for a long time to come, whether such non-White persons will be living in their reserved homelands or in the White area.

30. It will also be recalled that Mr. Pepler informed the Court, on the basis of scientific surveys and assessments made by his department, that far more people and far more stock could be accommodated in the various existing reserves than are found there today and that the existing reserves plus the proposed extensions made ample provision for present population numbers purely as farmers, quite apart from the additional prospects offered in regard to the secondary sector of the economy.

31. Of course the carrying capacities of the reserves depend not only on their size and natural endowments, but also on improvements effected by man where possible. In this respect much has been done by

Respondent, with resultant substantial increases in the number and quality of the stock. The steps taken by Respondent included the development of water supplies by sinking hundreds of boreholes and wells and building dams, the combating of stock diseases, and the improvement of the quality of the stock by selective breeding and the introduction of well-bred bulls and rams.

The population is being guided to greater productivity by means of education and a gradual adaptation of their traditional economic practices and social institutions. Crop rotation and suitable crop varieties are introduced. Experts visit the reserves, and all advice is free. Breeding stock is sold to the inhabitants of the reserves at cost or even below cost.

32. The Odendaal Commission Report, and the South African Government's reaction thereto, envisage further large-scale improvement schemes in the non-White homelands, some of which are already well under way. Reference may be made to the Government White Paper on the Commission's recommendations, as reprinted in the Supplement to the Counter-Memorial, especially to the following:

(a) *Pages 12-13* (paragraph 7) regarding a large-scale water and electricity scheme for Ovamboland and various smaller schemes for other homelands;
(b) *Pages 13-15* (Paragraph 8, particularly sub-paragraphs *(a)* (ii) and *(b)*) regarding roads and air services;
(c) *Page 16* (paragraph 9 *(b)*) regarding mining;
(d) *Pages 16-17* (paragraph 10) regarding industries;
(e) *Page 17* (paragraph 11) regarding agriculture.

33. In regard to all additions and improvements to Native reserves, as dealt with above (paragraphs 26-32), it will be observed that they are part of the fruits that have been and are being enjoyed by the peoples in question from the Respondent's basic policy of stimulating a modern economy in the Police Zone through White enterprise.

One should bear in mind that, whereas members of the White group have to pay for their farms, all additions to the Native reserves (with the exception of one farm) have been on a gratuitous basis. By far the greatest amount spent on improvements in the Native reserves is derived from public monies, whereas European owners of private farms pay for their own improvements. The Natives pay no taxes other than to their Native trust funds, which are used exclusively for their benefit.

In times of drought every possible kind of assistance is given to the inhabitants of the reserves. All reasonable steps are taken to save stock losses and grazing is made available. Food is subsidized, and free issues

of food are supplied to the aged and incapacitated, to hospitals and to schools.

Progress and Development in the Application of Respondent's Policies

34. The period after the Second World War, particularly as from about 1950 until today, saw marked progress in and as a result of the application of Respondent's policies, and also certain adaptations in the policies themselves in the light of changed circumstances. I wish to devote very brief attention to these developments, in the political, economic and educational spheres, and in general.

35. In the political sphere, there is in operation in every Native homeland (except that of the Bushmen) a form of self-government practised with Respondent's encouragement and approval. The details differ from people to people, the important consideration being to allow to each people the system derived from its traditions. In some systems there are hereditary chiefs together with elected headmen, in others councils of elected headmen. Elections or appointments are made through traditional processes. Respondent, while retaining ultimate control and seeking to afford guidance to progress, interferes as little as possible either with elections or appointments or with acts of self-government.

In the light of awakened interest, in African communities generally, as regards national development towards self-determination or independence, it is Respondent's policy to utilize the traditional systems as a basis for further development and modernization, with the co-operation of the groups concerned, especially by the introduction of more democratic elements, and so to pave the way for each people to develop by evolution to a stage where it can determine its own future destiny.

The soundness of such an approach was fully endorsed by the Odendaal Commission, who made proposals for practical implementation thereof. The proposals noted above in regard to extension and consolidation of the various homelands, and their further economic development, are all, apart from their intrinsic merits, designed to contribute to the effective and fair implementation of the policy of separate freedoms.

Specifically in the political sphere the Commission recommended, in respect of each such territory, the establishment of a separate citizenship and general franchise, and a parliamentary system of government, combining elected representatives with the existing governing bodies. The proposals envisage a gradual taking over of powers from the South African Government, and a gradual Africanization of the civil service in each case.

The basic consideration is that each group, including the White

group, will govern itself only, and that domination of one group by another will be avoided. On reaching maturity each group may decide for itself whether it wishes to stand on its own legs or to enter into some political or economic or other ties with another group or groups. Possibilities are endless, but South African political leaders have indicated preference for a possible organization operating on the lines of a commonwealth or common market, i.e., on a basis of consent as between equals and not a basis of majority rule. This idea offers prospects for regional co-operation in southern Africa over an even wider area than the Republic and South West Africa.

36. In regard to the economic sphere, reference has already been made to the progress achieved in regard to development of the homelands, and to the further projects now under way.

As regards other aspects of economic well-being and progress, the evidence and admitted facts show that the earnings of Natives in the Territory compare favourably with all other comparable countries. It is also significant that Applicants had to concede that they were not alleging that the Respondent had not built enough houses, schools, roads, hospitals, irrigation schemes, etc.

Another noteworthy aspect of economic progress is that which has flowed from the policy of giving preference to members of a group in regard to economic opportunities within the homeland of that group, and to Natives in general within Native townships in the White area. These protected opportunities must be of enormous value. Just as the best land in Native homelands would soon pass into White ownership if that had not been forbidden by law, very few, if any, Natives could probably, as at the present stage, compete successfully with White men in regard to exploitation of commercial, industrial and professional opportunities within the homelands and townships. By the policy of protection and special encouragement, however, e.g., through the waiving of prescribed licence fees, the administration has succeeded in establishing hundreds of Native businessmen in their areas and townships; numerous teams of specially trained Native artisans are engaged upon the development and building projects under way in the homelands and townships; Native teachers in 1963 numbered over 1,200, and increasing numbers of Natives are employed by the Government in their own areas as inspectors, secretaries, clerks, etc.

37. In the sphere of education, marked progress was made in regard to Native education as from 1950 onwards. School enrolment figures more than doubled themselves between 1950 and 1962—from 22,659 at the earlier date to 47,088 at the later. In 1963 there was a further increase

to 49,297. The 1962 figure was estimated by the Odendaal Commission to represent about 46 per cent. of the over-all possible school population. The estimate for the present time is about 52 per cent. The Odendaal Commission recommendations set their target at an increase to 60 per cent. in all Native homelands by 1970. These attendance figures compare more than favourably with those in other African States. The 1960 figure (40 per cent. of the over-all possible school population) represented 9.2 per cent. of the total Native population in the Territory: the corresponding percentage for Ethiopia (in 1961) was 0.910 and for Liberia (also in 1961) 4.421. For the African States as a whole, the proportion of school-age population at school in 1961 was given by a United Nations publication as 16 per cent. In individual States the percentage ranged from less than 2 per cent. to "nearly 60 per cent." And "in the majority of cases, the proportion of children out of school exceeds 80 per cent." (Unesco/ED/180, p. 5.)

There is in South West Africa still an unsatisfactory falling off in attendance figures in higher standards, but the situation is improving. It may be expected to improve yet further upon implementation of the Odendaal proposals. These involve the taking over of Native education in South West Africa by the Bantu Education Department of the Republic, and the application by it of the methods of the Bantu education system which have been such a triumphant success in the Republic, as described to this Court by Dr. van Zyl in his evidence [1]. Further the proposals involve more advanced and greater numbers of schools, hostel facilities and facilities for the training of teachers. The Commission estimated that expenditure on the buildings alone would, in the case of the non-White groups, amount to R3,500,000 over the first five years.

