3. PRELIMINARY OBJECTIONS FILED BY THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

LIST OF ABBREVIATIONS

A.D.	Appellate Division of the Supreme Court of South Africa
A.J.I.L.	The American Journal of International Law.
A.P.S.R.	The American Political Science Review.
Bib. Un.	Bibliothèque Universelle et Revue de Genève.
B.Y.B.I.L.	The British Year Book of International Law.
C.L.J.	The Cambridge Law Journal.
G.A.	General Assembly.
Grotius Soc.	Transactions of the Grotius Society.
I.L.A., Rep.	International Law Association, Reports.
L. of N., Assembly, Rec.	League of Nations, Assembly, Records.
L. of N., Council, Min.	League of Nations, Council, Minutes.
L. of N., O.J.	League of Nations, Official Journal.
L. of N., O.J., Spec. Sup.	League of Nations, Official Journal, Special Supplement.
O.R.	Official Records.
P.M.C., Min.	Permanent Mandates Commission, Minutes.
R.D.I.	Revue de Droit International et de Législation Comparée.
S.A.L.J.	The South African Law Journal.
S.C.	Security Council.
U.N.C.I.O.	United Nations Conference on International Organization.
U.N. Doc.	United Nations Document.
U.N.P.C.	United Nations Preparatory Commission.
U. of S.A., Parl. Deb., Senate.	Union of South Africa, Parliamentary Debates, Senate.

CHAPTER I

INTRODUCTORY

A. The Preliminary Objections to be dealt with herein relate to the proceedings instituted in the International Court of Justice by the Government of Ethiopia and the Government of Liberia, by separate Applications filed on 4th November, 1960. The said Governments are hereinafter referred to as the "Applicants". Pursuant to an Order of the Court of 13th January, 1961, each Applicant filed a separate *Memorial* on 15th April, 1961. Thereupon the proceedings were joined by the Honourable Court by Order of 20th May, 1961. The said proceedings are directed against the Government of the Union of South Africa which, as from 31st May, 1961, is known as the Republic of South Africa. [1] The term "Respondent" is hereinafter used, for convenience, as referring to the Government of the Union or of the Republic, as the context relative to date might require; and sometimes the term "Mandatory" is used with the same meaning.

B. Respondent herewith files, in terms of Article 62 of the Rules of Court, the Preliminary Objections stated hereinunder, and prays that the Honourable Court may, without deciding on the merits of the case submitted by the Applicants, and by reason of one or more or all of the said Objections, declare that it has no jurisdiction in the South West Africa Cases. The Objections may briefly be stated as follows:

1. The "Mandate for German South West Africa", upon Article 7 of which the Applicants' claim to jurisdiction is founded, has lapsed, in the sense and to the extent that it is no longer "a treaty or convention in force" within the meaning of Article 37 of the Statute of the Court. (See paragraph D below.)

2. Even if the Mandate could be said still to exist as a "treaty or convention in force", the alleged dispute is not between Respondent and "another Member of the League of Nations" in terms of Article 7 thereof, inasmuch as both Applicants ceased to be Members of the League of Nations at its dissolution.

3. In any event the conflict or disagreement alleged by the Applicants to exist between them and Respondent, is not a "dispute" as envisaged in the said Article 7, in that the said conflict or disagreement does not affect any material interests of the Applicant States or their nationals.

[1] *The Republic of South Africa Constitution Act*, No. 32 of 1961, Sections 1, 3 and 121.

4. Furthermore, in any event, the alleged conflict or disagreement is not a "dispute" which "cannot be settled by negotiation" within the meaning of the said Article 7.

C. Each of these Objections will, in the above order, be fully developed in a separate Chapter below. These will be preceded, however, by a Chapter setting out the historical background to the present proceedings insofar as is relevant for the purposes of the Preliminary Objections.

D. Attention is, at the outset, drawn to the ambit of the contention relative to lapsing of the Mandate as advanced in support of the First Objection. That contention confines itself to the propositions that, insofar as the Mandate was an international "treaty or convention" within the meaning of Article 37 of the Statute of the Court, it lapsed upon dissolution of the League, and that this consequence is in itself fatal to the Applicants' claim to jurisdiction. No submissions are advanced about the questions whether the Mandate, in the wider sense of being an institution, lapsed upon dissolution of the League or survived the League, and, in the latter event, with what exact import and to what exact extent: such questions extend beyond the ambit of relevance to jurisdictional issues. In particular, it is for the purposes of these Objections to jurisdiction unnecessary to review the proposition stated in the 1950 Advisory Opinion of the Court [1] to the effect that the Mandate acquired an objective or "real" aspect which survived the League: if, for purposes of argument, the correctness of such a proposition be assumed in the fullest measure, there is yet no conflict involved with Respondent's contention that in the sense of an international "treaty or convention" the Mandate is no longer "in force". The significance of the distinction is more fully developed in Chapter III below. The purpose of this initial brief reference is to guard against confusion which could arise—as has in fact happened in the past—from the different senses in which the terms "Mandate", and "lapsing of the Mandate", could be used and understood.

E. Certain of the submissions advanced by Respondent in support of the Preliminary Objections are not in accord with conclusions arrived at, or views expressed by, the Court or some of its Members in the Advisory Opinion of 1950. Respondent recognises that, although advisory opinions have no binding force, they are entitled to the greatest respect. Respondent submits, however, that where good reasons exist therefor, an advisory opinion may be departed from in subsequent contentious proceedings.

It is also submitted that certain of Applicants' allegations, especially at pages 97 and 98 of their *Memorials*, cannot be supported. Applicants allege (page 97) that a statement of law in an advisory opinion, concerning an "actual dispute ... especially

[1] *"International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950, p. 128."*

if rendered after hearing of the disputants' submissions is 'substantially equivalent' to deciding the dispute". In support thereof the *Eastern Carelia Case*[1] is quoted and Applicants further allege (page 98) that the *Peace Treaties Case* of 1950[2] "followed the doctrine of *Eastern Carelia*, but distinguished the two cases". This allegation is incorrect. The Majority Opinion in the *Peace Treaties Case* merely distinguished the two cases but expressed no view on the correctness of the doctrine that an advisory opinion may be "substantially equivalent to deciding the dispute". The Majority Opinion in the *Peace Treaties Case* is reflected in the statement at page 71 that the "Court's reply is only of an advisory character", is for the enlightenment of the United Nations and is not given to States.

In Respondent's submission, certain aspects of the 1950 Opinion will have to be reconsidered, even assuming the correctness of Applicants' statement that:

> "The International Court does not adhere to the doctrine of *stare decisis*; nevertheless it will not readily depart from a prior ruling, especially if the subsequent proceeding involves issues of fact and law identical in every respect to those in the prior proceeding".[3]

In every instance in which Respondent in these proceedings urges a departure from conclusions stated or views expressed in the 1950 Opinion, it submits that good reasons exist therefor. The said reasons are dealt with separately in Respondent's argument relative to each instance of suggested departure. In the main they will be found to relate to features of the 1950 proceedings, such as the lack of presentation, or of adequate presentation, to the Court of material information of vital importance, factual and otherwise. In the result, the issues cannot, in any true sense, be regarded as "identical in every respect to those in the prior proceedings", either as regards the *facts* or as regards the conclusions of *law* to be drawn therefrom. The Court's jurisdiction was in any event, not formulated as a specific issue in the 1950 Opinion, which was primarily intended for the guidance of the General Assembly in respect of a general question submitted to the Court.

In Respondent's submission these features render desirable, and even necessary in the interests of justice, a *de novo* and thorough consideration of the matters in question.

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[1] P.C.I.J., Ser. B, No. 5 (1923).

[2] "*Interpretation of Peace Treaties, Advisory Opinion: I. C. J. Reports 1950, p. 65.*"

[3] P. 97 of the *Memorials*.

CHAPTER II

HISTORICAL BACKGROUND

Part A.

INTRODUCTORY

1. In this Chapter the historical background to the present proceedings will be recounted, but only to the extent relevant for the purposes of Respondent's Preliminary Objections. For the sake of convenience, particularly as regards replying to certain of the allegations by the Applicants in Chapter II of their *Memorials*, the subdivisions in that Chapter are broadly adhered to. Many of those allegations could, however, be relevant only to the merits of their case, and full replies thereto would not be relevant for the purposes of the Preliminary Objections.

This account will, therefore, not contain a comprehensive statement of the historical background to the proceedings. Respondent will, in particular, refrain from furnishing full replies to those allegations, and citations from various reports, which relate to charges that Respondent has violated substantive obligations concerning the administration of South West Africa.

ORIGIN AND NATURE OF THE MANDATE SYSTEM

2. Although the term "Mandate" had been used before in regard to certain international relationships,[1] it first acquired a special meaning in International Law when the Mandate System of the League of Nations was instituted. This System originated, together with the League, from the peace settlements effected after World War I. As Quincy Wright remarked:

> "This system, like most other political innovations, was not a product of disinterested juristic thought nor of detached scientific investigation but was a compromise invented by the Versailles statesmen to meet an immediate political dilemma".[2]

[1] In this respect *vide* Hall, H. D. *Mandates, Dependencies and Trusteeship* (1948), p. 17 *et seq.* and "The Trusteeship System", *B.Y.B.I.L.*, Vol. XXIV (1947), pp. 44-46; Wright, Q. *Mandates under the League of Nations* (1930), pp. 15-23; Schneider, W. *Das Völkerrechtliche Mandat* (1926), p. 14 *et seq.*; Mohr, E. G. *Die Frage der Souveränität in den Mandatsgebieten* (1928), p. 4; Temperley, H. W. V. *A History of the Peace Conference of Paris* (1920-24), Vol. VI, p. 502; Kennedy, W. P. M. and Schlosberg, H. J. *The Law and Custom of the South African Constitution* (1935), pp. 514-15; Rolin, H. "Le Système des Mandats Coloniaux", *R.D.I.*, Vol. XLVII (1920), pp. 356-57.

[2] Wright, *op. cit.*, p. 3.

3. The dilemma which required resolution by compromise involved, briefly, a clash of views and aspirations within the ranks of the Allied and Associated Powers relative to the future of territories and colonies conquered from enemy powers during the war.

4. Among such territories was German South West Africa, which had been surrendered to South African military forces in July, 1915, as a result of which Respondent remained in military occupation for the remainder of the war and thereafter pending the peace settlements. Similar situations obtained in respect of other territories conquered and occupied by other Allied and Associated Powers. These included, *inter alia*, the former German colony in New Guinea, which was occupied by Australia; that in Samoa, by New Zealand; the German islands in the Pacific Ocean north of the Equator, by Japan; and various German territories elsewhere in Africa, by Great Britain, Belgium and France. Further north, various portions of the Ottoman Empire were in Allied occupation.

5. During the war, secret treaties and agreements were made between some of the Allies whereby their respective claims to various occupied territories were to be recognised in the event of an Allied victory. And the British Imperial War Cabinet decided in March, 1917, that the three Dominions, Australia, New Zealand and South Africa should be allowed to annex the abovementioned occupied territories, adjacent to their own, namely, German New Guinea, German Samoa and German South West Africa respectively. [1]

On the other hand, certain proposals for international control of conquered colonies, some of them even relating to all colonies, [2] were also made during the war years.

In 1918, G. L. Beer, historian, and adviser to President Wilson of the United States of America, connected such proposals with others then current for the establishment of a League of Nations. He proposed a Mandate System for Mesopotamia and certain of the German Colonies, urging that the administration of these areas should be entrusted to "different States acting as mandatories of the League of Nations". [3] Beer considered, however, that the Mandate System could not be applied to South West Africa, and recommended that this region be incorporated in the Union of South Africa. [4]

[1] *Vide* Lloyd George, D. *The Truth about the Peace Treaties* (1938), Vol. I, pp. 114-23 and Vol. II, p. 766; Spiegel, M. *Das Völkerrechtliche Mandat und seine Anwendung auf Palästina* (1928), pp. 8-9; Temperley, *op. cit.*, Vol. I, p. 195; Logan, R. W. *The African Mandates in World Politics* (1948), pp. 1-2; Townsend, M. E. *The Rise and Fall of Germany's Colonial Empire* (1930), pp. 363-69, 377-78.

[2] *Vide* Hobson, J. A. *Towards International Government* (1915). *Vide* also the discussion by Potter, P. B. in "Origin of the System of Mandates under the League of Nations", *A.P.S.R.*, Vol. XVI, No. 4 (November, 1922), pp. 563-83.

[3] Beer, G. L. *African Questions at the Paris Peace Conference*, ed. by L. H. Gray (1923), p. 431.

[4] *Ibid.*, p. 443.

Like Beer, General Smuts, in the publication referred to by the Applicants,[1] linked a proposed Mandate System with a proposed League of Nations. He limited his proposal to "territories formerly belonging to Russia, Austria-Hungary and Turkey", and expressly excluded the "German colonies in the Pacific and Africa", since in these cases "it would be impracticable to apply any ideas of political self-determination in the European sense".[2]

The United States of America was not a party to the secret treaties and agreements mentioned above; she entered the war after most of them had been concluded. At the termination of the war President Wilson strongly advocated a policy of "no annexations"; and he went to the Paris Peace Conference determined to secure application of the proposed Mandate System, in an extreme form, to *all* ex-enemy colonies and possessions. His proposals, as contained in his drafts of the Covenant, included that the League would be vested with complete authority and control, that it would be entitled (not obliged) at its discretion to delegate to a State or "organised agency" powers to act "as its agent or mandatory", and also that by reason of an appeal from the people of the territory the League could substitute some other State or agency as mandatory.[3] In keeping with this conception, his Third Draft proposed that the expenses of Mandatory government would, if necessary, be borne by all the Members of the League.[4]

6. From the above, the makings of conflict at the Paris Peace Conference will be manifest. The future of the German Colonies was discussed as from the 24th January, 1919, in the "Council of Ten", which consisted of the heads of government and foreign ministers of the United States of America, the United Kingdom, France, Italy and Japan. Representatives of Australia, New Zealand and South Africa were allowed to be present and to express their views at the discussions concerning the future of the former German Colonies in New Guinea, Samoa and South West Africa.

There was fairly general agreement that a Mandate System was to be established. The controversy concerned the contents of such a System, and particularly the peoples and territories to which it was to be applied, especially inasmuch as there was general recognition of the wide differences between the various peoples and territories concerned, ranging from, on the one hand, developed societies to, on the other, peoples still living in the Stone Age.[5] The

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[1] Smuts, J. C. *The League of Nations: A Practical Suggestion* (1918), p. 15 and Applicants' *Memorials*, p. 34.

[2] Smuts, *op. cit.*, pp. 12 and 15.

[3] *Vide* particularly paras. I, II and III of his Second Draft, as amended by his Third Draft: Baker, R. S. *Woodrow Wilson and World Settlement* (1922-23), Vol. III, pp. 108-10, 126-29.

[4] *Ibid.*, p. 127.

[5] *Vide For. Rel. U.S.*: *The Paris Peace Conference, 1919*, Vol. III, p. 786. According to an article in the *United Nations Review* of September, 1954, (Vol. 1, No. 3, p. 31), the people in some parts of New Guinea still live "in Stone Age conditions of primitive savagery". *Vide* also Vol. 2, No. 3 (September, 1955), p. 34.

representatives of the three Dominions strongly pressed their cases for incorporation of the respective territories, and were supported by the British Prime Minister, Mr. Lloyd George. After representatives of Japan and France had also spoken in favour of annexation in their cases, President Wilson's reaction was so strong as to threaten "a break-up of the conference". [1]

The Conference reached a state of apparent deadlock on 27th January, 1919. There followed negotiations behind closed doors for two days, during which Lloyd George secured the agreement of the representatives of the Dominions to a document which he handed in as a proposal to the Conference on 30th January, announcing that it

> "did not represent the real views of the Colonies [Dominions]; but it had been accepted by them as an attempt at a compromise . . . because they fully realised that there could be no greater catastrophe than for the delegates to separate without having come to a definite decision". [2]

The document contained provisions which, with unimportant alterations and one important addition, [3] eventually became Article 22 of the Covenant. [4] Its essential feature, as Lloyd George explained, was the division of Mandates into three classes in recognition of the wide range of differences between the various communities and territories. He described the third of these classes (the eventual C Mandates) as:

> "Mandates applicable to countries which formed almost a part of the organisation of an adjoining power, *who would have to be* appointed the mandatory". [5] (Italics added.)

It was in this category that German New Guinea, German Samoa and German South West Africa were to be put.