38. In general the picture of South West Africa emerging from the admitted facts and the uncontested testimony is one of orderly, evolutionary progress, with the overwhelming majority of the inhabitants, White and non-White, manifesting their support for Respondent's policies in ever-increasing measure. In the case of the non-White peoples this was demonstrated, *inter alia*, by the enthusiasm evoked by a recent visit, at their own request, of leaders of a number of groups to the Republic of South Africa, in order to see developments in the Transkei and other

[1] The information he gave included the following: In 1964 nearly 2 million Bantu children were at school, being over 80 per cent. of the school-age population, and nearly 32,000 Bantu teachers, including school principals, were employed. There were at present 55 Bantu school inspectors and 170 Bantu assistant inspectors. At the end of 1965 about 1,300 Bantu candidates were expected to write the official school-leaving examination (Matriculation or Senior Certificate, the same as for White and Coloured persons) of whom about 800 were expected to pass. For the Junior Certificate (two years lower) the candidate figure was 12,000, of whom, 7,000 to 8,000 were expected to pass.

examples of application of the policy of separate development in the Republic.

Results of Applying the Alleged Norm or Standards

39. Against the background of what has been set out above, it seems self-evident that application of the suggested norm or standards in South West Africa is likely to prove disastrous, as was indeed emphatically stated in evidence by one expert after another.

40. In the political sphere which is largely the key to well-being in all spheres, application of the norm or standards would mean that Respondent is obliged to treat the Territory as an integrated unit, to be governed by a central parliament elected on the basis of a system that will ultimately be one man one vote.

Mr. Cillie in his evidence pointed out that this would mean domination by the Ovambos, forming 45 per cent. of the population, or by ruthless men exploiting their numerical preponderance; the domination would mean submergence of the most developed minority groups—the White, the Coloured and the Rehoboth groups—as well as the least developed ones—the Bushmen and the tribes of the Kaokoveld.

> "It means to these people, as it means to the Whites, that they are being forced to commit a form of national suicide, and that prospect evokes all the forces of resistance that you would expect in any nation in similar circumstances." (C.R. 65/61, p. 101.)

Later he said pointedly: "It would mean chaos" (C.R. 65/61, p. 146).

One need merely have regard to chaotic conditions existing or developing in numerous African countries, where several relatively underdeveloped nations constitute one political State, to realize that if the Applicants' policy is applied under present circumstances the inevitable result would indeed be retrogression and chaos. The sad histories of numerous African States, e.g., the former Trust Territory Ruanda-Urundi (now Rwanda and Burundi), the former French Cameroons, Algeria, Ghana, the Congo, the Sudan, Kenya, Zanzibar, Togo, Nigeria, the Central African Federation of the Rhodesias and Nyasaland, and other States—such as Cyprus—speak for themselves.

When universal franchise is introduced into a fairly homogeneous society there is a reasonable prospect of success, even where the general standard of development of the electorate is fairly low. But when various national groups differing widely as to physical appearance, ethnic stock, culture, language, and standards of development are being integrated into the same political system, failure seems to be inevitable. The tensions, uncertainties and disharmonies which arise from attempts at assimilation of peoples with gross dissimilarities are strong enough

to doom to failure any schemes that the ingenuity of man may devise.

One should bear in mind that these separate groups existed at all material times. The Respondent did not create them. There is no justification for forcing people to live together who have no desire to live together, when it is possible to avoid it. There is no justification for forcing different communities to be dissolved into one integrated political unit, when they are opposed thereto, and when one knows that retrogression, chaos and suffering will result therefrom.

41. In the economic sphere, the first important consideration is the effect that would come from application of the norm or standards in the political sphere. The White group would either depart or be drawn into endless strife, possibly hostilities. Either event would either collapse or cripple the economy.

But application of the norm or standards in the economic sphere itself would directly bring about similar results. It would mean doing away with the various reciprocal protections, and with the special advantages, to which I have referred above. The effects, especially for the indigenous groups, seem obvious.

I quote Professor Krogh:

> ". . . under the circumstances I have sketched to you, and bearing in mind these diverse social and economic conditions in South West Africa, I have little doubt in saying that it would lead to the rapid deterioration of the material and economic welfare of the majority of the population, and by this I particularly refer to the non-White population groups. I can also see that they will not tolerate this and that this might very well lead to social strife, that would in fact arrest the economic development of South West Africa, which I think is an exceptional example in Africa . . ." (C.R. 65/65, pp. 44-45.)

He was strongly supported by others. Professor Logan's diagnosis of the effects of removal of the controls included "the subjugation or almost obliteration of some of the existing tribal groups", also "violent antagonism and frequently . . . warfare". He expected that "the economy . . . would, to a large extent fall apart" and that "a rather chaotic situation would develop" (C.R. 65/58, pp. 46-47). And Mr. Pepler predicted: ". . . it will be a very tragic day for the Native peoples" (C.R. 65/69, p. 62).

42. In the educational sphere, Dr. van Zyl and Professor Eiselen, who are undoubtedly experts in this field, described to the Court the advantages of the system of differentiation. They demonstrated that where a school for a particular community is governed by the community, the interest of the community in the school and in education is stimulated. They described the advantages of mother-tongue as a medium of in-

struction. It seems clear beyond any doubt that today it is generally accepted that this method of teaching is the best. Dr. van Zyl emphasized that the vernacular was of the utmost importance in bridging the gap between the home and the school and that it led to parents displaying a greater interest in the education of their children. In his opinion the use of the mother-tongue was the best way to ensure that pupils understood what they were being taught. Furthermore it promoted original thinking. Experiments had shown that pupils taught through the medium of their own language performed better at school, in all subjects, than pupils who were taught through a foreign medium.

If a system of joint schooling were introduced, mother-tongue instruction would become impossible, and all the advantages attached thereto, and to the system as a whole, would be lost. In any event it is common cause that had such a system been attempted it would have failed. The undisputed evidence is that by having the present system the Respondent is acting in accordance with the wishes of the vast majority of the population of the Territory.

Dr. van Zyl's conclusion was:

> "The differences among the population groups in background, language, tradition and culture are so big that the people do not mix socially, with the result that integrated schools are almost inconceivable. From what I know of the people, there cannot be peaceful integration in the field of education and any attempt to enforce integration will cause the collapse of the educational services."

43. On the admitted and uncontroverted facts the above conclusions are so indisputable that it is small wonder that Applicants' Agent, towards the end of the proceedings, refrained from an attempt at contesting them. Instead he attempted to evade them by suggesting that they were not directed at the contents, properly understood, of the norm or standards on which he was relying. He became inconsistent on the question whether the norm or standards did involve one integrated political system with universal adult suffrage, but in the end he conceded that such was the "target for achievement". In the economic sphere he seemed to suggest that protective and preferential measures in favour of the non-White groups were permissible, but that such measures in favour of the White group were *per se* impermissible as constituting "racial discrimination", a concept which he did not attempt to define. Nor did he attempt to explain how such a distinction could be said to be contained in the norm or standards as formally defined and incorporated in Applicants' amended submissions, or to relate to any of the alleged sources of the norm or standards. In regard to education he avoided the question of integrated schools, contenting him-

self with a somewhat obscure subtlety about compulsory education.

All I need say about these manoeuvres is that they are not attractive, either as to their merit or their timing, and that they do not advance the Applicants' cause: they have rather the opposite effect. The case is concerned with a norm or standards as set out in the definition formally incorporated in the amended submissions. The case cannot now be considered as if it were concerned with something else. The attempt to do so appears to be an acknowledgement that the norm or standards, as contemplated in the amended submissions have been shown to be non-existent.