President Wilson indicated that the document "made a long stride towards the composition of their differences", but at the same time suggested deferment of a decision. A somewhat heated discussion ensued, in which the Prime Minister of Australia rendered clear that for his country and New Zealand the document "represented the maximum of their concession". [6] A speech, generally described by commentators as "conciliatory", was then made by the South African Prime Minister, General Botha, in which he stated, *inter alia:*

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[1] Lloyd George, *op. cit.*, Vol. I, p. 530.

[2] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, p. 785.

[3] Para. 9 of Art. 22, concerning the Permanent Mandates Commission.

[4] For text *vide For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, pp. 795-96.

[5] *Ibid.*, p. 786.

[6] The words quoted are taken from the original unpublished Minutes of the Council of Ten. In *For. Rel. U.S.* the word "minimum" is erroneously substituted for the word "maximum". *Vide* Vol. III, pp. 799-800.

"He appreciated the ideals of President Wilson. ... They must remember that their various peoples did not understand everything from the same point ... Personally he felt very strongly about the question of German South West Africa. He thought that it differed entirely from any question they had to decide in this conference, but he would be prepared to say that he was a supporter of the document handed in that morning [by Lloyd George], *because he knew that, if the idea fructified, the League of Nations would consist mostly of the same people who were present there that day, who understood the position and who would not make it impossible for any mandatory to govern the country*. That was why he said he would accept it". [1] (Italics added.)

After further discussion, President Wilson agreed to accept the proposal, which was then adopted, with very minor amendments. [2] In its eventual form, as Article 22 of the Covenant, [3] it became part of the Treaty of Versailles, which was signed on 28th June, 1919, and came into force on 10th January, 1920.

7. In terms of Articles 118, 119 and 257 of the Treaty, Germany renounced all rights in or over her colonial possessions in favour of the Principal Allied and Associated Powers. The Mandate for South West Africa was allocated to the Union of South Africa by the Supreme Council of the Allied and Associated Powers on the 7th May, 1919, its decision in that regard being recorded as follows:

"*German South West Africa*. The Mandate shall be held by the Union of South Africa". [4]

On the 24th December, 1919, the Principal Allied and Associated Powers approved the terms of a draft Mandate Agreement acceptable to the Mandatory. The Mandate and the proposed terms were confirmed and defined by the Council of the League, in agreement with the Mandatory, on the 17th December, 1920, as the "Mandate for German South West Africa". [5]

8. The main elements of the compromise embodied in Article 22 of the Covenant are rendered clear by the above historical background. As was commented generally by M. Rappard, Secretary and subsequently member of the Permanent Mandates Commission:

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[1] *Ibid.*, pp. 801-02.

[2] Miller, D. H. *The Drafting of the Covenant* (1928), Vol. II, pp. 213-28.

[3] A draft clause on Mandates was introduced by Smuts at the Sixth Meeting of the League of Nations Commission on 8th February, 1919. As to amendments to this draft made in the League Commission, *vide* Miller, *op. cit.*, Vol. II, pp. 283, 285, 306, 313, 323-24 and 355. At the Sixth Meeting, an attempt was made to insert the word "if" between the words "as" and "integral" in the provision relating to C Mandates, which reads, "South West Africa and certain of the islands in the South Pacific ... can be best administered under the laws of the Mandatory State as integral portions thereof". After discussion, the word "if" was not inserted. *Vide* Miller, *op. cit.*, Vol. I, pp. 186 and 190 and Vol. II, p. 273.

[4] *For. Rel. U.S.: The Paris Peace Conference, 1919, Vol. V*, p. 508. The 7th May is the correct date, not the 5th as stated by Applicants on p. 36 of the *Memorials*.

[5] *Vide* Annex B *infra* and *L. of N., O.J.*, 1921, p. 89.

"The terms of the compromise were obvious: President Wilson succeeded in preventing annexation; the conquerors in retaining their conquests". [1]

More particularly, in return for the concession that all the German Colonial possessions were brought into the Mandate System, President Wilson had to abandon certain of the extreme aspects of his proposals concerning League supremacy and control and the consequent payment of expenses of Mandate administration by League Members. All Mandatories were to be States, not "organised agencies". The Mandates were to be allocated by the Principal Allied and Associated Powers (not the League), and at any rate in the case of the C Mandates the allocation *"would have, to be"* to the adjacent claimant States. [2] The relationship between the League and Mandatories was in each case regulated by a Mandate *agreement*, which would normally require mutual consent for alteration. [3] All this was very far removed from the envisaged free League discretion to appoint and change Mandatories. Again in the case of C Mandates, the Mandatories were to have powers to administer the territories "as integral portions" of their own. And there would be no objection to eventual amalgamation that could naturally result from such administration, if agreed to by the inhabitants. At the Peace Conference President Wilson stressed that

"it was up to the Union of South Africa to make it so attractive that South West Africa would come into the Union of their own free will. ... If successful administration by a mandatory should lead to union with the mandatory, he would be the last to object"; [4]

and later he said that:

"if South Africa managed South West Africa as well as she had managed her own country, then she would be married to South West Africa". [5]

Finally, the "open door" principle of equal trade opportunities for Members of the League, although originally envisaged for all Mandates, was excluded in the case of C Mandates. [6]

9. In view of the above features, commentators quite naturally referred to C Mandates as being in their practical effect not far removed from annexation.

Thus, during the First Session of the Permanent Mandates Commission, Mr. Ormsby-Gore, the United Kingdom member, stated:

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[1] Rappard, W. E. "The Mandates and the International Trusteeship System", *Varia Politica* (1953), p. 182.
[2] *Vide* Lloyd George's statement on 30th January, 1919, para. 6 *supra*.
[3] *Vide* Art. 7 of the "Mandate for German South-West Africa".
[4] *For. Rel. U.S.*: *The Paris Peace Conference, 1919*, Vol. III, pp. 741-42.
[5] *Ibid.*, p. 788.
[6] *Vide* final words of Art. 22(6).

"... this case of South West Africa was, indeed, a typical example of the complete political incorporation of a mandated territory in the territory of the mandatory Power". [1]

Margalith wrote:

"It has been found necessary, also, to devise three types of administration, and to give in the case of C Mandates, powers that amount nearly to annexation. Otherwise the British Dominions could not have been won over to the acceptance of the mandates principle at all". [2]

When introducing the Peace Treaty in the British House of Commons on 3rd July, 1919, Lloyd George stated:

"... South West Africa, running as it does side by side with Cape Colony, was felt to be so much a part, geographically, of that area that it would be quite *impossible to treat it in the same way as you would a colony* 2,000 or 3,000 miles away from a centre of administration. *There is no doubt at all that South West Africa will become an integral part* of the Federation of South Africa. It will be colonised by people from South Africa. You could not have done anything else. You could not have set customs barriers and have a different system of administration". [3] (Italics added.)

And Temperley wrote:

"Clearly the development of this territory must in the main come from the adjoining Union of South Africa, *and its progress would be seriously handicapped it if were administered as a distinct entity with separate native, fiscal, and railroad policies. As, however, it was feared that an exception made in one case—no matter how valid it might be—might open the door to others, a general application of the system was insisted upon.* This had some unfortunate consequences since, mainly in order to meet the special circumstances in South Africa, a broad formula had to be adopted which was not completely satisfactory as far as other areas were concerned". [4] (Italics added.)

10. It will be observed from the aforegoing that considerable over-simplification, tending towards a wrong impression, is involved in the Applicants' statement in their *Memorials* that:

"The Mandate System, as ultimately given expression in Article 22 of the Covenant of the League of Nations and in the several Mandate Agreements, represented a victory for the opponents of the principle of annexation". [5]

A compromise can hardly be regarded as a victory for either side. By itself, the Applicants' over-simplification may be unimportant. But certain other statements by them demonstrate that negation

[1] *P.M.C., Min.*, I, p. 21.
[2] Margalith, A. M. *The International Mandates* (1930), pp. 33-34.
[3] Temperley, *op. cit.*, Vol. III, p. 95.
[4] *Ibid.*, Vol. II, pp. 233-34.
[5] Applicants' *Memorials*, p. 33.

of the significance of the compromise could lead to erroneous conclusions.

So, for example, it is unsafe to assume that the Mandate System as finally agreed upon, and particularly as regards C Mandates, could be interpreted in terms of quotations from General Smuts' publication. The quotations set out by Applicants at p. 33 of their *Memorials* relate to a proposed System which the author considered to be totally inappropriate for those territories which eventually became C Mandates [1] and which could only be accommodated in a specially adapted System, agreed to by way of compromise.

Similarly there is no justification for Applicants' expression "so striking a reversal of concept", [2] as applied to a 1920 speech by General Smuts in which he, in common with the commentators mentioned in paragraph 9 above, spoke of the relationship between the Union and South West Africa as being, in effect, close to annexation. This matter will be further dealt with below.

These and other attempts in the *Memorials* to disparage policies directed towards closer assimilation between South Africa and the Territory as being somehow in conflict with duties undertaken by Respondent, do not accord with the expressed intentions of the statesmen who created the Mandate System. Respondent accepted the obligations which the Mandate for South West Africa involved for it; and it has always regarded compliance with those obligations as being a matter of importance—according to their letter and spirit during the lifetime of the League, and according to their spirit thereafter. But it resents and resists attempts at the unilateral imposition upon it of suggested duties which were excluded from those undertaken, and which would amount to a repudiation of the compromise whereby Respondent was induced to agree to the Mandate System being rendered applicable at all to the case of South West Africa.

THE LEAGUE OF NATIONS PERIOD

11. The functions of the League of Nations in respect of Mandates were exercised by the Council, the Assembly and the Permanent Mandates Commission.

12. The *Council* was the body to which every Mandatory was ultimately accountable. It was to the Council that the Mandatories had to render annual reports, [3] to its "satisfaction". [4]

The Council alone had the power to take decisions and address recommendations to the Mandatories. [5]

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[1] *Vide* para. 5 *supra*.
[2] Applicants' *Memorials*, p. 38.
[3] Art. 22 (7).
[4] *e.g.* Art. 6 of the Mandate for South West Africa.
[5] *Vide The Mandates System—Origin—Principles—Application* (1945), p. 35; Hall, *op. cit.*, p. 174; *P.M.C., Min.*, I, p. 5.

Article 4 of the Covenant entitled any Member of the League not represented on the Council "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." This provision enabled a Mandatory to be represented when the Council considered matters relating to its own Mandate and to Mandates in general.

In terms of Article 5 of the Covenant, decisions of the Council required "the agreement of *all* the Members of the League represented at the meeting." (Italics added.) Whether a Mandatory could exercise its vote in the Council in such a way as to frustrate the unanimous view of all the other Members on a matter affecting its own Mandate, was never raised. In fact no occasion on which there was such a division of votes ever arose; all Council decisions concerning mandates were taken unanimously. [1] In this connection Jennings states that the "invariably careful and even elaborate avoidance of an adverse vote from the Mandatory" in the Council is "difficult to understand unless one may assume at any rate the possibility of a veto in the Mandatory state". [2]

13. The *Assembly* derived its powers in respect of Mandates from Article 3 of the Covenant in terms of which it could "deal at its meetings with any matter within the sphere of action of the League. . ."

At the First Assembly a "working basis" was, however, decided on according to which

> "Neither body [i.e. the Assembly or the Council] has jurisdiction to render a decision in a matter which by the Treaties or the Covenant has been expressly committed to the other organ of the League. Either body may discuss and examine any matter which is within the competence of the League". [3]

Thus, in respect of Mandates, the Assembly's role was confined to:

> ". . . the exercise of a certain moral and very general influence in this domain. Its function may be said to be to maintain touch between public opinion and the Council". [4]

14. The *Permanent Mandates Commission* was instituted by the Council on 29th November, 1920, pursuant to the provisions of Article 22, paragraph 9, of the Covenant, in terms of which its functions were "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".

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[1] *Vide "South-West Africa—Voting Procedure, Advisory Opinion of June 7th, 1955: I.C.J. Reports 1955"*, pp. 100-01. (Judge Lauterpacht's Separate Opinion.)

[2] Jennings, R. Y. "The International Court's Advisory Opinion on the Voting Procedure on Questions concerning South-West Africa", *Grotius Soc.*, Vol. 42, (1956), p. 92.

[3] *L. of N., Assembly, Rec.*, I, p. 320.

[4] *The Mandates System—Origin—Principles—Application*, p. 34 *et seq.*

Article 22 of the Covenant did not make provision for petitions from inhabitants of Mandated territories, nor did the Mandate instruments do so. Petitions were, however, sent to the Permanent Mandates Commission, and as a result the Council, at its 23rd session in 1923, framed rules relating to the procedure to be adopted with regard thereto. In terms of these rules, petitions from "communities or sections of the populations of mandated areas" were to be submitted only through the Mandatory concerned, which would be entitled to attach "such comments as it might think desirable." Petitions "regarding the inhabitants of mandated territories received . . . from any source other than that of the inhabitants themselves", were to be addressed to the Chairman of the Commission who had to decide whether they should be regarded as "claiming attention". If so, the Mandatory concerned was then to be asked for its comments thereon. [1]

The question whether the Permanent Mandates Commission was entitled to grant oral hearings to petitioners was raised on several occasions in the organs of the League, especially during the years 1926-1927, when a proposal for such hearings "in certain cases" met with considerable opposition. When the views of the mandatories were sought in regard thereto, they unanimously expressed their opposition, with the result that the Council on 27th March, 1927, decided that

> "there is no occasion to modify the procedure which has hitherto been followed by the Commission in regard to this question". [2]

In constituting the Permanent Mandates Commission, the Council decided *inter alia* that it was to consist of nine members,[3] the majority to be nationals of non-Mandatory States. It further provided that

> "All the Members of the Commission shall be appointed by the Council and selected *for their personal merits and competence. They shall not hold any office which puts them in a position of direct dependence on their Governments while members of the Commission*". [4] (Italics added.)

The Permanent Mandates Commission was described as

> "essentially an advisory body—a body whose duty it is to examine and report—designed to assist the Council in carrying out its task. Its work is preliminary in character. Constitutionally, it has no power to take decisions binding on the mandatory Powers or to address direct recommendations to them. Its conclusions are not final until they have been approved by the Council".[5]

[1] *L. of N., O.J.*, 1923, p. 300.
[2] *Ibid.*, 1927, p. 348.
[3] Later increased to ten and then to eleven.
[4] *L. of N., O.J.*, 1920 (no. 8), p. 87.
[5] *The Mandates System—Origin—Principles—Application*, p. 35. *Vide* also van Asbeck, F. M. "International Law and Colonial Administration", *Grotius Soc.*, Vol. 39 (1953), p. 14.

The Commission itself realized and stated that, having adopted the rule of "absolute independence and impartiality", its Members should exercise their authority "less as judges from whom critical pronouncements are expected, than as collaborators who are resolved to devote their experience and their energies to a joint endeavour". [1]

Although its powers were purely advisory, the Commission developed into an effective institution. In this connection M. Rappard, —at first Secretary and later for a long time a member of the Commission—stated:

> "As the Commission, thanks to the personal competence and generally recognized independence of its members, came to enjoy a real respect and, indeed, quite some prestige, an international or rather a super-national moral authority sprang up . . . In its capacity as a purely advisory body . . . the Permanent Mandates Commission had no powers of coercion whatever. As a universally esteemed group of impartial and independent experts, however, its powers of persuasion were indisputably very effective. No Mandatory government . . . could afford to disregard its advice for fear of no other sanctions but those of public and parliamentary opinion.
>
> The net result was a willing co-operation between the League and the Mandatory governments, and the enhancement of the standards of administration in the mandated territories and even, by a natural repercussion, in colonial administration everywhere". [2]

15. There was at all times cordial co-operation between Respondent and the Permanent Mandates Commission. On occasion differences of opinion arose—as was the case also with regard to other Mandated territories—but this was inevitable in view mainly of uncertainties and obscurities in a new system, operating under the somewhat vague terms of the compromise embodied in Article 22 of the Covenant. And with both Respondent and the Commission approaching their task in the spirit of that compromise, the problems which arose were always satisfactorily solved.

Applicants' *Memorials*, on the other hand, contain statements and allegations suggesting strife between Respondent and the Commission, and even a "hostile" attitude towards the Commission on Respondent's part. These allegations and suggestions are unfounded, as will appear from closer scrutiny of the facts to which they relate.

16. At page 37 of their *Memorials*, Applicants state as follows:

> "Annual reports called for in Article 6 of the Mandate for South West Africa were *for a time* submitted by the Union to the Council of the League of Nations, beginning with a report for 1919". (Italics added.)

Respondent finds it difficult to appreciate why such language should be used, when the true facts are that Respondent regularly

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[1] *L. of N., O.J.*, 1921, pp. 1124-25.

[2] Rappard, *Varia Politica*, p. 184.

submitted annual reports until 1940, after the outbreak of the Second World War, which brought about a cessation of all reporting by Mandatories and of meetings of the Commission.

17. The Applicants state at page 37 of their Memorials that

> "the Union was not at first overtly hostile towards the Permanent Mandates Commission".

Respondent denies the implication that it was at some time hostile, overtly or otherwise, towards the Commission. On the contrary, there is abundant evidence to show that despite occasional divergencies of view regarding specific matters, Respondent's attitude throughout was one of friendly co-operation.

So, for instance, Respondent was the first of all the Mandatories to be represented at the discussions of the Permanent Mandates Commission by the officer "personally responsible for the administration" of the Mandated territory, namely the Administrator of South West Africa—which action the Council particularly appreciated and commended to other Mandatories. [1]

At Respondent's invitation, the Chairman of the Commission visited South West Africa in 1935 and made an extensive tour of the Territory. As far as is known, this was the only occasion on which a member of the Commission was invited by a Mandatory to visit a Mandated territory. Respondent had extended this invitation also to the Secretary-General of the League and the Director of the Mandates Section of the League, but neither could avail himself thereof. [2]

On many occasions appreciation was expressed, on both sides, of the relationship and co-operation between Respondent and the Commission. As examples may be mentioned the following:

(a) In a letter by General Smuts, dated the 16th May, 1923, to the Chairman of the Commission, there occurred *inter alia:*

> "I also wish to express my appreciation of the valuable work which you are doing as Chairman of the Permanent Mandates Commission; and I wish especially to thank you and the other members of the Commission for the way in which you have assisted the Council of the League in order to meet my wishes about the naturalisation of the white German inhabitants of South-West Africa. You have shown great fairness and wisdom in realising the special and exceptional character of the problem in that territory, and I thank you for finally agreeing to the solution which I have put forward". [3]

(b) On 6th June, 1936, the Chairman of the Commission thanked the South African representative

> "for his co-operation and expressed the Commission's appreciation of the cordiality, sincerity and loyalty shown by the accredited

[1] *L. of N., O.J.*, 1924, p. 1287.
[2] *P.M.C., Min.*, XXVII, p. 153.
[3] *Ibid.*, III, p. 215.

> representative of the Mandatory power. It was a matter for satisfaction that there was such close co-operation between the Commission and the Union".[1]

(c) In his address of 9th April, 1946, to the Assembly of the League in its final session, the South African representative stated:

> "it is generally recognised that the League discharged its supervisory functions in respect of mandates with high seriousness, skill and success. For twenty years, as one of the mandatory Powers, South Africa worked in close co-operation with the Permanent Mandates Commission, and we are proud of the fact that our relations with that body have always been both happy and cordial".[2]

Again the reason for the language in the *Memorials*, as above cited, is difficult to appreciate.

18. The Applicants state at page 37 of their *Memorials* that

> "Officials of the Union Government viewed the mandate as tantamount to annexation".

They then quote, at the same page, two extracts from a newspaper report of a speech made by General Smuts at Windhoek in September, 1920, the first being that he

> "emphasised that the League of Nations had nothing to do with the giving of the Mandates",

and the second

> "In effect, the relations between the South West Protectorate and the Union amount to annexation in all but name".

This the Applicants then describe as

> "so striking a reversal of concept towards the Mandate System".

In regard to the first of the above extracts, General Smuts was speaking of the *allocation* of Mandated territories by the Principal Allied and Associated Powers.[3] His address was delivered some months prior to the execution of the Mandate instrument.[4] In regard to the second extract, Respondent has already pointed out[5] that General Smuts's description accorded with that of other commentators, and that when regard is had to the nature of the compromise arrived at in respect of C Mandates, no "reversal of concept", "striking" or otherwise, was involved. That General Smuts, in the passage in question, was concerned only with the *practical effect* of the C Mandate, and was in no way seeking to evade the significance of the safeguards envisaged in the interests of the

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[1] *Ibid.*, XXIX, p. 137.
[2] *L. of N., O.J., Spec. Sup.* No. 194, p. 32.
[3] *Vide* para. 7 *supra*.
[4] 17th December, 1920—*vide* para. 7 *supra*.
[5] Para. 10 *supra* read with para. 9 *supra*.

native population, or of League supervision in respect thereof, appears from the context of the whole address as reported, as well as from a letter written by him on the subject to M. Rappard on the 4th July, 1922. In the report of the speech there occurs, *inter alia*, the following:

> "... the mandate was a new idea in International Law, and therefore it was only right that a full explanation should be given at this stage. He emphasised that the League of Nations had nothing to do with the giving of mandates, *which were already settled as a fact by the Peace Treaty*, quite apart from the League of Nations.
>
> Under the Peace Treaty Germany had renounced her colonies not to the League of Nations, but to the Great Powers. Article 119 of the Treaty made that clear. *The Great Powers passed a resolution in Paris in May, 1919, conferring various mandates and in the case of South-West Africa the mandate was given to the Union.* This mandate was accepted by the Union Parliament. The League of Nations was only concerned in one way, namely to define the scope of the mandate in any particular area ... The Prime Minister then quoted the relevant portion of the Peace Treaty providing for the government under the laws of the Mandatory. *Subject to safeguards*, the Union Government had complete authority over South West Africa, not as a separate territory, but as an integral portion of the Union, as though it were Union territory, *with safeguards for the natives against slavery, traffic in arms, liquor and military training—the control of these safeguards lying with the League of Nations.* The Union Government could extend to South-West Africa its legal, judicial, administrative and financial systems, its Civil Service, its police, and its Railway Administration, and it could declare South-West Africa a Province of the Union and could give Parliamentary representation, the only limit being in regard to natives.
>
> In effect, the relations between the South-West Protectorate and the Union amount to annexation in all but name. Without annexation the Union could under the Peace Treaty do whatever it could have done *in annexed territory, save the reservation of the natives*".[1] (Italics added.)

In his letter to M. Rappard, General Smuts pointed out that he had addressed the German section of the population and had explained to them "the futility of looking to the Fatherland and the necessity of throwing their lot in with the people of the Union". He added:

> "I have explained to them that the Union has full power of legislation and administration over South-West Africa as an integral portion of the Union, and that the effect is very much the same as if they were incorporated into the Union, subject of course to the full safeguards in the interests of the native population. In all this, I have confined myself to the strict letter of Article 22. . . .
>
> *Do not for a moment think that in my ideas or proposals I depart from the system of mandates*, which I consider one of the most bene-

[1] *P.M.C., Min.*, II, p. 92.

> ficent advances in international law. *We must only recognise the fact that C mandates are in effect not far removed from annexation.* The case is, of course, quite different with the other two far more important types of mandates".[1] (Italics added.)

In the light of these facts, apparent in full from the Minutes of the Permanent Mandates Commission as referred to by Applicants themselves at page 37 of the *Memorials*, there can again be no justification for the Applicants' language in question.

19. Applicants state at page 38 of the *Memorials* that the Permanent Mandates Commission "felt obliged on more than one occasion to call the Union to task with respect to its attitude toward the legal status of the Territory." Applicants then proceed to allege in this regard that

> "... when the Union concluded a series of Agreements with Portugal regarding the boundary between Angola and South West Africa, the Commission drew attention *to the fact* that in the Preamble to one such Agreement, the Union asserted 'full sovereignty over the territory of South West Africa, lately under the sovereignty of Germany'." (Italics added.)

As a fact Respondent in the Preamble did not assert "full" sovereignty: the word "full" was not used and the word "sovereignty" was qualified by the words "*subject to the terms of the said Mandate.*"

The relevant part of the Preamble read:

> "*And Whereas* under a mandate issued by the Council of the League of Nations in pursuance of Article 22 of the Treaty of Versailles, the Government of the Union of South Africa, *subject to the terms of the said mandate, possesses sovereignty* over the Territory of South-West Africa (hereinafter referred to as the Territory) lately under the sovereignty of Germany".[2] (Italics added.)

A lengthy controversy did arise, with reference to this Preamble, as to the meaning to be assigned to the word "sovereignty". There followed discussions and correspondence, which as a result of misunderstandings were protracted. Part only of these is quoted by the Applicants. A full account, as recorded in the official records of the League—but which would needlessly lengthen this statement—shows that the difficulty related mainly to the meaning to be assigned to the word "sovereignty" in the context of Mandates. This was a question dealt with at great length by many authorities, who arrived at a variety of conclusions. Wright mentions at least ten theories. [3]

As far as the League was concerned, M. Hymans had in 1920, in a report adopted by the Council on 5th August, 1920, stated as follows:

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[1] *Ibid.*, p. 91.
[2] *L. of N., O.J.*, 1926, p. 1533.
[3] *Op. cit.*, pp. 319-39.

> "The degree of authority, control or administration is, so far as 'B' or 'C' Mandates are concerned, a question of only secondary importance.
> In the former case, as in the latter, the Mandatory Power 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 imposed by paragraphs 5 and 6." [1] (Italics added.)

There was, however, no attempt in the League to define where sovereignty, in the traditional sense of absolute power, was lodged in regard to Mandates. In this regard, the above report by M. Hymans had stated:

> "I shall not enter into a controversy—though this would certainly be very interesting—as to where the sovereignty actually resides. We are face to face with a new institution. Legal erudition will decide as to what extent it can apply to this institution the older juridical notions." [2]

Similar sentiments on this aspect of the matter were expressed by M. Beelaerts van Blokland in a report adopted by the Council on 8th September, 1927, [3] and also in a further report by M. Procopé adopted on 6th September, 1929. [4] The different senses in which the word "sovereignty" could be used, contributed to the misunderstandings involved in the lengthy discussions and exchange of communications between the Commission and Respondent.

What is, however, of importance, is that all such misunderstanding was resolved through the acceptance by Respondent, in a letter of 16th April, 1930, of the above reports of M. Beelaerts van Blokland and M. Procopé, which were to the effect, *inter alia*, that "sovereignty in the traditional sense of the word does not reside in the Mandatory Power." [5]

In the light of this outcome of the exchange of communications between the Commission and Respondent concerning the question of sovereignty, Respondent finds it difficult to understand why Applicants' *Memorials*, at page 39, leave this matter on the note of " 'no clear reply to this question' ", " 'regrettable misunderstanding' " and "its [Respondent's] assertion of the possession of sovereignty over the mandated territory."

20. With regard to the reference at page 39 of the Applicants' *Memorials* to an "intention to incorporate" the Territory, Respondent's view has consistently been that closer association between South West Africa and South Africa was in accordance with the compromise arrangement regarding C Mandates as

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[1] *L. of N., Council, Min.*, VIII, p. 183.
[2] *Ibid.*, p. 185.
[3] *L. of N., O.J.*, 1927, p. 1120.
[4] *Ibid.*, 1929, p. 1467.
[5] *Ibid.*, 1930, pp. 838-39.

contained in Article 22 and given effect to in the Mandate instrument for South West Africa. [1]

In September, 1920, General Smuts saw the constitutional development of South West Africa as follows:

> "The policy of the Government would be to carry out the mandate. South-West Africa would always be a separate unit as a large country, but it was impossible to run it as a province at the present time, though later, no doubt, it would become one, with a Provincial Council and members in the House of Assembly, but first other stages would have to be passed through. The first would probably be an Advisory Council to be appointed to advise the Administrator. Not long after that, the Council would become an elected council, and in due course there would be a full Parliamentary system". [2]

Although Respondent during the existence of the League never made any formal proposals, either for the incorporation of South West Africa as a fifth province or otherwise, incorporation was from time to time strongly urged by sections of the inhabitants of the Territory. This pressure from within the Territory arose mainly as a counter to events in the 1930's—the claims of Germany under Hitler to the restoration of the former German colonies and the insistence on the part of the German section of the population in South West Africa that this would sooner or later be achieved. M. Rappard in 1934 called this agitation for incorporation "a very natural reaction". [3]

The statement of M. Rappard referred to at page 39 of the *Memorials* was made in 1925. It did not relate to any concrete proposal or intention and, in fact, constituted speculation on a purely hypothetical basis. Consequently Sir Frederick Lugard considered that in the absence of a concrete proposal, this discussion was beyond the Commission's competence. [4]

In the circumstances the phrase "the proposal" at page 39 of the *Memorials* is not understood, nor does Respondent understand the allegation that such a proposal *(sic)* "frequently drew the Commission's attention."

21. The purport of the quotation given by the Applicants at pages 39 to 40 of their *Memorials*, will be better understood when that quotation is read in the context of the full paragraph in which it appeared. That paragraph read:

> "The Commission was informed by the mandatory Power that the latter has appointed a special Committee to study certain constitutional problems raised by a motion of the Legislative Assembly of the territory aiming at its incorporation as a 'fifth province of the Union'. It noted, in particular, that this committee is to take

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[1] *Vide* para. 8 *supra*.
[2] *P.M.C., Min.*, II, p. 92.
[3] *Ibid.*, XXVI, p. 50.
[4] *Ibid.*, VI, p. 60.

account, *inter alia*, 'of the character of the territory as a mandated territory and the rules of international law governing the mandate'.

The *Commission noted with satisfaction* the statement by the accredited representative that the mandatory Power will not take any action in this respect until it has first communicated its intentions to the League of Nations.

As the guardian of the integrity of the institution of mandates, the Commission therefore expects to be informed of the mandatory Power's views on the question, which it will not fail to subject to that careful examination that its international importance demands.

The Commission wishes, on this occasion, to draw attention to the mandatory Power's fundamental obligation to give effect, not only to the provisions of the mandate, but also to those of Article 22 of the Covenant." [1] (Italics added.)

M. Rappard indicated the attitude of Members of the Commission when he said:

"... he deeply appreciated the statements made by the accredited representatives. The attitude of the Union Government in this matter had now been fully and completely defined. Last year, there had been some misunderstanding on the subject, because the previous accredited representative had apparently not felt authorised to make definite statements. There had been no lack of goodwill on his part, and this observation implied no criticism of his attitude. It was, however, a matter of congratulation that so full a statement had now been made. This statement went a long way to create that mutual confidence between the Mandates Commission and the mandatory Power which was so necessary for the success of their mutual efforts". [2]

Thus as regards the Mandatory's attitude, the Commission expressed, not "misgivings" [3], but "satisfaction".

Applicants state at page 40 of the *Memorials* "in the meantime the Union had established 'a South West Africa Commission' ... to deal further with the matter of incorporation". In fact this Commission was the body referred to in the observations of the Permanent Mandates Commission, above quoted, as a "Committee to study certain constitutional problems." Its appointment had been notified to the Commission by Respondent, and the observations of the Commission arose from the discussion of that very notification.

The Commission's subsequent observations referred to by the Applicants at page 40 of the *Memorials*, read in full:

"The Commission noted the statement in the annual report (page 4) that the mandatory Power 'is of opinion that to administer the mandated territory as a fifth province of the Union subject to the terms of the mandate would not be in conflict with the terms of the mandate itself'. It also noted that the mandatory 'feels that sufficient grounds have not been adduced for taking such a step'.

[1] *Ibid.*, XXVII, p. 229.
[2] *Ibid.*, p. 161.
[3] As is alleged by Applicants at p. 39 of *Memorials*.

> The Commission does not express any opinion as to a method of administration the scope of which it has had no opportunity of judging and the adoption of which, according to the statement of the mandatory Power, is not contemplated; it confines itself to making all legal reservations on the question". [1]

In the absence of any specific proposal, the Permanent Mandates Commission could hardly be expected to take any other course than to reserve its position, as it did. The significance which the Applicants attach to this reservation is therefore not understood.

Respondent has never made a secret of its conviction that closer association between South Africa and South West Africa would best serve the interests of the inhabitants of South West Africa. It held that view before Versailles and reassessment in the light of subsequent events has not led to any other conclusion. Respondent sees nothing wrong, sinister or strange in seeking that closer association.

There is, however, no justification for Applicants' statement at page 40 of their *Memorials* that

> "the question of the legal status of the Territory was perhaps the most serious area of disagreement persisting between the Union and the Permanent Mandates Commission".

As appears from the facts aforestated, there was no "area of disagreement persisting" as regards "the legal status of the Territory"; and Respondent is not aware of any "area of disagreement", "serious" or otherwise, "persisting" in regard to any other matter.