44. These considerations lead to the inevitable conclusion that there was not only no need for the creation of the alleged norm or standards, but that, had they been applied in South West Africa, the purpose of the Mandate would have been defeated.

Conclusion

45. In all these circumstances there can be no doubt that the alleged norm or standards do not exist and in any event do not apply to Article 2 (2) of the Mandate Declaration for South West Africa.

Article 2 (1) of the Mandate
(Applicants' Submission No. 5)

1. Applicants' Final Submission No. 5, as amended on 19 May 1965, reads as follows:

> "5. Respondent, by word and by action, has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of Respondent's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that Respondent has the duty forthwith to cease such action and refrain from similar action in the future; and that Respondent has the duty to accord full faith and respect to the international status of the Territory."

It will be observed that the submission, on its own, is completely vague, inasmuch as the "word" and "action" relied upon are not identified at all. The only possible clue to identification is to be found in the preamble to all the submissions, which contains the words "upon the basis of allegations of fact, and the statements of law set forth in the written pleadings and oral proceedings herein". These words are also very wide and vague. They raise the problem of selecting from the voluminous pleadings and records of the oral proceedings that which was intended to be relied upon as constituting the "word" and the "action" spoken of in the submissions.

2. In the original version of this submission, as set out in the Memorials, the words "by word and by action" were followed immediately by the words "in the respects set forth in Chapter VIII of this Memorial". Those "respects" were easily identifiable. They consisted of four enumerated official actions plus an alleged motive or intent on Respondent's part to incorporate the Territory of South West Africa unilaterally into the Union (now Republic) of South Africa. The contention was that the four actions, read in the light of the alleged intent, constituted the alleged violation of the obligations in question (Memorials, p. 195).

In view of the fact that the final submission no longer contains a specific reference to these "respects set forth in Chapter VIII of [the] Memorial[s]", the question arises whether they were intended to form part of the final submission. For reasons which I shall indicate later, I am satisfied that, on a true analysis of events during the oral proceedings, this question is to be answered in the negative and that Applicants have indeed, for understandable reasons, abandoned reliance upon the said actions and the said alleged intent. However, I do not wish to confine myself to that conclusion for disposing of the said actions and alleged intent as suggested grounds for acceding to the submission. As a matter of merit they clearly do not, in my opinion, support the submission, for reasons which I proceed to state briefly.

3. The four actions relied upon in the Memorials were:

(a) "General conferral" of South African citizenship upon inhabitants of South West Africa.
(b) Inclusion of representatives from South West Africa in the South African parliament.
(c) Administrative separation of the Eastern Caprivi Zipfel from the rest of South West Africa.
(d) The vesting of South West Africa Native Reserve Land in the South African Native Trust, and the transfer of administration of Native affairs to the South African Minister of Bantu Administration and Development.

In my view it is unquestionable that these administrative and legislative provisions *prima facie* did not go beyond an exercise of the "full power of administration and legislation" vested in Respondent, including the right to administer the Territory "as an integral portion of the Union of South Africa". And this is probably the reason why the original submission relied, as indicated above, on Respondent's alleged motive or intent as rendering illegal actions which might otherwise be unobjectionable [1].

[1] Note the formulation of the conclusion at page 195 of the Memorials: "By the aforegoing actions, read in the light of the Union's avowed intent, the Union has violated, and is violating ..." (Italics added.) *(Footnote continued overleaf.)*

4. A question of primary importance is therefore whether the alleged motive or intent was established as a fact. It can hardly be doubted that the answer is in the negative.

In the first instance, this point is really disposed of by Applicants' admissions of fact to which I referred when dealing with Submissions Nos. 3 and 4. These admissions related also to disputed facts concerned with Submission No. 5. Indeed, that the admission was intended to embrace also such facts, appears clearly from a statement by Applicants' Agent in which he referred to—

> ". . . the facts with respect both to militarization and annexation, as disputed by the Respondent, and as subsequently accepted by the Applicants for purposes of these proceedings".

Respondent had, in its pleadings, drawn very sharp issue with the allegation of an intent or purpose or motive to incorporate the Territory. It directly denied the existence of such an intent, etc., and, indeed, expressed an intention of continuing to administer the Territory as if the sacred trust provisions of the Mandate were still in force. Detailed expositions and analyses of fact were offered in support of the denial.

In my view there can be no doubt that the issue thus drawn was one of fact. In the oft-quoted words of Bowen, L.J.: "The state of a man's mind is as much a fact as the state of his digestion." (*Edgington* v. *Fitzmaurice* (1885), 29 Ch.D. 459 at p. 483.) It seems clear therefore that Applicants' admissions would on ordinary principles have embraced also this dispute.

However, it is not necessary to speculate, since Applicants themselves rendered it abundantly clear that they regarded Respondent's state of mind as a fact, and that they must therefore have intended Respondent's version of this fact to fall within the compass of their admissions. This may be illustrated by two quotations. On 27 April, Applicants' Agent referred to:

> "Respondent's apparent misconception that any of the Applicants' reasons, or arguments, reflect their assumption that state of mind, motive or purpose is something other than a fact."

In reply to this "misconception" the learned Agent then continued:

> "Many situations of course are known to the law in which motive, or intent, is not merely a relevant fact but, indeed, may be a decisive one . . . Further discussion of so elementary a matter as to whether motive, or state of mind, is a fact, and provable as such, would be a waste of the Court's time."

Note also the sentence at page 186: "Motive is an important indicator since it sheds light upon the significance of individual actions, which might otherwise seem ambiguous."

On 18 May, i.e., the second last day of Applicants' argument, their Agent confirmed this attitude. He is recorded as saying—

> "... the subjective analysis is, as the Respondent has properly pointed out, one which is susceptible of factual determination; as the Respondent has said repeatedly, it is possible for courts to ascertain states of mind; facts are determinable in terms of states of mind. In certain types of legal problems—delicts, crimes—the state of mind is indeed the crucially relevant fact that determines the character of the crime. Therefore there is no question but that a state of mind is determinable as a fact. However, as applied to the objective of the Mandate, the state of mind with which the Respondent approaches its task, *while a fact*, nevertheless does not appear to the Applicants to be a fact which is determinative of the purposes of the Mandate itself ..."

This last quotation confirms again that the very purpose of the admissions was to avoid the further evidential enquiry that might have been necessary had the dispute, *inter alia*, as to intent, persisted.

5. However, even if there may be any doubt as to the intended ambit of Applicants' admissions in the above respect, it is abundantly clear from the record that no question of any improper state of mind on Respondent's part could in any event have remained once the more tangible facts set out by Respondent were accepted as true. Respondent's expositions included a whole chapter of relevant statements and facts that had not been mentioned in the Memorials, some not in this context and some not at all (see Book VIII of the Counter-Memorial, section C, Chapter II, pp. 94-105). They included also evidence as to actual benefits received by the inhabitants from the measures complained of (*ibid.*, Chapters IV-VII, pp. 114-156; Rejoinder, Vol. II, pp. 454-457). All of this material requires to be considered before any inference as to state of mind can be drawn. And upon such consideration there remains not even a suspicion that Respondent might be embued with the intent or motive to incorporate South West Africa unilaterally into the Republic and that consequently its repeated denials of such an intent or motive are to be disbelieved. On the contrary, to mention only one consideration, in the light of the admitted fact that Respondent is pursuing a policy aimed at separate self-determination for the various population groups of South West Africa, it is difficult to see what practical purpose could, from Respondent's point of view, be served by an interim attempt at interim incorporation of the Territory into the Republic.

6. The firm conclusion from the admissions and the eventually undisputed facts is therefore that Respondent was not motivated by, and indeed did not have, any intention or motive to annex or incorporate the Territory, and that the measures complained of were not only intended for the benefit of the inhabitants of the Territory, but, in fact, operated to their benefit.