22. Applicants allege at page 40 of their *Memorials* that the Permanent Mandates Commission "repeatedly deemed it necessary to criticize other phases of the Union's administration of the Territory" —and they then list five aspects of administration, giving references. For reasons stated in paragraph 1 above, Respondent does not deal here with the substance of the allegations, other than to state that neither the references cited by Applicants nor the other records of the League support the allegation that the Commission had "repeatedly criticized" aspects of its administration of South West Africa. It was the duty of the Commission to express its views on the administration, and complete agreement at all times between the Mandatory and individual members or even the Commission as a whole could not possibly be expected. Yet, individual differences which did arise from time to time, were remarkably few and they were invariably settled to the satisfaction of the Commission, the Council and the Mandatory.

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[1] *Ibid.*, XXXI, p. 192.

The Period of Transition 1945-1946

Establishment of the United Nations

23. The establishment of the United Nations Organisation resulted largely from inter-Allied co-operation during the Second World War. The name "United Nations" had been adopted by the Allies in the later stages of the war and used in declarations, such as that of the 1st January, 1942, at Washington, pledging war-time co-operation. The prospect of establishing a new international organisation for the preservation of international peace was mentioned in a declaration signed on the 30th October, 1943, at Moscow, by the representatives of four of the major Allied Powers, *viz.* the Union of Soviet Socialist Republics, the United States of America, the United Kingdom and China. The first blueprint of the organisation was prepared during discussions in the period August to October, 1944, at Dumbarton Oaks, Washington, in which the said four powers participated. Following on these discussions there was published the proposal *inter alia* that the key body in the contemplated organisation was to be a Security Council on which the "Big Five" powers (being the above four and France) were to be permanently represented. During the Yalta Conference of February, 1945, between President Roosevelt of the United States of America, Prime Minister Churchill of the United Kingdom and Premier Stalin of the Soviet Union, came an announcement that the question of voting procedure in such a Security Council had been settled and that "a conference of United Nations" should be called to meet at San Francisco to prepare a charter for "a general international organisation to maintain peace and security ... along the lines proposed in the informal conversations of Dumbarton Oaks".

A conference of delegates of fifty nations was held at San Francisco between the 25th April and the 26th June, 1945, at which the Charter of the United Nations was drafted, unanimously agreed upon and signed by all the representatives. It came into force on the 24th October, 1945, when, as required by Article 110 thereof, the five Powers that were to be permanent members of the Security Council and a majority of the other signatory States had filed their ratifications. [1]

24. During the aforesaid events the League of Nations was still in existence; and it continued to exist side by side with the new organisation until April, 1946.

There was no suggestion that the United Nations was to be the League under a new name, or an automatic successor in law to League assets, obligations, functions or activities. Indeed, two of the major powers which played a leading rôle in the establishment of the United Nations, and were to be permanent members of the

[1] *Everyman's United Nations* (6th ed.), pp. 4-5. *Vide* also Goodrich, L. M. and Hambro, E. *Charter of the United Nations* (2nd ed.), pp. 3-18.

Security Council, were known to be strongly averse to any notion of automatic succession. They were the Soviet Union, which had been expelled from the League in December, 1939, and the United States of America, which had never been a Member of the League.

In terms of Article 3 of the Charter, the original Members of the United Nations were the States which, having participated in the San Francisco Conference or having signed the Declaration by the United Nations of 1st January, 1942, also signed the Charter and ratified it in accordance with Article 110. There were 51 such original Members of the United Nations, of which 17 were not at that time (1945-1946) Members of the League. They were:

> Byelorussian Soviet Socialist Republic, Chile, Costa Rica, El Salvador, Guatemala, Haiti, Honduras, Lebanon, Nicaragua, Paraguay, Peru, Philippines, Saudi Arabia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United States of America, Venezuela.

Of those 17, six had never been Members of the League. They were:

> Byelorussian Soviet Socialist Republic, Lebanon, Philippines, Saudi Arabia, Ukrainian Soviet Socialist Republic and United States of America.

All the others (except the Soviet Union) had many years before withdrawn from the League on notice. [1]

Further, of the 42 Members of the League of Nations at that time, 11 were not original Members of the United Nations. They were:

> Afghanistan, Bulgaria, Estonia, Finland, Ireland, Latvia, Lithuania, Portugal, Siam (Thailand), Sweden and Switzerland.

Four of these, *viz.* Switzerland, Lithuania, Latvia and Estonia, never became Members of the United Nations. The others were admitted to membership at various times, in some cases years after the establishment of the United Nations. [2]

As a result of the admission of new Members, United Nations membership grew to 99 as at the end of 1960. Although 14 of these new Members had at some stage or another been Members of the League, the other 34 had never been.

25. At the San Francisco Conference, during the discussions concerning the provisions of the Charter relative to a proposed Trusteeship System, [3] the South African representative made the following statement:

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[1] For dates *vide* Walters, F. P. *A History of the League of Nations* (1952), Vol. I, pp. 64-65.

[2] *Vide* dates in *Everyman's United Nations* (6th ed.), p. 6.

[3] In Committee II/4 on 11th May, 1945.

"I wish to point out that there are territories already under Mandate where the Mandatory principle cannot be achieved.

As an illustration, I would refer to the former German territory of South West Africa held by South Africa under a 'C' Mandate.

The facts with regard to this territory are set out in a memorandum filed with the Secretariat, which I now read:

When the disposal of enemy territory under the Treaty of Versailles was under consideration, doubt was expressed as to the suitability of the Mandatory form of administration for the territory which formerly constituted the German Protectorate of South West Africa.

Nevertheless, on 17th December, 1920, by agreement between the Principal Allied and Associated Powers and in accordance with Article 22 Part 1 (Covenant of the League of Nations) of the Treaty, a Mandate (commonly referred to as a C Mandate) was conferred upon the Government of the Union of South Africa to administer the said territory.

Under the Mandate the Union of South Africa was granted full power of administration and legislation over the territory as an integral portion of the Union of South Africa, with authority to apply the laws of the Union to it.

For twenty-five years, the Union of South Africa has governed and administered the territory as an integral part of its own territory and has promoted to the utmost the material and moral well-being and the social progress of the inhabitants.

It has applied many of its laws to the territory and has faithfully performed its obligations under the Mandate.

The territory is in a unique position when compared with other territories under the same form of Mandate.

It is geographically and strategically a part of the Union of South Africa, and in World War No. 1 a rebellion in the Union was fomented from it, and an attack launched against the Union.

It is in large measure economically dependent upon the Union, whose railways serve it and from which it draws the great bulk of its supplies.

Its dependent native peoples spring from the same ethnological stem as the great mass of the native peoples of the Union.

Two-thirds of the European population are of Union origin and are Union Nationals, and the remaining one-third are Enemy Nationals.

The territory has its own Legislative Assembly granted to it by the Union Parliament, and this Assembly has submitted a request for incorporation of the territory as part of the Union.

The Union has introduced a progressive policy of Native Administration, including a system of local government through Native Councils giving the Natives a voice in the management of their own affairs; and under Union Administration Native Reserves have reached a high state of economic development.

In view of contiguity and similarity in composition of the native peoples in South West Africa the native policy followed in South West Africa must always be aligned with that of the Union, three-fifths of the population of which is native.

There is no prospect of the territory ever existing as a separate state, and the ultimate objective of the Mandatory principle is therefore impossible of achievement.

The Delegation of the Union of South Africa therefore claims that the Mandate should be terminated and that the territory should be incorporated as part of the Union of South Africa.

As territorial questions are however reserved for handling at the later Peace Conference where the Union of South Africa intends to raise this matter, it is here only mentioned for the information of the Conference in connection with the Mandates question". [1]

26. The significance of the above statement appears further from an extract from a later statement by Field-Marshal Smuts, which can conveniently—although out of historical sequence—be cited here. Addressing the Fourth Committee of the General Assembly of the United Nations at its fourteenth meeting on 4th November, 1946, Field-Marshal Smuts stated, *inter alia:*

> "It was . . . incumbent on the Union Government as trustee of the interests of the people of South West Africa to ensure that, when the proper time arrived for consideration of any change in the status of the Territory, such consideration should not be prejudiced by any prior commitment on the part of the Union Government by virtue of its membership of any organization which might replace the League of Nations; Accordingly, in May 1945, when questions relating to trusteeship were under consideration by the San Francisco Conference, the Union Government entered a reservation designed to ensure that the future status of South West Africa and the desirability of its incorporation in the Union should not be prejudiced by any proposals adopted by the Conference in regard to the future of mandated Territories. The text of this reservation is given in Paragraph 1 of Document A/123. In the event, however, the Charter of the United Nations by the use of the term 'may' instead of 'shall' in Article 77 excluded any obligation to place Mandated Territories under trusteeship and made the application of the trusteeship system to such territories a matter of voluntary agreement. This no doubt accounts for the fact that in addition to South West Africa three other Mandates—Transjordan, Palestine and the Japanese Pacific Islands—have so far been excluded from the Trusteeship System". [2]

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[1] The official records of the San Francisco Conference contain only a brief summary of this statement. (*U.N.C.I.O. Docs.* Vol. 10, p. 434.) The text quoted here is taken from the original typewritten document from which the South African representative, Dr. D. L. Smit, read the statement in the Committee on Trusteeship on 11th May, 1945, which accords with an unofficial verbatim record in the custody of the United Nations Secretariat. The original document read by the South African representative contains also the following paragraph which is, however, not reflected in the unofficial verbatim record:

> "As stated in the Memorandum, this is not a matter that can be decided here, but I am directed to mention it for the information of the 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."

Dr. Smit affirms that he made the whole statement as it appears in Respondent's records.

[2] *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, p. 239.

27. Towards the conclusion of the San Francisco Conference, on 25th June, 1945, there was established a Preparatory Commission of the United Nations, consisting of one representative of each signatory State. [1] The functions entrusted to it were to convoke the General Assembly in its first session, to prepare the provisional agenda, documents and recommendations for the first sessions of the principal organs of the Organisation, and to do certain other defined preparatory work pending establishment of the Secretariat. [2] One of these items of preparatory work was 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 Organisation to take over on terms to be arranged". [3]

The Commission first met on 27th June, 1945, at San Francisco. And when its Second Session opened on 24th November, 1945, in London, it had before it a Report by its Executive Committee, [4] which was composed of representatives of the Governments of fourteen States. This report served as a basis for the work of the full Commission, which rendered its own report on 23rd December, 1945, [5] setting out therein *inter alia* recommendations concerning the agenda and proposed resolutions for the First Part of the First Session of the General Assembly, which was held in London from 10th January to 14th February, 1946.

28. The Commission's task in regard to the possible transfer of certain functions, assets and activities of the League to the United Nations, was carried out in the following stages:

(a) A sub-committee of the Executive Committee made certain recommendations, cited in Section 3 of Chapter IX of the latter's report. The sub-committee recommended, with certain exceptions and qualifications, the transfer of the functions, activities and assets of the League. Among the exceptions were the political functions of the League; and the sub-committee also indicated that:

> "Since the questions arising from the winding up of the Mandate system are dealt with in Part III, Chapter IV, no recommendation on this subject is included here". [6]

In regard to functions arising from Treaties, the sub-committee recommended the adoption of a resolution by which the United Nations should express their willingness to exercise functions and powers previously entrusted to the League, reserving, however, the right to decide which functions and powers they were prepared to take over and to determine which Organ of the United Nations, or

[1] *U.N.C.I.O. Docs.*, Vol. 5, pp. 300, 315 and Vol. 1, p. 630.
[2] *Ibid.*, Vol. 5, pp. 300, 316.
[3] *Ibid.*, p. 316, item (c).
[4] *Doc.* PC/EX/113/Rev. 1, 12th November, 1945.
[5] *Doc.* PC/20, 23rd December, 1945.
[6] *Doc.* PC/EX/113/Rev. 1, Chap. IX, sec. 3, paras. 1, 2 and 5, p. 110.

Specialised Agency associated with it, would exercise the functions or powers taken over. [1] Added to this recommendation was the following:

> "The transfer to the United Nations of functions or powers entrusted to the League of Nations by treaties, conventions, agreements or instruments having a political character, would if the parties to these instruments desire, be separately considered in each case".[2]

As regards possible transfer of functions and activities as well as of assets, the sub-committee suggested the appointment by the Preparatory Commission of a small committee to negotiate with the Supervisory Commission of the League of Nations regarding "the parallel measures that should be adopted by the League of Nations and the United Nations". [3]

(b) The Executive Committee's recommendations, as set out in Sections 1 and 2 of Chapter IX of its Report, reveal acceptance in substance of the sub-committee's recommendations. Recommendation No. 1 of the Executive Committee read as follows:

> "1. that the functions, activities and assets of the League of Nations be transferred to the United Nations with such exceptions and qualifications as are made in the report referred to above, and without prejudice to such action as the United Nations may subsequently take with the understanding that the contemplated transfer does not include the political functions of the League, which have in fact already ceased, but solely the technical and non-political functions;" [4]

A footnote relative to exceptions and qualifications read in part:

> "The Committee recommends that no political questions should be included in the transfer. *It makes no recommendation to transfer the activities concerning* refugees, *mandates* or international bureaux".[4] (Italics added.)

Section 2 of this Chapter of the Executive Committee's Report contained a draft Resolution for the General Assembly, concerning the assumption by the United Nations of functions of the League under International Agreements. It distinguished between:

"A. Secretarial Functions";

"B. Functions and Powers of a Technical and Non-Political Character"; and

"C. Treaties and International Conventions, Agreements and other Instruments having a Political Character".

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[1] *Ibid.*, para. 8, p. 111.
[2] *Ibid.*, para. 10, p. 111.
[3] *Ibid.*, paras. 32 and 33, p. 114.
[4] *Ibid.*, p. 108.

In regard to A and B it suggested an expression of willingness, subject to the reservations mentioned by the sub-committee, to ensure continued exercise of functions and powers. In regard to C it suggested the following:

> "The General Assembly of the United Nations decides that it will itself examine or will submit to the appropriate organ of the United Nations any request from the parties that the United Nations should take over the exercise of functions or powers entrusted to the League of Nations by treaties and international conventions, agreements or other instruments having a political character".[1]

The sub-committee's recommendation that a small Committee be appointed to negotiate with the League Supervisory Commission regarding parallel measures, was endorsed.[2]

(c) Discussions in the Preparatory Commission itself revealed that two delegates in the Executive Committee had voted against acceptance of Chapter IX of its Report,[3] and also that there was concern amongst some delegates about the possibility that the word "transfer", as used in the recommendations concerning functions and activities of the League, could "imply a legal continuity which would not in fact exist", resulting in a suggestion that the phrase "the assumption of responsibility for certain functions and activities" might be adopted.[4] This was eventually done,[5] with the further substitution of "powers" for "activities". The recommendations of the Commission, relative to functions and powers, in the form as finally adopted by the General Assembly in its Resolution XIV (I) of 12th February, 1946, read as follows:

"TRANSFER OF CERTAIN FUNCTIONS, ACTIVITIES AND ASSETS OF THE LEAGUE OF NATIONS

I

FUNCTIONS AND POWERS BELONGING TO THE LEAGUE OF NATIONS UNDER INTERNATIONAL AGREEMENTS

Under various treaties and international conventions, agreements and other instruments, the League of Nations and its organs exercise, or may be requested to exercise, numerous functions or powers for the continuance of which, after the dissolution of the League, it is, or may be, desirable that the United Nations should provide.

Certain Members of the United Nations, which are parties to some of these instruments and are Members of the League of Nations,

[1] *Ibid.*, p. 110.
[2] *Ibid.*, p. 109 (last para. of sec. 1).
[3] *U.N. P.C., Committee 7, Summary Records*, para. 1, p. 2.
[4] *Ibid.*, para. 3, pp. 2-3.
[5] *Ibid.*, pp. 10-11.

have informed the General Assembly that, at the forthcoming session of the Assembly of the League, they intend to move a resolution whereby the Members of the League would, so far as this is necessary, assent and give effect to the steps contemplated below.

Therefore:

1. *The General Assembly* reserves the right to decide, after due examination, not to assume any particular function or power, and to determine which organ of the United Nations or which specialized agency brought into relationship with the United Nations should exercise each particular function or power assumed.

2. *The General Assembly* records that those Members of the United Nations which are parties to the instruments referred to above assent by this resolution to the steps contemplated below and express their resolve to use their good offices to secure the co-operation of the other parties to the instruments so far as this may be necessary.

3. *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.

A. *Functions pertaining to a Secretariat*

. . .

B. *Functions and Powers of a Technical and Non-Political Character*

Among the instruments referred to at the beginning of this resolution are some of a technical and non-political character which contain provisions, relating to the substance of the instruments, whose due execution is dependent on the exercise, by the League of Nations or particular organs of the League, of functions or powers conferred by the instruments. Certain of these instruments are intimately connected with activities which the United Nations will or may continue.