This being so, Applicants' case as originally presented became insupportable. As I have said earlier, the acts complained of fell *prima facie* within the ambit of Respondent's powers of legislation and administration. If it is admitted or established that these acts were intended to promote the well-being of the inhabitants and did so in fact, it seems to me that Respondent cannot be held to have acted illegally in any respect.

7. A contention to the contrary was advanced by Applicants for the first time in their Reply (p. 357), on an alternative basis. The submission was that the acts referred to in the Memorials constituted "*ipso facto*, and without regard to Respondent's motive or purpose, *a violation of Respondent's obligation to respect the separate international status of the Territory*". Before dealing with issues raised by this contention, I would point out that even if it were correct, the effect of Applicants' above-mentioned admissions would at least be to reduce their complaints to insignificant technicalities of which it may rightly be said that *de minimis non curat lex*. As an illustration of what I have in mind, I may refer to Applicants' complaint regarding the general conferment of South African citizenship on the inhabitants of the Territory. If such conferment were shown to have been a step in a deliberate scheme of piecemeal incorporation involving also an obstacle to the political advancement of the inhabitants of the Territory, it would have been a serious matter and would certainly have been regarded as such by this Court. However, once it is accepted, as it now is, that no such scheme exists and that the measure was introduced for the advantage of the inhabitants, who have, as a fact, received only benefit and no detriment whatsoever therefrom (and particularly no detriment to their political advancement or detriment to the international status of the Territory) I cannot see what the practical significance would be of a finding that technically it was wrong of Respondent to introduce such a measure. This is, however, in passing—my own view is that the suggestion of a *per se* violation of the Territory's international status is not only immaterial from a practical point of view, but also untenable in law, as I shall show more particularly in respect of each of the actions in question.

8. The first of the four actions was termed in the Memorials "the general conferral of Union citizenship upon the inhabitants of the Territory". The relevant measure in this regard was Act 44 of 1949 which had the effect of extending South African citizenship to all persons born in South West Africa after a certain date. There does not appear to be any prohibition on such conferment in the Mandate, as indeed the express authorization to administer the Territory "as an integral portion of the Union of South Africa" and to "apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require" would, in my view, suggest that it would be permissible if properly done for the benefit of the inhabitants and not for an ulterior purpose.

9. Applicants, indeed, did not base their case in this regard on an interpretation of the provisions of the Mandate. On the contrary, they relied solely on the terms of a resolution of the Council of the League of Nations dated 23 April 1923. It is clear that any resolution of the League Council relating to the legal effect of the mandates is entitled to great weight. On the other hand it must not be forgotten that the Council did not possess legislative competence. All obligations sought to be imposed on the Mandatory must in the final analysis rest upon the provisions of the Mandate.

10. Turning now to the terms of the Council resolution, I would point out that it does not appear to oppose the introduction of joint nationality as such—indeed it specifically authorized voluntary nationalization of individual inhabitants of mandated territories by the mandatory power. The Council's main concern appears to have been rather that inhabitants of mandated territories should not be completely *assimilated* with the population of the mandatory power. "Assimilation" was the crucial matter dealt with in the report of Marquis Theodoli which formed the basis of discussions in the Permanent Mandates Commission (Reply, p. 359). The same concept, although not by that name, was the burden of the Commission's proposal No. III and the reasoning in support of it (Counter-Memorial, Book VIII, p. 115) and also of the opening paragraph of the Council's resolution, which reads:

> "The status of the Native inhabitants of a Mandated territory is distinct from that of the nationals of the mandatory Power and cannot be identified therewith by any process having general application." (Counter-Memorial, Book VIII, p. 116.)

If this is the correct interpretation of the resolution, it would in my view not be transgressed by general nationalization by the mandatory of the inhabitants of the mandated territory unless such inhabitants thereby lost their separate status. In my view, Act 44 of 1949 did not result in any such loss. It did not purport to abolish or reduce the rights of the Native inhabitants of the Territory; their status as inhabitants of a mandated territory remained and is not shared by the inhabitants of South Africa. Repeal of Act 44 of 1949 would not add anything to the rights of inhabitants of the Territory.

11. If I am wrong in my above-stated view, and if the Council resolution should be read as intending to impose an absolute prohibition on the general nationalization of the inhabitants of mandated territories, irrespective of whether such inhabitants thereby lost their separate status or not, I regret to say that I do not regard it as a correct statement of the legal position. In my view no such provision was expressed, or can be implied in the Mandate. On either view of the meaning of the Council resolution I accordingly find that Act 44 of 1949 does not *per se* constitute a violation of the separate international status of South West Africa.

12. The second action raised in the Memorials, was the inclusion in terms of Act 23 of 1949 of representatives from South West Africa in the South African Parliament. In the Memorials the objection taken to this measure was stated to be that it—

> ". . . is not only part of a plan to incorporate the Territory politically, but also excludes 'natives' from the processes of self-government". (Memorials, p. 193.)

The "plan to incorporate the Territory politically" has fallen by the wayside and no more need be said about it. As regards the so-called exclusion of the Natives from the processes of self-government, the Applicants appear to have identified themselves with criticism in a report by the Committee on South West Africa to the effect that "the existing arrangements . . . have excluded either the consultation or the representation of the largest section of the population . . .".

It will become apparent that charges or comment to this effect extend beyond the *per se* effect of the legislation, and necessitate enquiry into the whole political framework of which the legislation forms part. Expositions on this subject were given by Respondent in its pleading relative to Applicants' Submissions Nos. 3 and 4, and the facts thus presented were eventually accepted as true by the Applicants. These facts were further supplemented in uncontroverted testimony of expert witnesses. From these admitted facts it appeared clearly that the above-quoted comments of the Applicants and of the Committee on South West Africa were not justified. The mere absence of representation of non-White groups in the political institutions designed solely for the White group, does not mean that the non-White groups are excluded either from consultation or from processes of self-government. The fact is that Respondent's system, with a view to the best interests of all the population groups concerned, makes distinct and separate provision for the consultation, self-government and political development of each group, in a manner best suited to the needs and circumstances of each group. Once this is accepted, and acceptance, in my view, follows inevitably from the Applicants' admission, the averments and comment under discussion will be seen to be unfounded.

It has also been suggested that the arrangements operate to the detriment of the non-Whites, inasmuch as the interests of the White part of the population are likely to be better served, e.g., if it came to a partition of the Territory. This suggestion extends even further beyond a case resting on the *per se* aspects of the particular legislation. Indeed, a moment's reflection will show that it is completely out of place in the present context. A complaint that the political institutions of the White section of the population are more effective than those of other sections

would not appear to have any relevance to alleged violations of the separate international status of the Territory, with which I am dealing at present. It could have a bearing, if at all, only on that part of the case dealing with the alleged failure on the part of Respondent to promote well-being and progress in the political sphere, i.e., Applicants' Submissions Nos. 3 and 4. As I have shown when dealing with these submissions, Applicants no longer attempt to establish a case on the basis of unfairness towards, or oppression of, the non-European population of the Territory, and could in any event in my view not have succeeded with such case. Had the suggestion under discussion been advanced in the pleadings as an averment in support of any of their submissions, and persisted in during the oral proceedings, there would doubtlessly have been much closer investigation into the relative effectiveness of the arrangements for the White group and of those for the non-White groups. In such an investigation due regard would have had to be paid to the fact that the whole system is a developing, evolutionary one, and that, as Mr. Cillie stressed in his evidence—

> "... as political organs and economic and social institutions develop among the various non-White peoples ... Less and less it is going to be in Southern Africa a matter of unilateral decisions and arrangements. It stands to reason that, as children grow up and develop a will of their own, their wishes have to be taken into account in the affairs of the family and that is what we are driving at."

In the circumstances I need to say nothing further about the suggestion here.

13. All that remains then is the question whether the representation of inhabitants of South West Africa in the South African Parliament is indeed *per se* an infringement of the Mandate, and, in particular, of the separate international status of the Territory. As I have said before, Article 22 of the Covenant and the mandate instrument authorized the administration of the Territory as an integral part of South Africa. There is no express provision precluding the Respondent from allowing representatives from South West Africa in its Parliament, and there is no justification for reading an implied term to this effect into either of these instruments. Such a term cannot be said to be necessary in the sense that one can confidently say that had it been raised at the time the parties would have conceded that it fell within the ambit of their agreement. On the contrary, the addition of such a term would constitute a radical alteration of the provisions of the Mandate and the Covenant.

Moreover, the conduct of the parties at the time of the drafting of the Covenant and at all material times thereafter, confirm that there could not have existed any common intention of precluding the Respondent from allowing representatives of South West Africa in its Parliament.

When introducing the Peace Treaty in the House of Commons on 3 July 1919, Lloyd George emphasized that "South West Africa will become part of the Federation of South Africa".

14. In 1923 General Smuts informed the Permanent Mandates Commission of the probability that the White inhabitants of the Territory would be given representation in the Respondent's Parliament. If any State thought that such representation in Respondent's Parliament impeded "opportunity of self-determination" or was "inconsistent with the international status of the territory" a voice of protest should and would have been heard.

15. In later years the representation of South West Africa in the South African Parliament was raised before and discussed in the United Nations on a number of occasions. At all times the United Nations contained a larger number of Members who had also been foundation Members of the League. It is significant, therefore, that none of them expressed the view that the Covenant or the Mandate precluded the Respondent from allowing representatives elected by voters in South West Africa in its Parliament.

Thus, on 11 April 1947, the House of Assembly of Respondent's Parliament adopted a resolution reading, *inter alia*, as follows:

> "Therefore this House is of opinion that the territory should be represented in the parliament of the Union as an integral portion thereof, and requests the Government to introduce legislation, after consultation with the inhabitants of the territory providing for its representation in the Union Parliament . . ."

This resolution was brought to the attention of the Secretary-General of the United Nations by letter in 1947, and in this communication it was also stated that Respondent would maintain the status quo and would continue to administer the Territory in the spirit of the Mandate. Nobody expressed a view that this undertaking was inconsistent with the resolution. When the Respondent's representative expressed the view in the General Assembly of the United Nations in 1947 that such representation in Respondent's Parliament was not the same as incorporation and would not constitute a violation of any provision of the Mandate, not a single State challenged the soundness of this statement. In 1948 the Respondent's representative in the Fourth Committee explained the provision of the proposed legislation whereby the Territory would be represented in the Respondent's Parliament, and again emphasized that the proposed arrangement would not constitute incorporation, and again nobody suggested that such representation would be inconsistent with the international status of the Territory or would in any other way breach the provisions of the Mandate. Neither of the Applicants have offered any explanation for their failure to challenge the Respondent's contentions on these occasions.

When later on 26 November 1948 the Respondent's representative repeated its previous assurances that the measures designed to establish

parliamentary representation in the Territory did not mean the Territory's incorporation or absorption into South Africa, the General Assembly actually recorded in a resolution that it took note—

> "... of the assurance given by the representative of the Union of South Africa that the proposed new arrangement for closer association of South West Africa with the Union does not mean incorporation and will not mean absorption of the Territory by the Administering Authority".

Again not a single State challenged the correctness of Respondent's statement.

16. In 1949, Act 23 of 1949 was transmitted to the Secretary-General of the United Nations. It was only at the end of the debate of the Fourth Session of the Fourth Committee that one of the delegates proposed an amendment to certain draft resolutions to the effect that the said Act constituted a violation of the United Nations Charter. It will be observed that even at this stage there was no suggestion that it constituted a violation of the Mandate or the Covenant. In any event, this resolution was defeated. A similar resolution was defeated in 1950. The above attitude of States confirms my view that there is no substance in this charge.

17. The third complaint upon which the Applicants based their aforesaid submission is that the Eastern Caprivi Zipfel—hereafter referred to as the Caprivi—is administered separately from the rest of the Territory.

A proper appreciation of this issue necessitates some knowledge of the geographical features of this area. It is east of longitude 21° and forms part of a strip of land acquired by the German Government in 1890 as a zone of free access to the Zambesi River. It is long and narrow and forms the north-eastern part of the Territory. In the rainy season a large area becomes a huge swamp with the result that is is impossible to approach it from the remainder of the Territory. It is mainly inhabited by two tribes which have never had any connections with the other Native groups in South West Africa.

An attempt between the years 1929 and 1939 to administer the Caprivi as a part of South West Africa failed—it appeared clearly that it was in the interests of the area to have it administered directly by Respondent. This conclusion was reported to the Permanent Mandates Commission who stated the following:

> "The Commission learned from the annual report that owing to the difficulty of satisfactorily controlling the eastern part of the Caprivi Zipfel, it is contemplating making over the control of this area to the Union Department of Native Affairs. It noted the statements of the accredited representative to the effect that the officer administering the area in question would work in close

co-operation with the Mandatory Government which would be acting for the Administration of South West Africa and that information regarding that part of the territory would be included in the annual reports as hitherto.

The Commission holds the view that the administrative arrangement contemplated calls for no observations on its part provided all the provisions of the Mandate are properly applied in the eastern portion of the Caprivi Zipfel." (Italics added.)

18. Applicants sought to support this contention relative to the Caprivi by arguing that—

". . . [e]ven if problems of accessibility make administrative separation expedient, it is incumbent upon Respondent to take other steps to preserve the territorial integrity of the Mandated Territory as a whole, and to develop the 'sense of territorial consciousness among all the inhabitants' which is required by the United Nations. Such a responsibility is implicit in the undertaking of the Mandate itself." (Reply, p. 363.)

Such an obligation could exist, if at all, only as part of the Mandatory's general duty to promote the political well-being and progress of the inhabitants of the Territory. But, as such, it has no relevance, in my view, to the present discussion of alleged infringements of the international status of the Territory. In any event, it is clear to me that no such obligation was ever imposed by the Mandate, or even by the United Nations in respect of dependent territories generally, as is apparently contended by Applicants.

19. In view of the above circumstances I have no hesitation in holding that the administrative separation of the Caprivi was a perfectly legitimate exercise of Respondent's governmental powers.

20. The fourth complaint relates to the transfer of the Administration of Native Affairs from the Administrator to the Minister of Bantu Administration and Development, and to the vesting of South West African Native Reserve land in the South African Native Trust. In this regard also it must be kept in mind that it is no longer contended that these measures were actuated by any improper motive, or that they have had any undesirable effect on well-being or progress. That being so, there can, in my view, be no reason why Respondent should not determine which official or agency should exercise or administer particular functions or assets relating to the Territory. It could hardly be suggested that Respondent is under an obligation to entrust all functions regarding the administration of South West Africa only to those of its officials who are stationed in Windhoek to the exclusion of officials stationed in the Republic itself. Nevertheless that would appear to be the effect of this contention, which should in my view, be rejected.

21. To sum up, once it was admitted by the Applicants that the various actions referred to in Chapter VIII of the Memorials were not motivated

by any plan to annex or incorporate the Territory, the whole basis of Applicants' original case fell away. The alternative contention that these acts "constitute *per se*, and without regard to Respondent's purpose or motive, a violation of Respondent's obligation to respect the separate international legal status of the Territory" (Reply, p. 354) reduced Applicants' charge at best (for them) to a mere technicality and at worst to a completely untenable proposition.