It is necessary, however, to examine carefully which of the organs of the United Nations or which of the specialized agencies brought into relationship with the United Nations should, in the future, exercise the functions and powers in question, in so far as they are maintained.

Therefore:

The General Assembly is willing, subject to these reservations, to take the necessary measures to ensure the continued exercise of these functions and powers, and refers the matter to the Economic and Social Council.

C. *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 intruments having a political character . . ." [1]

Regarding transfer of assets, the Preparatory Commission on 18th December, 1945, set up a committee

"to enter, on its behalf, into discussion with the League of Nations Supervisory Commission, which has been duly authorized by the members of the League of Nations, for the purpose of establishing a common plan for the transfer of the assets of the League to the United Nations on such terms as are considered just and convenient. This plan will be subject, so far as the United Nations is concerned, to approval by the General Assembly". [2]

It will be observed that the task of this negotiating committee was confined to assets, the earlier recommendations of the Executive Committee and its sub-committee (sub-paras. (a) and (b) above) not being followed insofar as they related to functions and activities —ostensibly inasmuch as the conception of a "transfer" of certain functions and activities had been abandoned in favour of one of "assumption" of certain functions and powers.

The Commission's recommendation regarding assets was merely that the plan to be developed as a result of the discussions should be submitted for approval to the General Assembly. [3] This was done at the First Part of the First Session, the General Assembly approving of the common plan in Part III of Resolution XIV of 12th February, 1946 *(supra)*.

29. (a) It will be recalled that the sub-committee of the Executive Committee stated in its recommendations that "questions arising from the winding-up of the Mandate System are dealt with in Part III, Chapter IV" of the Executive Committee's Report. [4]

(b) Reference to Chapter IV of its Report reveals that the Executive Committee, in view of possible delay in constituting the Trusteeship Council in terms of Article 86 of the Charter, recommended that the General Assembly create a Temporary Trusteeship Committee "to carry out certain of the functions assigned in the Charter to the Trusteeship Council, pending its establishment". [5]

One of the functions proposed for such a Committee 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 Mandates System". [6]

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[1] *G.A. Resolution* XIV(1), 12th February, 1946 in *U.N. Doc.* A/64.
[2] *Doc.* PC/20, p. 118.
[3] *Ibid.*
[4] *Vide* para. 28(a) *supra.*
[5] *Doc.* PC/EX/113/Rev. 1, Chap. IV, sec. 2, para. 3, p. 55.
[6] *Ibid.*, para. 4 (iv), p. 56.

And in Section 3, para. 9, there was included in the proposed Provisional Agenda for the Temporary Trusteeship Committee:

> "Problems arising from the transfer of functions in respect of existing mandates from the League of Nations to the United Nations".

This is probably what the sub-Committee of the Executive Committee had in mind in speaking of "Part III, Chapter IV" of the Executive Committee's report.

(c) The recommendations regarding a Temporary Trusteeship Committee were, however, not accepted by the Preparatory Commission. They were replaced by a recommendation that the General Assembly should adopt a resolution calling on states administering territories under League of Nations Mandate to undertake practical steps for submitting trusteeship agreements in respect of them "preferably not later than during the Second Part of the First Session of the General Assembly".[1] The recommendation proceeded:

> "Those trusteeship matters which will be taken up by the General Assembly at the First Part of its First Session for the purpose of expediting the establishment of the trusteeship system, will be considered by the Trusteeship Committee of the General Assembly, using the methods which the General Assembly considers most appropriate for the further consideration of these matters".[2]

(d) In the discussion preceding this recommendation, in the 4th Committee of the Preparatory Commission on 20th December, 1945, the representative of Australia made certain reservations concerning aspects of the proposed preamble, stating, *inter alia*:

> "There was an implication that Article 80 imposed an obligation on States administering the territories mentioned in Article 77 to place those territories under trusteeship. *The terms of Articles 75 and 77 made it clear that the placing of a territory under trusteeship would be a voluntary act.*
>
> Thirdly, the phrase 'calls on,' since it had a special connotation in the Charter (e.g. Articles 33 and 41), was unfortunate in this context.
>
> His Delegation cordially associated itself with the language of the resolution, but had to insist that the language of the preamble was not within the letter and spirit of the Charter; *the action of a mandatory would be as voluntary as that of any State putting any kind of dependent territory under trusteeship*".[3] (Italics added.)

Respondent's representative on the same occasion

> "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

[1] *Doc.* PC/20, Chap. IV, sec. 1, p. 49.
[2] *Ibid.*
[3] *U.N. P.C., Committee 4, Summary Records*, p. 39.

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". [1]

In the discussion on the same subject in the Preparatory Commission meeting on 23rd December, 1945, Respondent's representative stated:

"the South African Delegation associated itself wholly with the desire of Committee 4 to apply the principles laid down in the Charter and that its efforts had been directed towards that end. In view, however, of the special position of the Union of South-Africa, which held a mandate over South-West Africa, it reserved its position with regard to the document at present under review, and especially because 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 territories under mandate, and that the time had now come for the position to be examined as a whole. For that reason, the South African delegation reserved its attitude until the Assembly met". [2]

(e) The Preparatory Commission's report was considered at the First Part of the First Session of the General Assembly in January-February, 1946. Addressing a Plenary Meeting on 17th January, 1946, the South African representative stated his Government's position on the South West Africa Mandate 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 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

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[1] *Ibid.*, p. 40.

[2] *U.N. P.C., Journal*, p. 131.

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". [1]

On 22nd January, 1946, in the Fourth Committee, he added:

"Referring to the text of Article 77, he said that under the Charter the transfer of the mandates regime 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". [2]

(f) Of the other Mandatories the representative of the United Kingdom stated (on 17th January, 1946):

"We have decided to enter forthwith into negotiations for placing Tanganyika, the Cameroons and Togoland under the trusteeship system. Preliminary negotiations have already started. I must make it clear that our willingness to place these territories under the trusteeship system naturally depends upon our being able to negotiate terms which in our view are generally satisfactory, and which achieve the objectives of the Charter and are in the best interests of the inhabitants of the territories concerned . . .

Regarding Palestine, the Assembly is aware that an Anglo-American Committee of Enquiry is, at this very moment, examining the question of European Jewry, which is one of the most tragic episodes in the whole of history, and also the Palestine problem. We think it necessary to await the Committee's report before putting forward any proposals relating to the future of Palestine.

Regarding the future of Transjordan, it is the intention of His Majesty's Government in the United Kingdom to take steps in the near future for establishing this territory as a sovereign independent State and for recognizing its status as such. In these circumstances, the question of Transjordan going under trusteeship does not arise". [3]

The representative of France stated (on 19th January, 1946):

"The French Government intends to carry on with the work entrusted to it by the League of Nations. Believing further that it is in the spirit of the Charter that this work should henceforward be carried on under the trusteeship system, it is prepared to study

[1] *G.A., O.R., First Sess., First Part*, 12th Plenary Meeting, 17th January, 1946, pp. 185-86.

[2] *Ibid., Fourth Comm.*, 3rd Meeting, 22nd January, 1946, p. 10.

[3] *Ibid.*, 11th Plenary Meeting, 17th January, 1946, pp. 166-67.

the terms of the agreements by which this regime could be defined in the case of Togo and the Cameroons, on the understanding, however, that this shall not entail, for the populations concerned, any diminution in the rights which they already enjoy by reason of their integration into the French community, and further that these agreements will be submitted for approval to the representative organs of these populations". [1]

Other Mandatory Powers, New Zealand, Australia and Belgium, stated intentions to negotiate trusteeship agreements in respect of the mandated territories administered by them. [2]

(g) In its Resolution XI of 9th February, 1946, the General Assembly (in the preamble) *inter alia* expressed regret at the fact that the Trusteeship Council could not be brought into being at that session, because trusteeship agreements had first to be concluded, and referred to the above-mentioned recommendation of the Preparatory Commission as regards expediting the conclusion of such agreements. The Resolution proceeded to state *inter alia* that

> "*with respect to Chapters XII and XIII of the Charter, the General Assembly:*
>
> *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 other 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". [3]

Dissolution of the League of Nations

30. The situation as far as the League of Nations was concerned, after establishment of the United Nations, was described in a League publication as follows:

> "The adoption of the Charter of the United Nations by a Conference at which the great majority of the States Members of the League were represented made the latter's ultimate disappearance a foregone conclusion and from that time onwards the chief concern of those responsible for its destinies was to see that its activities were terminated in a manner worthy of the part it has played in world affairs during the last quarter of a century". [4]

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[1] *Ibid.*, 16th Plenary Meeting, 19th January, 1946, p. 251.
[2] *Ibid.*, 14th and 15th Plenary Meetings, 18th January, 1946, pp. 227, 233 and 238.
[3] *U.N. Doc.* A/64, p. 13.
[4] *The League Hands Over* (1946), p. 61.

31. The Secretary-General of the League, in a communication dated the 20th September, 1945, drew the attention of League Members to the task entrusted at San Francisco to the United Nations Preparatory Commission relative to "the possible transfer of certain functions, activities and assets of the League which it may be considered desirable for the new Organisation to take over on terms to be arranged".[1] The communication contained a proposal that the Supervisory Commission of the League be empowered to negotiate with representatives of the United Nations in this regard and to draw up provisional terms of transfer "subject to the final decision of the League Assembly".[2] The proposal was accepted by the Members of the League, and negotiations were entered into with the United Nations negotiating committee established by its Preparatory Commission on the 18th December, 1945.[3] By reason of the limited terms of reference of the United Nations committee,[4] the negotiations concerned *assets* only. The joint deliberations were successful and resulted in the "common plan", which was approved by the General Assembly of the United Nations in Part III of its Resolution XIV of the 12th February, 1946.[5] It still required the assent of the League Assembly to become effective.

After referring to the United Nations resolutions relative to possible assumption of League functions and powers,[6] the authors of *The League Hands Over* stated:

> "Thus by the time the Assembly met in its twenty-first session it was in possession of the United Nations' plans for taking over the League's material assets and for carrying on, either directly or through one of its related agencies, all the League's most important functions and activities of a non-political character. Its main business, therefore, was 'to make provision for bringing the League of Nations to an end in orderly fashion, so that as much as possible of its surviving work can be continued without interruption and as much as possible of its property can be used to promote those high purposes of international peace and co-operation for which the League itself was founded' ".[7]

32. The League Assembly met in its twenty-first, and last session from the 8th to the 18th April, 1946.

Its final resolution, adopted on 18th April, 1946, provided at the commencement of its operative part as follows:

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[1] *Vide* para. 27 *supra*.
[2] *The League Hands Over*, p. 61.
[3] *Vide* para. 28(c) *supra*.
[4] *Ibid.*
[5] *Ibid.*
[6] *Vide* para. 28 *supra*.
[7] At p. 63. The quotation was taken from the *Report of the First Committee to the Assembly* in *L. of N., O.J., Spec. Sup.* No. 194, p. 250.

> "*Dissolution of the League of Nations.*
>
> 1. (1) With effect from the day following the close of the present session of the Assembly, the League of Nations shall cease to exist except for the sole purpose of the liquidation of its affairs as provided in the present resolution". [1]

The rest of the Resolution related to practical arrangements concerning liquidation, which need not be quoted. Of significance for present purposes, however, is that paragraph 5 thereof approved of the common plan for transfer of *assets* to the United Nations.

33. "*The Assumption by the United Nations of Functions and Powers hitherto exercised by the League under International Agreements*" was the heading of a separate resolution adopted earlier on the 18th April, 1946. It read, in so far as is relevant, as follows:

> "The Assembly of the League of Nations,
>
> Having considered the resolution on the assumption by the United Nations of functions and powers hitherto exercised by the League of Nations under international agreements, which was adopted by the General Assembly of the United Nations on February 16th, 1946. [2]
>
> Adopts the following resolutions:
>
> 1. *Custody of the Original Texts of International Agreements.*
>
> . . .
>
> 2. *Functions and Powers arising out of International Agreements of a Technical and Non-political Character.*
>
> The Assembly recommends the Governments of the Members of the League to facilitate in every way the assumption without interruption by the United Nations, or by specialised agencies brought into relationship with that organisation, of functions and powers which have been entrusted to the League of Nations, under international agreements of a technical and non-political character, and which the United Nations is willing to maintain". [3]

34. "*The Assumption by the United Nations of Activities hitherto performed by the League*" was the heading of a further separate resolution of the 18th April, 1946, reading as follows:

> "The Assembly directs the Secretary-General of the League of Nations to afford every facility for the assumption by the United Nations of such non-political activities, hitherto performed by the League, as the United Nations may decide to assume". [3]

35. Finally, "Mandates" was the heading of another important separate resolution of the 18th April, 1946. Before setting out its

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[1] *L. of N., O.J., Spec. Sup.* No. 194, p. 281.
[2] *G.A. Resolution* XIV (1), 12th November, 1946, in *U.N. Doc.* A/64, p. 35.
[3] *L. of N., O.J Spec. Sup.* No. 194, p. 278.

terms, regard is to be had to certain events which preceded its adoption.

(a) The session was scheduled to last less than two weeks, and delegates knew that it would not be possible to discuss the future of the Mandate System at any length in an appropriate Committee. Informal discussions were consequently initiated between those Members of the League most directly concerned, with a view to securing the greatest possible measure of agreement before the matter was officially considered in the Committee.

In pursuance of the said discussions, the representatives of Mandatory Powers, in addressing the plenary meeting of the Assembly, made statements indicating the intentions of their Governments regarding their respective Mandates. In the resolution ultimately adopted the Assembly "took note" of these statements.

(b) The following are relevant extracts from these statements of intention by the various Mandatories:

(i) *By the representative of the United Kingdom* (on the 9th April, 1946):

> "The mandates administered by the United Kingdom were originally those for Iraq, Palestine, Transjordan, Tanganyika, part of the Cameroons and part of Togoland. Two of these territories have already become independent sovereign States, Iraq in 1923, and Transjordan just the other day in 1946. As for Tanganyika and Togoland under their mandate, and the Cameroons under their mandate, His Majesty's Government in the United Kingdom have already announced their intention of placing them under the trusteeship system of the United Nations, subject to negotiations on satisfactory terms of trusteeship.
>
> The future of Palestine cannot be decided until the Anglo-American Committee of Enquiry have rendered their report, but until the three African territories 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". [1]

(ii) *By the representative of South Africa* (on the 9th April, 1946):

> "Since the last League meeting, new circumstances have arisen obliging the mandatory Powers to take into review the existing arrangements for the administration of their mandates. As was fully explained at the recent United Nations General Assembly in London, the Union Government have deemed it incumbent upon them to consult the peoples of South-West Africa, European and non-European alike, regarding the form which their own future Government should take. On the basis of those consultations, and having regard to the unique circumstances which so signally differentiate South-West Africa—a territory contiguous with the Union—

[1] *Ibid.*, p. 28.

from all other mandates, it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South-West Africa a status under which it would be internationally recognised as an integral part of the Union. As the Assembly will know, it is already administered under the terms of the mandate as an integral part of the Union. In the meantime the Union will continue to administer the territory scrupulously in accordance with the obligations of the mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.

The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete 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". [1]

(iii) *By the representative of France* (on the 10th April, 1946):

"The French Government intends to pursue the execution of the mission entrusted to it by the League of Nations. It considers that it is in accordance with the spirit of the Charter that this mission should henceforth be carried out under the regime of trusteeship and it is ready to examine the terms of an agreement to define this regime in the case of Togoland and the Cameroons". [2]

(iv) *By the representative of New Zealand* (on the 11th April, 1946):

"New Zealand has always strongly supported the establishment of the International Trusteeship System, and has already declared its willingness to place the mandated territory of Western Samoa under trusteeship... New Zealand does not consider that the dissolution of the League of Nations and, as a consequence, of the Permanent Mandates Commission will have the effect of diminishing her obligations to the inhabitants of Western Samoa, or of increasing her rights in the territory. Until the conclusion of our Trusteeship Agreement for Western Samoa, therefore, the territory will continue to be administered by New Zealand, in accordance with the terms of the Mandate, for the promotion of the well-being and advancement of the inhabitants". [3]

(v) *By the Belgian representative* (on the 11th April, 1946):

"At the meeting of the General Assembly of the United Nations in London on January 20th last, she declared her intention of entering into negotiations with a view to placing the Territory of Ruanda-Urundi under the new regime. In pursuance of this intention,

[1] *Ibid.*, pp. 32-33.
[2] *Ibid.*, p. 34.
[3] *Ibid.*, p. 43.

the Belgian Government has prepared a draft agreement setting out the conditions under which it will administer the territory in question.