22. It was probably the realization that their original charges were insupportable that induced Applicants ultimately to abandon them, as in my view they clearly did. In coming to this conclusion I fully appreciate that a failure by a party to refer in the oral proceedings to particular contentions or arguments raised in the written pleadings, does not necessarily amount to an abandonment of such contentions or arguments. However, in the present case there are a number of additional considerations which in my view compel the aforesaid conclusion. Most of these considerations have been dealt with before and it will not be necessary to do more than refer briefly to them again. Firstly, it is significant that in Submission No. 5 as originally drafted there appeared specific references to the actions complained of, which references were deliberately deleted in the amended submission. This in itself suggests that the original grounds of action are no longer relied upon, a suggestion which is strengthened by the consideration that the case as originally framed could no longer succeed after Applicants had admitted that an essential element thereof—the intent to incorporate—did not exist.

When attempting to ascertain positively what case was sought to be made in the amended submission, which, as I noted above, is now completely vague as to the conduct complained of, the obvious starting point seems to me the Applicants' final oral argument in which they purported to explain their case. Reference to such oral argument shows that Applicants at that stage did not only fail to advance any argument in support of their original charges, but emphasized that their sole and only case rested on an entirely different basis. They commenced their discussion by expressing an intention of disposing of Submission No. 5 "in the context of the requirement of administrative supervision".

They then elucidated their contention in support of their Submission No. 5 in, *inter alia*, the following passages:

> ". . . turning to the question of annexation, administrative supervision is here again seen to *be of the essence*. Respondent's refusal to submit to administrative supervision, indeed, is an *underlying element of the Applicants' complaint in this regard.* (Italics added.)
>
> In the absence of such accountability, Respondent's function of administration would cease to be international.

That is the essence of our contention in this regard. (Italics added.)

> The absence, the denial, or the rejection of international supervision, alters the international status of the Territory; it deprives it of that character. *This is the basis of our submission in this regard.*" (Italics added.)

and, finally—

> "With respect to the Submission 6 *(sic)*, relating to annexation, the refusal and denial of submission to international administrative supervision impairs the international status of the Territory."

In other words, Applicants repeatedly emphasized that their sole contention was that refusal to submit to international supervision was in itself an act inconsistent with the international status of the Territory. This attitude is in line with the features I have mentioned above, all of which, cumulatively, satisfy me that Applicants did not intend in their amended submission to pursue the charges originally raised in the Memorials, or the alternative thereto first raised in the Reply. They intended to limit their case to the one contention mentioned above, to the exclusion of all others. Consequently I now turn to a consideration of the merits of the sole contention ultimately relied upon.

23. In the first place, its effect now is that Submission No. 5 amounts merely to a paraphrase of Submissions Nos. 2, 7 and 8. Consequently there appears little purpose in retaining it as a separate submission. But in any event, it seems to me a complete *non sequitur* to argue that Respondent has treated the Territory in a manner inconsistent with the international status of the Territory and has impeded opportunities for self-determination by the inhabitants of the Territory merely because Respondent has refused to submit to international supervision. The one question relates to the merits of Respondent's actions and policies, the other purely to supervision thereof. It follows, therefore, that even if Respondent were obliged to submit to United Nations supervision (which in my view is not the case) mere failure to do so would not be an act contrary to the separate international status of the Territory.

Article 4 of the Mandate

(Applicants' Submission No. 6)

1. Article 4 of the Mandate provided as follows:

> "The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory."

2. In its original form Applicants' Submission No. 6 read as follows:

> "The Union, by virtue of the acts described in Chapter VII herein, has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to remove all such military bases from within the Territory; and that the Union has the duty to refrain from the establishment of military bases within the Territory." (Memorials, p. 198.)

3. The installations described in Chapter VII of the Memorials, which were alleged to constitute military bases within the meaning of Article 4 of the Mandate, were the following:

(a) an alleged military landing ground in the Swakopmund district of South West Africa;

(b) an alleged military camp or military air base at Ohopoho in the Kaokoveld area of South West Africa;

(c) the supply and maintenance facilities of the Regiment Windhoek.

The reason advanced by Applicants in their Memorials for contending that these institutions were military bases, was that "[a]rmed installations not related to police protection or internal security fall within the class of 'military bases' or 'fortifications' . . .". (Memorials, p. 181.)

4. The facts relative to the aforementioned facilities are set forth in the Respondent's pleadings and are, as will be shown later, not in dispute. For the purposes of this opinion I shall briefly restate the material facts concerning each of the said facilities.

(a) *The Alleged Military Landing Ground in the Swakopmund District of South West Africa*

The allegation in the Applicants' Memorials, based on "information and belief", was that the military landing ground in question was situated in the Swakopmund district *within the Mandated Territory of South West Africa.* This allegation was not correct. The said landing ground is *not* situated within the territorial boundaries of South West Africa, but falls in the area of the Port and Settlement of Walvis Bay which, although administered for practical purposes as if it were part of the Territory of South West Africa, is in fact a part of the Republic of South Africa [1]. Although Applicants accepted this "geographical explanation", they advanced the contention in their Reply that Walvis Bay must,

> "in a military sense, be considered to be in South West Africa, inasmuch as it is completely surrounded by territory subject to the

[1] It appears that Applicants based their allegation on a statement contained in a report of the Committee on South West Africa. It would seem that the Committee, apparently unaware of the true factual and legal position, was misled by a reference in Government Notice No. 636 of 1958 (SA) to the farm Rooikop, on which the landing ground is situated, as falling within the magisterial district of Swakopmund—a correct statement at the time, but only in so far as the said administrative arrangement is concerned.

Mandate and necessarily depends thereon for essential services, transport, communications and supplies, including water".

I quote this statement at this stage in view of the factual allegations contained therein.

Even if these factual allegations were correct, there would be no legal justification for considering Walvis Bay, "in a military sense" to be "in South West Africa". The Applicants did not mention any legal principle, nor am I aware of any legal principle, which could under such circumstances constitute one territory part of another, whether "in a military sense" or in any other sense. It is, however, not necessary to pursue this enquiry any further inasmuch as the factual allegations upon which Applicants based their contention were not correct. A reference to any reliable map will immediately show that the area of Walvis Bay is not "completely surrounded by territory subject to the Mandate". It is approachable from the sea without entering or crossing any part of the Mandated Territory. With regard to the other factual allegations contained in Applicants' above-quoted statement Respondent denied that Walvis Bay "necessarily depends [on South West Africa] for essential services, transport, communications and supplies, including water", and explained that, although use is made of certain services provided from South West Africa, such as road and rail transport, telephone and postal communications, Walvis Bay is not "necessarily" dependent thereon. Nor does it obtain its water supply from the Territory.

I have already mentioned that Applicants, during the course of the oral proceedings, intimated a general acceptance by them of Respondent's statements of fact in the pleadings. This acceptance, as I will show later, applied also to the facts relative to their charges concerning militarization. In the result the whole factual basis upon which Applicants sought to found their contention that Walvis Bay must "in a military sense" be considered "to be in South West Africa", has fallen away.

(b) *The Alleged Military Camp or Military Air Base at Ohopoho in the Kaokoveld Area of South West Africa*

This facility is one of a few landing strips at various places in South West Africa which are mainly used for administrative purposes but also occasionally and intermittently for the landing of military aircraft. These strips are natural surface strips which have simply been cleared of vegetation and other obstructions. They are completely unmanned, provide no maintenance or service facilities, and can only be used for the landing of light aircraft.

(c) *The Supply and Maintenance Facilities of the Regiment Windhoek*

The Regiment Windhoek is a Citizen Force unit composed of civilians who undergo peacetime military training for certain limited periods.