In the course of the same declaration of January 20th, we expressed our confidence that the Trusteeship Council would soon come to occupy in the United Nations Organisation the important place which it deserves. We can only repeat that hope here and give an assurance that, pending its realisation, Belgium will remain fully alive to all the obligations devolving on members of the United Nations under Article 80 of the Charter". [1]

(vi) *By the Australian representative* (on the 11th April, 1946):

"The trusteeship system, strictly so called, will apply only to such territories as are voluntarily brought within its scope by individual trusteeship agreements... After the dissolution of the League of Nations and the consequent liquidation of the Permanent Mandates Commission, it will be impossible to continue the mandates system in its entirety.

Notwithstanding this, the Government of Australia does not regard the dissolution of the League as lessening the obligations imposed upon it for the protection and advancement of the inhabitants of the mandated territories, which it regards as having still full force and effect. Accordingly, until the coming into force of appropriate trusteeship agreements under Chapter XII of the Charter, the Government of Australia will continue to administer the present mandated territories, in accordance with the provision of the Mandates, for the protection and advancement of the inhabitants. In making plans for the dissolution of the League, the Assembly will very properly wish to be assured as to the future of the mandated territories, for the welfare of the peoples of which this League has been responsible. So far as the Australian territories are concerned, there is full assurance. In due course these territories will be brought under the trusteeship system of the United Nations; until then, the ground is covered not only by the pledge which the Government of Australia has given to this Assembly to-day but also by the explicit international obligations laid down in Chapter XI of the Charter, to which I have referred. There will be no gap, no interregnum, to be provided for". [2]

(vii) No statement was made concerning the future of the Pacific Islands in respect of which a Mandate had been granted to Japan.

(c) After the above statements by the representatives of the United Kingdom and of Respondent had been made (on the morning of the 9th April, 1946), but before the others could be delivered, and while the informal discussions were still proceeding regarding the drafting of a resolution, the representative of China, Dr. Liang, raised the question of the future of Mandates in the First Committee on the afternoon of the 9th April, 1946.

The Committee was at the time considering the draft resolution concerning assumption by the United Nations of League functions

[1] *Ibid.*

[2] *Ibid.*, p. 47.

and powers arising out of international agreements of a technical and non-political character (*vide* paragraph 33 above). Dr. Liang wished to propose for discussion the following draft resolution, which he read out:

> "*The Assembly:*
>
> *Considering* that the Trusteeship Council of the United Nations has not yet been constituted and that all mandated territories under the League have not been transformed into territories under trusteeship;
>
> *Considering* that the League functions as supervisory organ for mandated territories should be transferred to the United Nations after the dissolution of the League in order to avoid a period of *interregnum* in the supervision of the mandated territories;
>
> *Recommends* that the mandatory powers as well as those administering ex-enemy mandated territories shall continue to submit annual reports on these territories to the United Nations and to submit to inspection by the same until the trusteeship council shall have been constituted".

The Chairman, however, ruled that the proposal was not relevant to the item then under consideration by the Committee. What transpired is set forth as follows in the summary records of the League:

> "Dr. LONE LIANG (China) referred to the position of territories under mandate and to the position which would arise on the dissolution of the League, in view of the fact that the trusteeship council of the United Nations has not yet been appointed and was not likely to be set up for some time. The Chinese delegation wished to submit a resolution recommending that the mandatory powers should continue to submit annual reports on the mandated territories to the United Nations and that they should agree to inspection by the latter, pending the constitution of the trusteeship council.
>
> *The Chairman* thought that the question raised by the Chinese delegate could be discussed later, but for the moment they must confine themselves to examining the resolutions of the United Nations in the order in which they appeared in document A/13. 1946. The General Assembly of the United Nations had certainly not had the question of the system of trusteeship in mind when it drafted its resolution on functions and powers under international agreements of a technical and non-political character.
>
> Dr. LONE LIANG (China) accepted the Chairman's explanation". [1]

(d) Following this incident, the informal discussions mentioned above were renewed, the Chinese delegation also participating therein. The final outcome was that when the question of Mandates was reached in the First Committee, on the 12th April, 1946, the Chinese delegate, Dr. Liang, himself introduced a new draft of

[1] *Ibid.*, p. 76.

which Sir Hartley Shawcross of the United Kingdom said, when seconding the proposal, that it

> "had been settled in consultation and agreement by all countries interested in mandates, and he thought it could, therefore, be passed without discussion and with complete unanimity". [1]

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.
>
> The Chinese delegation had pleasure in presenting the draft resolution now before the Committee, so that the question could be discussed by the Assembly in a concrete form and the position of the League clarified". [2] (Italics added.)

Apart from Dr. Liang's statement, there was no discussion of the substance of the resolution, which was adopted unanimously (subject to drafting), the Egyptian delegate abstaining and "making all reservations on behalf of his Government with regard to Palestine". [2]

(e) The new draft contained what eventually became the Assembly's resolution concerning Mandates. The adoption of that Resolution by the Assembly on 18th April, 1946, was without discussion, save that the Egyptian delegate indicated that he would abstain from voting by reason of a reservation of his Government in regard to the Mandate for Palestine. The essence of the reservation appears from the following extracts from his statement:

> "The opinion of my Government is that Palestine has intellectually, economically, and politically reached a stage where it should

[1] *Ibid.*, p. 79.

[2] *Ibid.*, pp. 78-79.

no longer continue under mandate or trusteeship or whatever other arrangements may be considered. ... It is the view of my Government *that mandates have terminated with the dissolution of the League of Nations*, and that, in so far as Palestine is concerned, there should be no question of putting that country under trusteeship". [1] (Italics added.)

(f) Thereupon the Resolution was adopted (Egypt abstaining) as follows:

"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. Recognises 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". [2]

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[1] *Ibid.*, pp. 58-59.
[2] *Ibid.*, pp. 58, 278-79.

CHAPTER II (Continued)

Part B.

EVENTS SUBSEQUENT TO THE DISSOLUTION OF THE LEAGUE OF NATIONS: 1946-1960

THE PERIOD 1946-1949

1. Over the years of the Mandate's existence a growing desire had developed amongst the inhabitants of South West Africa for closer association with South Africa and for termination of the Mandate. This desire found concrete expression in resolutions passed by the South West Africa Legislative Assembly as far back as 1934. On the 14th May, 1943, the Legislative Assembly again asked for termination of the Mandate and incorporation of the Territory in the Union of South Africa. A similar resolution was passed on 8th May, 1946.

Since these resolutions emanated from a body wherein the non-White sections of the population were not directly represented, Respondent felt that they should be fully and directly consulted as to their wishes.

Respondent had made known on a number of occasions during 1945 and 1946, its intentions as to the future of South West Africa. This was done first at the San Francisco Conference in May, 1945. [1] In January, 1946, at the First Part of its First Session, the United Nations General Assembly was informed, [2] and in April of that year also the League of Nations Assembly at its final Session, [3] of Respondent's intention to consult the inhabitants of South West Africa regarding the future of the Territory.

The consultations which were thereupon conducted, resulted in an overwhelming majority of the non-White inhabitants of South West Africa expressing themselves in favour of "our country (becoming) part of the Union of South Africa"; 208,850 were in favour, 33,520 were against; and 56,790 could not be consulted because of practical difficulties.

The results and the manner of consultation, as well as a reasoned statement on the question of incorporation, were fully set out in a "Memorandum on the administration of South West Africa and on the wishes of its peoples as to the future status of the Territory",

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[1] *Vide* Part A, para. 25 *supra*.
[2] *Ibid.*, para. 29.
[3] *Ibid.*, para. 35 (b) (ii).

submitted to the Secretary-General of the United Nations by Respondent in October, 1946.[1]

2. In November, 1946, the South African representative (Field-Marshal Smuts) further elaborated on the question of incorporation in an address to the Fourth Committee of the United Nations General Assembly.

He dealt, *inter alia*, with the fundamental concepts of the Mandate System and stressed the importance of the wishes of the inhabitants of Mandated territories as to their ultimate destiny. In emphasising that South West Africa was "uniquely different" from other Mandated territories, he referred to the statement by President Wilson at Versailles[2] as to South West Africa's future association with South Africa.

He advanced many reasons why incorporation would facilitate the administration of the Territory and would also be in the best interests of South West Africa and beneficial to its inhabitants. He referred to the reservation made by Respondent at the San Francisco Conference in May, 1945, as to the future of the Territory,[3] and concluded by saying he was confident that the United Nations would recognise that, to give effect to the wishes of the population of South West Africa, would be "the logical application of the democratic principles of political self-determination" and would also be

> "the inevitable fulfilment of a historical evolution which is in itself designed to promote the best interests of the territory and confer upon it the benefits of the membership of a larger community without loss of those individual rights and responsibilities which the territory enjoyed under the Mandate".[4]

Some days later Field-Marshal Smuts also informed the Fourth Committee 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 recognise 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 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.

[1] *U.N. Doc.* A/123, in *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, pp. 199-235.

[2] Quoted *supra*, Part A, para. 8.

[3] *Vide* Part A, para. 25 *supra*.

[4] *U.N. Doc.* A/C.4/41, in *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, p. 244.

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. There was nothing in the relevant clauses of the Charter, nor was it in the minds of those who drafted these clauses, to support the contention that the Union Government could be compelled to enter into a trusteeship agreement even against its own view or those of the people concerned". [1]

3. Apart from the expressed wishes of the inhabitants, the numerous other considerations relied on for incorporation, as set out in the Memorandum [2] and elaborated on by Field-Marshal Smuts in his addresses, included the following (briefly stated):

(a) Experience had shown that the circumstances of South West Africa did not permit of entirely satisfactory administration under the Mandate System—or any analogous system.

(b) The geographical features and location of South West Africa, its vast semi-desert areas, its climate and low rainfall, and its sparse population rendered it incapable of a separate economic existence.

(c) Experience in two world wars had shown that for strategic and security reasons South Africa and South West Africa should constitute a single unit.

(d) The various peoples of South West Africa had a close ethnological and national affinity with those of South Africa—a substantial number in fact being of South African origin and South African citizens.

(e) A large measure of integration of the administration of South West Africa with that of South Africa—as sanctioned by Article 22 of the Covenant and the Mandate—had already taken place, and further integration was essential if the Territory were to share fully in the advanced technical and administrative services South Africa could provide.

(f) South West Africa was economically dependent on South Africa, not only for financial assistance and the subsidisation of its economic life, but also as a free market for its agricultural produce.

(g) The uncertainty as to the political future of the Territory inevitably militated against racial tranquility and the optimum development of the Territory.

4. In view of the above considerations Respondent considered that the General Assembly ought to endorse the proposal for in-

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[1] *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, 19th Meeting, 13th November, 1946, p. 102.

[2] *U.N. Doc.* A/123.

corporation. The General Assembly, however, rejected (in Resolution 65 (I)) the proposal on the ground "that the African inhabitants of South West Africa have not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognise on such an important question as incorporation of this territory", and recommended that South West Africa be placed under the International Trusteeship System of the United Nations.[1]

In rejecting the proposal for incorporation on this ground the General Assembly reflected on only one aspect of the factors favouring incorporation, namely the expressed wishes of the population, and remained silent on all the others.

In Respondent's view the other factors, especially those relating to the interests of the inhabitants, were of importance and should have been given weight in the General Assembly's consideration of the proposal, particularly if there were doubts as to the ability of the population to express themselves.

From the fact that the General Assembly did not, in its Resolution 65 (I), reflect on these factors at all, coupled with the nature of the discussions in the Fourth Committee, Respondent felt justified in inferring that there were other reasons which had motivated the approach of at least some Members of the United Nations to the proposal for incorporation.

The tone of the statements made in the Fourth Committee and the General Assembly by some delegations was regarded by Respondent as an indication that political motivations, unrelated and even detrimental to the interests of the inhabitants of South West Africa, would be an inherent element in any supervisory system under the United Nations. This, in Respondent's view, would greatly hamper its task in administering the Territory; and as Respondent had assumed a "sacred trust" in respect of the inhabitants, it had in any event to be mindful of their expressed wishes and their interests.

5. In response to the General Assembly's invitation to Respondent "to propose for the consideration of the General Assembly a trusteeship agreement",[1] Respondent consequently replied by letter (of 23rd July, 1947) to the Secretary-General, *inter alia*, as follows:

> "the Union Government desire to reiterate their view that it is implicit in the mandate system and in the mandate for South West Africa that due regard shall be had to the wishes of the inhabitants in the administration of the Territory. The wish clearly expressed by the overwhelming majority of all the native races in South West Africa and by unanimous vote on the part of the European representatives of the Territory that South West Africa be incorporated in

[1] *G.A. Resolution* 65 (I), 14th December, 1946, in *U.N. Doc.* A/64/Add.1, p. 123. (Quoted *in extenso* in Applicants' *Memorials*, pp. 43-44).

the Union therefore debars the Union Government from acting in accordance with the resolution of the General Assembly, and thereby flouting the wishes of those who under the Mandate have been committed to their charge. In the circumstances the Union Government have no alternative but to maintain the status quo and to continue to administer the territory in the spirit of the existing Mandate". [1]

In the same letter Respondent referred to a resolution adopted by the House of Assembly of the Union Parliament, on 11th April, 1947, reading as follows:

"Whereas in terms of the Treaty of Versail,es full power of legislation and administration was conferrend on the Union of South Africa in respect of the Territory of South West Africa, subject only to the rendering of reports to the League of Nations; and

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 Organisation, or to any other international organisation or body, and did not in fact do so; and

Whereas the Union of South Africa has not by international agreement consented to surrender the rights and powers so acquired, and has not surrendered these by signing the Charter of the United Nations Organisation and remains in full possession and exercise thereof; and

Whereas the overwhelming majority of both the European and non-European inhabitants of South West Africa have expressed themselves in favour of the incorporation of South West Africa with the Union of South Africa;

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, and that the Government should continue to render reports to the United Nations Organisation as it has done heretofore under the Mandate". [2]

The letter also referred to the fact that "the Union Government have already undertaken to submit reports on their administration for the information of the United Nations". [3]

6. In compliance with an undertaking given by Respondent at the First Session of the General Assembly in 1946, meetings were held throughout South West Africa during 1947 to acquaint the non-White inhabitants with the General Assembly's resolution 65 (I). These meetings showed that the overwhelming majority were stil in favour of incorporation. Likewise, the South West Africa Legislative Assembly on the 7th May, 1947, unanimously adopted a further resolution urging incorporation.

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[1] *U.N. Doc.* A/334, in *G.A., O.R., Second Sess., Fourth Comm.*, p. 135.
[2] *Ibid.*, p. 134.
[3] *Vide* para. 2 *supra*.

The wishes of the people of South West Africa were again communicated to the United Nations in a special report, [1] and were further elaborated on by the South African representative in the Fourth Committee on the 25th September, 1947. He intimated that Respondent:

Would not proceed with the incorporation of South West Africa;

Would consider itself under no legal obligation to propose a trusteeship agreement for the Territory;

Could not further ignore the wishes of the great majority of the inhabitants of South West Africa who favoured incorporation, by placing the Territory under the Trusteeship System; and

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 the administration of the Territory of South West Africa.

At the thirty-third meeting of the Committee on 27th September, 1947, in response to a request by the representative of Denmark for amplification of Respondent's proposal regarding maintenance of the *status quo*, the representative of the Union of South Africa explained 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 or 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". [2]

7. In November, 1947, the South African representative dealt in the General Assembly with the question of an alleged moral obligation to submit a trusteeship agreement—a contention based, firstly, on the fact that all other Mandated territories had been placed under the Trusteeship System or had been offered independence, and secondly, on resolutions of the General Assembly of 9th February [3] and 14th December, [4] 1946. He again stressed the many and material respects in which South West Africa differed from other Mandated territories, and emphasised that Respondent would be acting in defiance of the wishes of the vast majority of

[1] *U.N. Doc.* A/334/Add. I, in *G.A., O.R., Second Sess., Fourth Comm.*, pp. 136-38.
[2] *U.N. Doc.* A/422, in *G.A., O. R., Second Sess., Plenary Meetings*, Vol. II, p. 1538.
[3] *G.A. Resolution* XI(1), *in U.N. Doc.* A/64, p. 13.
[4] *G.A. Resolution* 65(I).

the inhabitants if a trusteeship agreement were concluded. He added that, whereas the resolution of 9th February, 1946, conveyed an *invitation*, and that of 14th December, 1946, a *recommendation*, that a trusteeship agreement be submitted in respect of South West Africa, his Government had "conscientiously performed" its duty in giving "most anxious consideration" to the recommendation, but could not accede thereto.[1]

At the same time he informed the General Assembly that

> "the Union of South Africa has expressed its readiness to submit annual reports for the information of the United Nations. That undertaking stands. Although these reports, if accepted, will be rendered on the basis that the United Nations has no supervisory jurisdiction in respect of this territory they will serve to keep the United Nations informed in much the same way as they will be kept informed in relation to Non-Self-Governing Territories under Article 73 (e) of the Charter".[2]

8. Despite the above, the General Assembly adopted a resolution maintaining its previous recommendation that South West Africa be placed under the Trusteeship System and urging Respondent to propose for the consideration of the General Assembly a trusteeship agreement for the Territory, motivating its resolution in the following terms:

> "Whereas it is a fact that all other States administering territories previously held under mandate have placed these territories under the Trusteeship system or offered them independence".[3]

At the Third Session of the General Assembly in 1948 the South African representative formally reiterated

> "that the Union Government, after full consideration of all the aspects of the matter, had once again come to the conclusion that it would be in the interests neither of the Territory of South West Africa and its people, nor of the Union and its people, to place the Territory under the authority of the Trusteeship Council of the United Nations, and that, in the circumstances, the Government regretted not being able to comply with the request of the United Nations Assembly to submit, voluntarily, a trusteeship agreement".[4]

9. In compliance with its earlier voluntary undertaking, Respondent submitted in September, 1947, a report on South West Africa for the year 1946.