Each trainee is enlisted for a period of four years and during that time he undergoes three periods of training. In his first year of enlistment the recruit attends a training course for a period of nine months at one or other military training institution in the Republic of South Africa. Over the last three years of his enlistment the trainee attends two training courses of three weeks each at a training camp at Windhoek in South West Africa. The said two periods of three weeks each is the only training which members of the Regiment Windhoek receive in South West Africa itself and, save when attending the training course aforementioned, the members of the Regiment carry on their ordinary civilian occupations and have no peacetime military obligations, except that they may be called up if needed for purposes of restoring or maintaining law and order. The complement of the Regiment varies from year to year inasmuch as in every year new recruits are enlisted and trained men discharged. In 1963 the complement was 20 officers and 221 other ranks. The Commanding Officer of the Regiment is not a professional soldier of the permanent force, but, like the trainees, a member of the Citizen Force and is predominantly occupied with his normal civil occupation.

At the training camp at Windhoek there are some houses occupied by members of the South West Africa Command [1]; for the rest the camp has ablution and cooking facilities only, sleeping accommodation for trainees being provided during every training course by the pitching of tents. The Regiment Windhoek is equipped with light reconnaissance vehicles, i.e., armoured cars [2]. It only remains to be said that the members of the Regiment Windhoek are all European inhabitants of South West Africa, there being no military training whatsoever of Natives in the Territory.

5. I have already stated that the facts as set out above are not in dispute. That is so inasmuch as Applicants, during the course of the oral proceedings, admitted as true all the factual statements contained in Respondent's pleadings. And, as I noted when dealing with Applicants' complaints regarding piecemeal annexation (Submission No. 5), their admission was specifically confirmed also with reference to the part of the case concerning militarization. In this regard Applicants' Agent referred to ". . . the facts with respect . . . to militarization . . . as disputed by the Respondent, and as subsequently accepted by the Applicants for purposes of these proceedings . . .". Not only were the facts, as aforestated, relative to the landing strip at Ohopoho and the Regiment Windhoek, admitted by the Applicants, but they were confirmed in every

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[1] The South West Africa Command is a military administrative organ for, *inter alia*, the Regiment Windhoek, with headquarters at Windhoek. It consists of a small permanent force staff, the complement of which in 1964 was three officers and seven other ranks.

[2] See in this regard the evidence of General Marshall: he found in the hangar at Windhoek: 12 small armoured cars ("ferrets"), which he described as reconnaissance vehicles; 6 Mark 4 armoured cars, 6 light tanks all Second World War material and half of them out of commission; 16 miscellaneous vehicles, jeeps, trailers, trucks, etc.; 1 six-pounder gun used for ceremonial purposes.

respect by General Marshall. General Marshall was not asked to testify as to any military facilities at Walvis Bay, which, as I have said, falls outside the mandated territory.

6. The question then arises whether, on the facts as aforestated, the three facilities referred to in the Memorials are military bases within the meaning of that expression in Article 4 of the Mandate.

I would say that obviously and as a matter of common sense the answer is in the negative. However, in view of the contrary contentions at one stage advanced by Applicants, I may add that this answer is confirmed by dictionary meanings and expert opinion.

The following definitions of the term "military base" are found in the dictionaries:

(a) *Webster's Complete Dictionary of the English Language* (1880)

Base (military) "A tract of country protected by fortifications, or by natural advantages, from which the operations of an army proceed."

(b) *Webster's New International Dictionary of the English Language* (Second Edition)

Base (military and naval) "The locality on which a force relies for supplies (base of supplies) or from which it initiates operations (base of operations); as, a submarine base."

(c) *The Shorter Oxford English Dictionary* (Third Edition)

Base (military) "The line or place relied upon as a stronghold and magazine, and from which the operations of a campaign are conducted."

(d) *Gaynor, The New Military and Naval Dictionary* (1951)

Base "A locality from which operations are projected or supported; the term may be preceded by a descriptive word such as 'air' or 'submarine', to indicate its primary purpose."

(e) *The Concise Oxford Dictionary of Current English* (1958)

Base (mil.) "Town or other area in rear of an army where drafts, stores, hospitals, etc., are concentrated (also [base] of operations)."

(f) *Funk and Wagnalls New Standard Dictionary for the English Language* (1961)

Base (mil.) "A place or region constituting a basis of operations or a point from which supplies and reinforcements *[sic]* may be drawn; a base of supply."

It seems to me that there is a common feature in all these definitions,

namely that a base is something *utilized* by a *force or an army* for the purposes of *operations or a campaign.*

If I am correct in my reading of these definitions it follows, in my opinion, that a place cannot be said to be maintained as a military or naval base unless its purpose is utilization by a force or an army for operations or a campaign, actual or prospective.

7. If the aforestated test is applied to the admitted facts relative to the facilities in question, not one of them would fall within the dictionary definitions of "military base". I of course exclude the military landing ground at Walvis Bay. As I have already pointed out, it falls outside the mandated territory, and the relevant facts thereof were not investigated. There is no basis, legal or factual, for a contention that it must be considered to be in South West Africa, whether "in a military sense" or any other sense. In so far as the two remaining facilities are concerned neither the landing strip at Ohopoho nor the supply and maintenance facilities of the Regiment Windhoek qualify, in terms of the dictionary definitions, as military bases.

This was also the expert opinion of General Marshall, who, Applicants' Agent conceded, was "indeed a recognized military authority and widely read as such in our native country".

General Marshall testified that he had visited South West Africa on two occasions during 1965 and had given particular attention to the facilities in question. He described his findings with regard to these installations in detail and concluded that neither of them could, in his opinion, be regarded as a military base.

8. Another reason why I consider that the said facilities cannot be regarded as military bases, within the meaning of Article 4 of the Mandate, is that the said Article itself does not prohibit, but on the contrary by implication permits, the training of the European inhabitants of the Territory as well as the training of the Natives for certain limited purposes, i.e., for internal police and local defence. It must have been contemplated that there would be training of inhabitants of the Territory at least for internal police and local defence purposes and, which is a necessary corollary, that there would be facilities for such training. It is, therefore, inconceivable that the prohibition against military bases in Article 4 was intended to extend to ordinary training facilities such as those provided for members of the Regiment Windhoek or to facilities such as the landing strips at Ohopoho and elsewhere, which are used mainly for administrative purposes but occasionally also by military aircraft, *inter alia*, for the training of air force personnel.

9. As I have mentioned, Applicants in their pleadings advanced arguments contrary to the above conclusions.

At one stage they suggested that the facilities in question were military bases inasmuch as they were, according to Applicants, not intended for "police protection or internal security" [1].

There is no substance in this contention, which appears to have been

[1] Memorials, pp. 182-183.

based on a misinterpretation of the sentence in Article 4 which deals with the military training of Natives. Inasmuch as there is no training of Natives in South West Africa, the qualification which Applicants sought to apply in their Memorials relative to the establishment of military bases was misplaced. And, in any event, there is no evidence that the facilities in question were intended for, or are used for, any military purposes other than for internal police and the local defence of the Territory.

At another stage the Applicants submitted that only Natives could lawfully be trained for police and local defence purposes, and they even went so far as to suggest that Article 4 would have been violated unless Respondent could confirm "that there [is] not in the entire territory a single soldier or sailor on the active list" [1]. I do not intend to deal with these arguments, which in my opinion are, to say the least, fanciful and baseless. Suffice it to say that neither the Mandate for South West Africa, nor any other mandate, prohibited the military training of non-Natives, and there is undisputed evidence before the Court that a large number of non-Natives were in fact trained and used in the forces stationed in the other African mandated territories during the lifetime of the League.

10. Before proceeding to deal with a further contention advanced by Applicants in the oral proceedings, I wish to draw attention to certain factual allegations which were introduced by Applicants for the first time in their Reply.

Under a heading "Military Activity in General" Applicants for the first time charged in their Reply that Respondent had—

> ". . . created a situation where there is the equivalent of a series of military bases or potential military bases in the Territory or at worst, where the Territory iself and its 'White' inhabitants have become armed and co-ordinated to the extent that the Territory has been transformed into a 'military base' within the meaning and intent of the Covenant and the Mandate".