This report was submitted on the basis clearly stated in the said undertaking, namely:

(a) that it would be for information purposes only, containing

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[1] *G.A., O.R., Second Sess.*, 105th Plenary Meeting, 1st November, 1947, p. 632 *et seq.*

[2] *Ibid.*, p. 632.

[3] *G.A. Resolution* 141(II), 1st November, 1947, in *U.N. Doc.* A/519, p. 47.

[4] *G.A., O.R., Third Sess., Fourth Comm.*, 76th Meeting, 9th November. 1948, p. 292.

the same type of information on the Territory as required for Non-Self-Governing Territories under Article 73 (e) of the Charter; and

(b) that Respondent did not recognise the United Nations as a supervisory authority in respect of the Territory—the reports not being intended for use by the United Nations as if the latter were the supervisory authority or as if a trusteeship agreement had in fact been entered into.

After receipt of this report, the General Assembly authorised

> "the Trusteeship Council in the meantime to examine the report on South West Africa ... and to submit its observations thereon to the General Assembly". [1]

Respondent declined an invitation by the Trusteeship Council to send a representative to attend its examination of the Report since such action would not have been consistent with its view that the Council was not vested with supervisory functions in respect of South West Africa.

Respondent, however, offered to transmit further information in writing if requested to do so. In response to such a request, further information *was* submitted; and in a covering letter of 31st May, Respondent, *inter alia:*

> "re-iterate(d) that the transmission to the United Nations of information on South West Africa, in the form of an 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 ... The Union Government desire to recall that in offering to submit a report on South West Africa for the information of the United Nations, they did so on the basis of the provisions of Article 73 (e) of the Charter. This Article calls for 'statistical and other information of a technical nature' and makes no reference to information on questions of policy.
>
> In these circumstances the Union Government do not consider that information on matters of policy, particularly future policy, should be included in a report (or in any supplement to the report) which is intended to be a factual and statistical account of the administration of the Territory over the period of a calendar year. Nevertheless, the Union Government are anxious to be as helpful and as co-operative as possible and have, therefore, on this occasion replied in full to the questions dealing with various aspects of policy. The Union Government do not, however, regard this as creating a precedent. Furthermore, the rendering of replies on policy should not be construed as a commitment as to future policy or as implying any measure of accountability to the United Nations on the part of the Union Government. In this connexion the Union

[1] *G.A. Resolution* 141(II).

Government have noted that their declared intention to administer the Territory in the spirit of the mandate has been construed in some quarters as implying a measure of international accountability. This construction the Union Government cannot accept and they would again recall that the League of Nations at its final session in April, 1946, explicitly refrained from transferring its functions in respect of mandates to the United Nations". [1]

When the Trusteeship Council's observations on the Report on South West Africa [2] came before the Fourth Committee in 1948, the South African representative referred to Respondent's earlier reservations, and stated that, in view thereof:

"the Union could not admit the right of the Trusteeship Council to use the report for purposes for which it had not been intended: still less could the Trusteeship Council assume for itself the power claimed in its resolution i.e. 'to determine whether the Union of South Africa is adequately discharging its responsibilities under the terms of the mandate ...' Furthermore, that power was claimed in respect of a territory which was not a trust territory and in respect of which no trusteeship agreement existed. The South African delegation considered that in so doing the Council had exceeded its powers".[3]

The South African representative also observed that the Trusteeship Council, in dealing with the report, apparently considered that it had a supervisory function in respect of South West Africa and that Respondent was accountable to it for the administration of the Territory—which was not in accordance with the basis of the undertaking with regard to reports. [4]

10. Respondent does not deal herein with the substance of the Trusteeship Council's comments on the report. [5] What is relevant, however, is that those comments and the subsequent discussions thereon did not observe the reservations under which the report had been submitted.

Moreover, many of the conclusions contained in the Trusteeship Council's observations were apparently based on misconceptions as to conditions in the Territory, and the discussions in the Fourth Committee made it clear to the South African delegation that similar misconceptions existed also amongst some of the Members of that Committee. The South African representative consequently dealt at length with conditions in the Territory [6] in order to acquaint the Committee with the true facts. It was found, however, that a majority of Members did not pay regard to the information

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[1] *U.N. Doc.* T.175, 3rd June, 1948, pp. ii-iii.

[2] *G.A., O.R., Third Sess., Sup.* No. 4 (A/603), pp. 42-45.

[3] *G.A., O.R., Third Sess., Fourth Comm.*, 76th Meeting, 9th November, 1948, p. 288.

[4] *Ibid.*, 77th Meeting, 10th November, 1948, p. 297.

[5] *Vide* Part A, para. 1 *supra*.

[6] *G.A., O.R., Third Sess., Fourth Comm.*, 78th Meeting, 11th November, 1948, p. 308 *et seq.*

given, and some continued with prepared speeches based on the Trusteeship Councils observations and the misconceptions involved therein—a fact to which the South African respresentative drew attention.[1]

Representatives of certain States also used the occasion for attacking Respondent's domestic policies in the Union. The South African representative had occasion to point out that such attacks, based on unfounded allegations, were unrelated to the welfare of the peoples of South West Africa.

In a statement to the General Assembly on 26th November, 1948, after explaining once more the reasons why South Africa could not enter into a trusteeship agreement, the South African representative in conclusion recalled:

> "that the League of Nations, at the last session of its Assembly, had not referred to Trusteeship Agreements and had simply stated that territories should be administered as heretofore until other arrangements could be made. The Union was anxious to make arrangements which would be satisfactory to all concerned. All he asked the General Assembly was that it should not make his Government's task more difficult and should believe in his country's good faith as the previous Mandates Commission had done. The Union was not likely to do anything in connexion with the territory of South West Africa which might earn the ill-will of other nations. He asked the Assembly to keep the door open for other arrangements".[2]

The majority in the General Assembly nevertheless supported a resolution maintaining its previous requests that South West Africa be placed under the United Nations Trusteeship System and expressing regret that Respondent had not yet done so. This resolution (227 (III)) also contained the following recommendation:

> "... Without prejudice to its resolutions of 14 December, 1946, and 1 November, 1947, that the Union of South Africa, until agreement is reached with the United Nations regarding the future of South West Africa, continue to supply annually information on its administration of the Territory".[3]

11. In a letter of 11th July, 1949, to the Secretary-General, Respondent referred to the previous explanations for its inability to place South West Africa under the United Nations Trusteeship System and, in referring to resolution 227 (III), stated *inter alia*,

> "... The recommendation of the General Assembly that the Union should continue to supply information on its administration of South West Africa has been given most careful consideration.
>
> It will be recalled, however, that the Union Government have at no time recognised any legal obligations on their part to supply information on South West Africa to the United Nations, but in a

[1] *Ibid.*, 81st Meeting, 16th November, 1948, pp. 343-44.

[2] *Ibid.*, 164th Plenary Meeting, 26th November, 1948, pp. 589-90.

[3] *G.A. Resolution* 227(III), 26th November, 1948, in *U.N. Doc.* A/810, pp. 89-91.

spirit of goodwill, co-operation and helpfulness offered to provide the United Nations with reports on the administration of South West Africa, with the clear stipulation that this would be done on a voluntary basis, for purposes of information only and on the distinct understanding that the United Nations has no supervisory jurisdiction in South West Africa. In this spirit a report was submitted in 1947, and in 1948 detailed replies were furnished to a subsequent questionnaire, formulated by the Trusteeship Council. It was emphasised at the time that the forwarding of information on policy should not be regarded as creating a precedent, or construed as a commitment for the future or as implying any measure of accountability to the United Nations on the part of the Union Government. The Union Government also expressed their confidence that the Trusteeship Council would approach its task in an entirely objective manner and examine the report in the same spirit of goodwill, co-operation and helpfulness as had motivated the Union in making the information available.

These hopes have not been realised. Instead the submission of information has provided an opportunity to utilise the Trusteeship Council and the Trusteeship Committee as a forum for unjustified criticism and censure of the Union Government's administration not only in South West Africa but in the Union as well. Inferences and deductions have been drawn from the information submitted which are quite inconsistent with facts and realities. The misunderstandings and accusations to which the United Nations discussions of this subject have given rise have had repercussions both in the Union and in South West Africa, with deleterious effects on the maintenance of the harmonious relations which have hitherto existed and are so essential to successful administration. Furthermore, the very act of submitting a report has created in the minds of a number of Members of the United Nations an impression that the Trusteeship Council is competent to make recommendations on matters of internal administration of South West Africa and has fostered other misconceptions regarding the status of this Territory.

In these circumstances the Union Government can no longer see that any real benefit is to be derived from the submission of special reports on South West Africa to the United Nations, and have regretfully come to the conclusion that in the interests of efficient administration no further reports should be forwarded. In coming to this decision the Union Government are in no way motivated by a desire to withhold from the world factual and other information regarding South West Africa published in accordance with the customary practice of democratic nations, and information of this nature previously embodied in annual reports to the League of Nations or the United Nations will continue to be made available to the general public in the form of statistics, departmental reports, reports by the Administrator to the South West African Legislature, blue books, and other governmental publications". [1]

At the Fourth Session of the General Assembly in September, 1949, the South African representative (with reference to the afore-

[1] *U.N. Doc.* A/929, in *G.A., O.R., Fourth Sess., Fourth Comm., Annex,* p. 7.

said letter) dealt fully with Respondent's decision to discontinue the submission of reports. [1]

12. In the premises aforestated the following statements by the Applicants regarding the events over the years 1946 to 1949 are unfounded:

(a) *"The Union's announcement [that submission of reports would be discontinued] signalled its repudiation of previous explicit commitments".* [2]

There was neither an explicit commitment nor a repudiation.

From the outset Respondent had made it clear that reports would be submitted voluntarily, for information purposes only and not in recognition of any supervisory functions vested in the United Nations.

This was Respondent's attitude throughout and was explicitly repeated in statements to, and correspondence with, the United Nations over the years under consideration. When therefore, the General Assembly failed to observe the reservations attached to Respondent's undertaking, withdrawal thereof did not involve a repudiation of a commitment. [3]

(b) *"By November, 1948, the Union Government was openly denying its obligations under the Mandate and insisting—in contradiction to its statements of a year earlier—that the Mandate had expired".* [4]

In support of this contention Applicants refer to a statement by Mr. Eric Louw, the representative of South Africa, in November, 1948, in which he referred to the "previous Mandate, since expired".

From the outset, and throughout the years under consideration, Respondent had repeatedly stated its intention to observe the "sacred trust" which it had assumed, and to administer the Territory "in the spirit of the Mandate".

In fact, the very statement of Mr. Louw, referred to above, contained also the following:

> "It is the firm intention of the South African Government to administer the territory in the spirit of the mandate which was originally conferred upon the Union, and that it will at all times promote to the best of its ability the wellbeing of all sections of the population.
>
> In making this statement, I am obliged to add that the words 'the spirit of the mandate' should not be interpreted as including

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[1] *G.A., O.R., Fourth Sess., Fourth Comm.*, 128th Meeting, 18th November, 1949, p. 200.

[2] *Vide* Applicants' *Memorials*, p. 47.

[3] The General Assembly itself in this regard recorded that Respondent had "withdrawn its previous undertaking" (*G.A. Res.* 337(IV)) in preference to earlier proposed wording objected to by Respondent to the effect that it had "repudiated its previous assurance". *Vide G.A., O.R., Fourth Sess.*, 269th Plenary Meeting, 6th December, 1949, p. 535.

[4] Applicants' *Memorials*, p. 47.

obligations other than that stated in the preceding sentence. It is unfortunately necessary for me to state this proviso because of the fact that the same phrase, when used by the previous government, was later interpreted in a manner which was not in accordance with the intentions of the then government". [1]

This attitude was repeated in the following statement of the South African representative to the General Assembly on 6th December, 1949:

> "My Government is fully conscious of that trust, and whatever our critics may say, it has never deviated from the path along which it is endeavouring to lead the peoples of South West Africa to the achievement of that degree of development which is their right and which it is my Government's duty to ensure to them". [2]

On the other hand, Respondent had from the dissolution of the League taken up the attitude that the Mandate in its original form, and with the obligations imposed therein, particularly that of accountability to the League of Nations, had not survived the League. [3]

Respondent, therefore, while denying that the United Nations was vested with supervisory functions over South West Africa (an attitude maintained throughout) at the same time intimated that it would observe the "sacred trust" assumed under the Mandate and would administer the Territory in the spirit of the Mandate (also an attitude maintained throughout).

(c) *"It is apparent from the history summarized above that in the period 1946-1949, the Union's policy concerning the Mandate underwent a marked change. At the beginning of the period, the Union conceded the existence of the Mandate and its obligations thereunder, including that of rendering reports to the United Nations. By the end of the period, the Union was referring to the Mandate as 'the previous Mandate, since expired', insisting that the administration of the Territory was a matter solely of internal concern, and refusing to render reports to the United Nations".* [4]

Respondent's policy underwent no marked change over the period 1946-1949, particularly in that:

(i) At no time after the dissolution of the League did Respondent concede the existence of the Mandate in its original form and as still encompassing its original obligations.

(ii) Respondent throughout denied that the United Nations was vested with any supervisory functions in respect of South West

[1] Verbatim text. A summary appears in *G.A., O.R., Third Sess., Fourth Comm.*, 76th Meeting, 9th November, 1948, p. 293.

[2] Verbatim text. A summary appears in *G.A., O. R., Fourth Sess.*, 269th Plenary Meeting, 6th December, 1949, para. 9, p. 524.

[3] *Vide e.g.* statement by Field-Marshal Smuts of November, 1946, quoted in para. 2 *supra*, and extract from letter of 23rd July, 1947, cited in para. 5 *supra*.

[4] Applicants' *Memorials*, p. 48.

Africa and throughout denied that it was obliged to render reports to the United Nations.

(iii) Respondent throughout maintained its expressed intention to observe the "sacred trust" which it had assumed and to administer the Territory in the spirit of the Mandate.

13. The statement by the representative of Liberia quoted at page 47 of the Applicants' *Memorials*, to the effect that Respondent wished to have the annexation of South West Africa accepted as a "*fait accompli*", was unfounded and was, at the time, specifically denied by the South African representative who said, *inter alia*, the following:

> "I endeavoured to prove to the Committee that not only was the closer association between the Union and the territory, ... within the authority conferred upon my Government by the mandate, but also that it was not 'annexation'—the territory having retained its separate identity ...
>
> Yet my Government was accused of having unilaterally annexed the territory and of having placed this organization before an accomplished fact. This criticism was maintained throughout our debates—and that despite the facts of the case to which my delegation repeatedly drew attention. Surely, argument however frank and honest, cannot prevail under such circumstances". [1]

The General Assembly, in Resolution 227 (III) of 26th November, 1948, took note of Respondent's assurance that its contemplated legislation for closer association "does not mean incorporation".

Respondent had previously made it clear that it did not intend proceeding with its proposal to incorporate South West Africa in the face of the United Nations' rejection of that proposal. [2]

14. The General Assembly in 1949 decided to ask the Court for an Advisory Opinion, but not only for the reason stated by the Applicants, namely, that Respondent's concepts of its legal obligations under the Mandate were essentially at variance with those of most other United Nations Members [3]—it was also because the other United Nations Members were not in agreement as to Respondent's obligations, particularly with regard to the submission of a Trusteeship Agreement for South West Africa. [4]

THE PERIOD 1950-1960

Introduction

15. A portion of Applicants' *Memorials* with the same heading as the above [5] contains a brief summary of events over the period

[1] Verbatim text. A summary appears in *G.A., O. R., Fourth Sess.*, 269th Plenary Meeting, 6th December, 1949, paras. 13 and 14, p. 524.