In my view it is impermissible for an Applicant to introduce an entirely new complaint of this kind in its Reply. The procedure of this Court requires that the Applicants' cause of action should be set out in the Application and Memorial. This requirement is not a mere procedural technicality—if new causes of action are allowed to be introduced at later stages of the proceedings it becomes impossible for the parties to deal fully therewith prior to the conclusion of the written proceedings. Each party should have the opportunities contemplated in the Rules of Court for dealing with the contentions of the other party. The Court itself is, to put it at its lowest, inconvenienced if, as happened in the present case, there is at the commencement of the oral proceedings no certainty as to the areas of agreement or dispute between the parties. In my view such a situation militates against the proper administration

[1] Reply, p. 340.

of justice, and should not be countenanced. In the present case it would seem, in view of what is stated hereinafter, that Applicants did not in the oral proceedings persist in this omnibus charge. They certainly made no mention of it or of the factual allegations embodied therein. There is, however, no certainty in this regard in view of the vague and unparticularized manner in which Applicants finally reformulated their Submission No. 6—also a matter to which reference is made hereinafter. Whatever the position may be in this regard, it is clear on the evidence that there could be no merit in the charge. At the conclusion of his evidence General Marshall was asked whether there was anything which he saw in South West Africa which, in his opinion, could be regarded as a military base, or whether the territory as such could be regarded as a military base.

His reply was: "My answer is no. May I add that the Territory is less militarized and more under-armed than any territory of its size I have ever seen in the world."

The witness's conclusions were not attacked by Applicants, either in cross-examination or in comment on the evidence, and, of course, no evidence whatsoever had been led by the Applicants. In my view, there can be no reason for not accepting General Marshall's evidence and opinions. Indeed, Applicants' Agent himself referred to the "first-hand authentic and undoubtedly correct factual statement" concerning what General Marshall saw on his inspection.

11. The only contention advanced by Applicants in the oral proceedings relative to their charges regarding militarization was to the effect that modern military science had progressed to the stage where the Territory could be effectively militarized within a short period, and that, in the absence of administrative supervision, Respondent must consequently be deemed to be guilty of a violation of Article 4 of the Mandate. It was apparently in pursuance of this new contention that Applicants' Submission No. 6 was amended to read as follows:

> "Respondent has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that Respondent has the duty forthwith to remove all such military bases from within the Territory and that Respondent has the duty to refrain from the establishment of military bases within the Territory."

It will be noted that (similarly to the position in respect of Applicants' reformulated Submission No. 5) the reformulated Submission No. 6 omits specific identification of any acts or installations. It is true that the reformulated submissions were all made "upon the basis of allegations of fact and statements of law set forth in the written pleadings and oral proceedings herein". It is, however, not clear which of the charges the Applicants are persisting in, particularly in view of the fact that their charges in the pleadings included a charge, dealt with in paragraph 10, *supra*, to the effect that the whole of South West Africa had become

transformed into a military base. And if, as Applicants explained in the oral proceedings, the basis of their complaint is lack of administrative supervision, what criterion is there for determining whether any of the particular installations or facilities referred to in the pleadings, or any other installations or facilities in the Territory, are or are not military bases?

In any event, if we have regard to the informal statement by Applicants' Agent in the oral proceedings as to what the Applicants' case really is, the complaint appears to be that Respondent would, in the absence of international supervision, be able to militarize the Territory without anybody being aware thereof. This line of argument clearly provides no support for a contention that "Respondent has established military bases within the Territory", nor does it in fact suggest any other violation of Article 4 of the Mandate.

12. For the reasons aforestated, I find that there is no substance in Applicants' charges relative to Article 4 of the Mandate.

The Alleged Duty to Transmit Petitions
(Applicants' Submission No. 8)

1. I have already expressed the view that, apart from other grounds, this submission should be dismissed also on the ground that Article 6 of the Mandate Declaration, which provided for the duty to report and account, no longer applies. However, even if Article 6 were still in force, the result would, in so far as Submission No. 8 is concerned, in my view, be the same. Neither Article 6, nor any other provision of the Mandate, required the Mandatory to transmit petitions to the Council or any other organ of the League. The procedure of submitting petitions through the mandatories arose as a result of rules of procedure drafted by the Council in 1923. (League of Nations, *Official Journal*, 1923 (No. 3), p. 300.) It is clear that these rules could not impose on the mandatories an obligation not provided for in the Mandate Declarations or in Article 22 of the Covenant. And, indeed, the said rules did not purport to do so. These rules were designed for the protection of the mandatories against frivolous or one-sided petitions by ensuring that the mandatories would have an opportunity of commenting on them before they were considered by the League. For this reason the rules provided that petitions emanating from the inhabitants of a mandated territory were not to be sent direct to the Council, but were to be transmitted through the mandatory concerned; thus enabling the mandatory to attach such comments as it might think desirable. And in respect of petitions emanating from any source other than the inhabitants themselves, the mandatory was to be asked for its comment before such petitions were considered by the Permanent Mandates Commission.

These rules of procedure were therefore not intended to impose obligations on the mandatories but rather to provide them with the opportunity of making timely comments on the allegations made in petitions to the League.

However, even if the Council's rules of procedure could in some way or another have given rise to an obligation on the part of the mandatories, such an obligation could, in any event, not be described as an obligation embodied in the "provisions of the Mandate". It follows that the Court would, in any event, not have jurisdiction in terms of Article 7 (2) of the Mandate to entertain disputes regarding the alleged violation of such an obligation.

2. In my view these are additional reasons why Applicants' Submission No. 8 should be dismissed.

Article 7, Paragraph 1, of the Mandate

(Applicants' Submission No. 9)

1. Little need be said about Submission No. 9. As in the case of Applicants' Submissions Nos. 5 and 6, which have been dealt with above, Submission No. 9 initially particularized Respondent's alleged conduct which was contended to be in conflict with Article 7 (1) of the Mandate. In the Memorials, Submission No. 9 read a follows:

> "... the Union, by virtue of the acts described in Chapters V, VI, VII and VIII of this Memorial coupled with its intent as recounted herein, has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate".

2. Also in respect of this submission, Applicants were forced to effect an amendment as a result of their admission of all the facts as set forth in Respondent's pleadings. These admitted facts disproved the allegations upon which the submission was based, and the Applicants accordingly deleted all the references made in the submission as originally formulated to the acts described in Chapters V, VI, VII and VIII of the Memorials as well as references to Respondent's alleged intent. In the result also this submission has become so vague as to be meaningless. It follows that, in my view, no declaration can be made as requested in this submission.

3. There are, however, also other grounds for reaching the same conclusion. On the dissolution of the League of Nations, Article 7 (1), in my view, lapsed in the same way, and for substantially the same reasons, as Article 6, with which I dealt above. It follows that, even if the Mandate were still in existence as an institution, Article 7 (1) would no longer be in force. In my view no agreement has been concluded. Neither the United Nations nor any one of its organs has stepped into the shoes of the League Council as the authority whose consent is required for modification of the terms of the Mandate.

4. In conclusion, I may add that Applicants in their final address to this Court relied solely on Respondent's refusal to submit to international supervision as a ground for contending that a declaration should be made in terms of Submission No. 9. My view in this respect is similar to that which I have expressed with regard to other submissions in support of which the same contention was advanced, namely that, even if Applicants would be entitled to a declaration in terms of their Submission No. 2, that would not, in my view, justify a declaration that Respondent has violated other provisions of the Mandate, for example, that Respondent has attempted to modify the terms of the Mandate in contravention of Article 7 (1) thereof.

(Signed) J. T. VAN WYK.