[2] *Vide e.g.* paras. 2 and 5 *supra*.

[3] Applicants' *Memorials*, p. 48.

[4] *Vide* summary of attitudes of Members as given in the Written Statement of the U.S.A. in "*International status of South-West Africa, Pleadings, Oral Arguments, Documents*", pp. 122-23.

[5] *Memorials*, pp. 48-51.

1950-1960. The broad outlines of fact as presented therein are substantially correct; but certain statements require comment with a view to proper perspective.

(a) The importance of the "restrictive nature" of the *Ad Hoc* Committee's terms of reference[1] will be dealt with below in the year-by-year chronology of events. There was, however, a further important reason, also reverted to below, for the failure of the negotiations between Respondent and this Committee. This was the insistence by the majority of Members in the General Assembly that Respondent should place South West Africa under United Nations Trusteeship—despite Respondent's objections and the Court's Opinion that it was not obliged to do so.

(b) While the reports of the Committee on South West Africa have in fact "annually criticised the Union sharply for the manner in which the Union administers the territory",[2] the question whether the criticism was justified cannot be canvassed herein[3]. Respondent on many occasions protested that the Committee's findings were based on unreliable information and were unjustified.

(c) The statement that "the Union has refused to co-operate with the Committee"[4] (on South West Africa) is an over-simplification, possibly derived from the Committee's own interpretation of the situation. The statement is correct insofar as it signifies that Respondent was not prepared to accept supervision by the Committee of the administration of South West Africa. Failure of negotiations, however, was again due mainly to the restrictive terms of reference on which the Committee was to negotiate, as will be dealt with later.

(d) The account of negotiations between Respondent and the Good Offices Committee[4] makes no mention of the fact that there *was*, as between Respondent and that Committee, agreement as to the possibility of an approach which merited investigation, but that the Committee's recommendation in that regard was rejected by the majority in the General Assembly—a matter more fully dealt with later. Moreover, the words "existing rights of the United Nations to supervise the administration of the Mandate"[4] beg the question in respect of one of the vital issues requiring negotiation. For reasons to be dealt with later, Respondent was unable to accept the 1950 Advisory Opinion of the majority of the Honourable Court, with regard to supervision, on which opinion the reference to "existing rights" is apparently based.

(e) The statement that "repeated debates and resolutions have failed to bring about the Union's compliance with the Mandate"[5]

[1] *Ibid.*, p. 49.
[2] *Ibid.*, p. 50.
[3] *Vide* Part A, para. 1 *supra*.
[4] *Memorials*, p. 50.
[5] *Ibid.*, p. 51.

also involves an assumption consistently disputed by Respondent. Respondent maintains that it faithfully honours the spirit of the Mandate in the administration of the Territory (a matter not canvassed herein) [1] and that it owes no accountability to the United Nations in respect thereof, a matter fully dealt with later.

Summary of the Court's Advisory Opinions:

16. Applicants' summary of the Court's three Advisory Opinions as set out in the *Memorials* [2] does not require comment save that with regard to the Advisory Opinion of 11th July, 1950, Respondent desires to draw attention to the following:

(a) The following quotation from the Opinion of the Majority, namely, that Respondent's obligations under the Mandate

> "represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon",

was clearly intended to apply only to the obligations relating to the administration of the Territory, and not to the obligations relating to the machinery for implementation, *i.e.* the obligations to accept international supervision and to submit reports. [3] The last-mentioned obligations were stated by the Majority of the Judges to be "an important part of the Mandates System". [4]

(b) Applicants' statement that

> "The Court affirmed the Union's international obligations under Article 22 of the Covenant and under the Mandate, including the duty to render annual reports and to transmit petitions from inhabitants of the Territory, and confirmed as well the power of the United Nations to exercise supervisory functions and to receive the annual reports and petitions", [5]

reflects the Majority Opinion only. Two Judges (Judges McNair and Read), dissented, expressing the view that the supervisory powers of the League had not passed to the United Nations, and that Respondent was not obliged to submit reports and transmit petitions to the United Nations.

Respondent will not deal here with the reasons advanced by the Court for its conclusions, but will do so in stating Respondent's legal contentions in Chapters III to V below.

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[1] *Vide* Part A, para. 1 *supra.*

[2] *Memorials,* pp. 51-54.

[3] *"International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950"*, p. 133.

[4] *Ibid.*, p. 136.

[5] *Memorials,* p. 52

Year-by-year Chronology of Relevant Events: 1950-1960

1950

17. When the Fourth Committee considered the Court's Advisory Opinion of the 11th July, 1950, the South African representative stated at the outset that Respondent's attitude to the Opinion could only be defined in the light of the debate in, and any resolution which might eventually emanate from, the General Assembly. He assured the Fourth Committee that Respondent did not wish to close the door to a friendly solution of a question which had been in dispute for so long and hoped that the United Nations would not do so either. He pointed out that while the Court's Opinion was entitled to the greatest respect, it was not automatically binding on the parties concerned, as would be a judgment.

Furthermore, since the Court had given its Opinion, important facts had come to light bearing directly on the reasoning and conclusions of the Court with regard to certain material points. He contended that if these facts had been placed before the Court it would probably not have come to the conclusion reached (in the Majority Opinion) with regard to transfer to the United Nations of the League's supervisory functions.

As to the additional facts which had come to light he dealt at length with the circumstances surrounding, and the developments leading up to, the adoption by the League of its resolution of 18th April, 1946, with special reference to the first Chinese draft resolution. [1]

He stated that the additional information had to be carefully weighed and considered by his Government together with:

(a) the fact that several widely varying interpretations of the Court's Opinion had been put forward in the Fourth Committee; and

(b) the attitude of the United Nations in regard to the international position of South West Africa as expressed in any resolution by the General Assembly.

He concluded his statement as follows:

> "It would be premature to expect me to say or do anything which could possibly be interpreted as binding my Government in any way until it has had every opportunity of considering fully and carefully the whole problem in all its aspects". [2]

18. While it was evident that the majority of Members of the United Nations were prepared to accept the Advisory Opinion, there was a difference of view in regard to the manner in which the Opinion was to be implemented. Some members favoured an immediate decision to set up an *ad hoc* body to deal with annual

[1] *Vide* Part A, para. 35 *supra*.

[2] Verbatim text. A summary appears in *G.A., O.R., Fifth Sess., Fourth Comm.*, 196th Meeting, 4th December, 1950, para. 52, p. 364. (*Vide* also paras. 41-51, pp. 362-64.)

reports and petitions, while others felt that a hasty decision would prove ineffective, that the Fourth Committee acting unilaterally had no right to set up and impose supervisory machinery and that Respondent's co-operation was essential. This resulted in the eventual adoption of a compromise resolution (449 A (V)) accepting the Court's Advisory Opinion and, *inter alia*, establishing an *Ad Hoc* Committee,

(a) to confer with Respondent on the "procedural measures necessary for the implementation of the Advisory Opinion"; and

(b) to examine reports and petitions. [1]

19. Respondent could not support the adoption of this resolution, and explained to the General Assembly that, in its view, the resolution, *inter alia*;

(a) took no account of the additional facts referred to in paragraph 17 above;

(b) established unilaterally, despite Respondent's protests, machinery for the examination of reports and petitions;

(c) assigned these supervisory functions to the very body created for the purpose of conferring with Respondent on the implementation of the Court's Opinion; and

(d) restricted the terms of reference in a way which held out little hope of fruitful discussions. [2]

20. Although Resolution 449 A (V) created machinery for negotiation, the General Assembly on the very same date adopted Resolution 449 B (V), again urging Respondent to place South West Africa under the United Nations Trusteeship System.

The inconsistency of on the one hand offering "negotiations" with a view to amicable settlement of a dispute, while on the other hand making what in effect amounted to an extreme demand relative to that dispute, namely United Nations Trusteeship for South West Africa, was to become a regularly recurring feature in the history of this matter.

21. Applicants' statements that,

> *"The Union, however, made it clear very early that it would not act in accord with the Advisory Opinion ..."*, [3]

and

> *"The Union's rejection of the Court's rulings in its Advisory Opinion was made manifest from the outset"*, [4]

are incorrect, particularly insofar as the context appears to suggest that such an attitude was displayed in the 1950 debates of the

[1] *G.A. Resolution* 449 A(V), 13th December, 1950, in *G.A., O.R., Fifth Sess., Sup.* No. 20 (A/1775), pp. 55-56.

[2] *G.A., O.R., Fifth Sess.*, 322nd Plenary Meeting, 13th December, 1950, p. 629.

[3] Applicants' *Memorials*, p. 55.

[4] *Ibid.*, p. 56.

General Assembly. Indeed, Respondent made it clear at the outset that it would be able to define its position with regard to the Court's Opinion only after careful consideration had been given to the debates and to any resolutions which might be adopted. (*Vide* para. 17 above).

The observation of the representative of China, as cited by Applicants, [1] in no way affects the significance of the additional facts relied upon by Respondent, as will be further demonstrated in Chapter III below.

1951

22. Respondent, despite its opposition to Resolution 449 A (V) and its expressed views regarding the profitability of the proffered negotiations, agreed to confer with the *Ad Hoc* Committee on South West Africa in an effort to arrive at a definite settlement of the South West Africa question. [2]

23. In the course of the discussions which ensued, the South African representative emphasised that the Court's Opinion was advisory and thus not binding either upon the United Nations or upon Respondent. He explained fully the reasons why Respondent could not accept the Court's Opinion relating to accountability to the United Nations as a supervisory authority in succession to the League. Nevertheless, his Government realised that negotiation would be impossible if it were to maintain its standpoint rigidly. [3]

24. Respondent accordingly expressed its preparedness, in deference to the wishes of the General Assembly, to negotiate a new international instrument embodying those obligations of the Mandate which, in the view of the Court, related directly to the "sacred trust" (Articles 2 to 5 of the Mandate), and, if considered necessary, also an obligation, similar to that of Article 7 of the Mandate, to submit to the jurisdiction of the International Court of Justice. Thereby the difference of view as to whether the Mandate had lapsed or not would be rendered a matter of no further practical importance.

The new international instrument would be concluded with the three remaining Principal Allied and Associated Powers of the First World War (France, the United Kingdom and the United States of America) as principals and not as agents of the United Nations. These three Powers were historically associated with the Mandate, were permanent members of the Security Council of the United Nations and had a recognised position in international affairs. [4]

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[1] *Ibid.*, pp. 55-56.
[2] *Vide U.N. Doc.* A/AC.49/SR. 2, pp. 2-4.
[3] *Vide U.N. Docs.* A/AC. 49/SR. 3 and 7.
[4] *U.N. Doc.* A/1901, in *G.A., O.R., Sixth Sess., Annexes* (Agenda item 38), pp. 2-11.

25. The Committee felt that Respondent's proposals "did not give the United Nations a sufficient role".[1] The South African representative accordingly indicated that, after further consideration, his Government was prepared to accept a compromise whereby the idea of a fresh agreement with the three Powers should be sanctioned by the United Nations prior to the negotiation of such an agreement.

This still did not satisfy the Committee, and after further consideration Respondent intimated its willingness to have the actual agreement submitted to the United Nations for confirmation.

The South African representative further indicated that if the Committee considered Respondent's proposal as falling outside its terms of reference, he would be glad to submit to his Government any suggestion from the Committee indicating how the proposal could be brought within the Committee's competence.[2]

26. Despite the concessions offered by Respondent, the Committee found the proposal unacceptable "because it did not allow for a full implementation of the advisory opinion" and "could not therefore be considered as within [its] terms of reference".[3]

The Committee in turn proposed a draft agreement embodying the terms of the Mandate in a modified form, and providing, *inter alia*, for new supervisory machinery under the United Nations.[4]

27. Respondent's representative explained to the Committee the reasons why Respondent could not accept the principle of accountability to the United Nations embodied in the Committee's proposal.

He emphasised that it would be virtually impossible to come to any arrangement involving such accountability without extending the obligations which Respondent had assumed under the Mandate. This was evident from the broader membership, and the fundamentally different structure, of the United Nations as compared with the League of Nations. The most important difference in structure was that relating to voting procedure, in that the League rule of unanimity did not apply in the United Nations. This was of particular significance in view of the basic ideological differences existing within the United Nations.[5]

28. In a letter to the *Ad Hoc* Committee on the 20th September, 1951, Respondent reiterated the basic elements of the concessions which it was prepared to make in an effort to achieve a settlement which would "satisfy the major desires" of the United Nations and of Respondent, and expressed regret that the Committee had felt that the proposal would not be acceptable to the General Assembly.

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[1] *Ibid.*, para. 25 (d), p. 5.
[2] *Ibid.*, para. 25.
[3] *Ibid.*, paras. 26 and 27, pp. 5-6.
[4] *Ibid.*, para. 27, pp. 5-6.
[5] *U.N. Doc.* A/AC. 49/SR. 11, p. 7.

On the other hand, the Committee's proposal did not provide for certain requirements considered by Respondent to be basically essential. If these were recognised, Respondent would not be unwilling to concede certain basic requirements of the United Nations, such as the principle of international accountability and provision for United Nations approval for any change in the international status of the Territory.

Respondent also reiterated the difficulties experienced in the submission of reports to the United Nations, and pointed out that, while it was not prepared to submit reports, information on the Territory from official sources was "always available."[1]

29. The *Ad Hoc* Committee, however, intimated that Respondent's proposal was "not within its terms of reference", and expressed its willingness to continue negotiations on the basis of its own counter-proposal.[2]

30. Respondent remained desirous to seek a mutually satisfactory solution. Before negotiations could, however, be resumed, the Fourth Committee on 16th November, 1951, at the Sixth Session of the General Assembly, granted oral hearings to petitioners on South West Africa.[3]

This decision was taken despite Respondent's repeated intimations that it did not accept accountability to the United Nations, and in spite of the fact that implementation of the Court's Advisory Opinion, including the question of petitions, was a matter on which negotiations were still in progress; this seriously hampered negotiations.[4]

1952

31. The Sixth Session of the General Assembly on the 19th January, 1952, adopted Resolution 570 A (VI) reconstituting the *Ad Hoc* Committee for the purpose of "conferring" with South Africa "concerning means of implementing the Advisory Opinion". At the same time, however, and despite Respondent's protests, the Committee was authorised to examine reports and petitions with regard to South West Africa.

The Assembly also reiterated its previous resolutions pressing for South West Africa to be placed under United Nations Trusteeship.[5]

32. Respondent had doubts as to the likelihood of fruitful results flowing from further negotiations with the *Ad Hoc* Committee.

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[1] *U.N. Doc.* A/1901, para. 32, pp. 7-8.

[2] *Ibid.*, para. 33, p. 8.

[3] *U.N. Doc.* A/C.4/190, in *G.A., O.R., Sixth Sess., Annexes* (Agenda item 38), p. 17.

[4] *Vide G.A., O.R., Sixth Sess., Fourth Comm.*, 204th Meeting, 16th November, 1951, pp. 17-19.

[5] *G.A. Resolution* 570 B (VI), 19th January, 1952, in *G.A., O.R., Sixth Sess., Sup.* No. 20 (A/2119) p. 64.

These doubts were founded upon the following considerations, pointed out to the United Nations on various occasions:

(a) The divergence in the views held by Respondent and the majority in the United Nations. Respondent, while carrying out the spirit of the "sacred trust" which it had assumed under the Mandate, did not recognise accountability to the United Nations in respect of its administration of South West Africa, whereas the majority in the General Assembly held the view that Respondent was obliged to account to the United Nations and in fact continued to press for a trusteeship agreement for the Territory.

(b) The manner in which the South West Africa issue had been dealt with in the United Nations, particularly the acrimony displayed by some members in the debates, marred objective consideration and jeopardised negotiations.

(c) The restrictive nature of the Committee's terms of reference, which left little hope for a compromise inasmuch as it required Respondent to accept accountability (in accordance with the Majority Opinion of 1950) as the only basis for negotiation.

Respondent was, however, desirous of arriving at an amicable arrangement and was therefore prepared to explore all avenues. On being assured by the *Ad Hoc* Committee in 1952 that its "terms of reference were such as to allow it to discuss any reasonable proposal", negotiations were resumed in September, 1952.[1]

33. In the circumstances Respondent hoped that its proposal of 1951[2] would be reconsidered on its merits. In re-submitting that proposal the South African representative contended that agreement had been reached in principle with regard to the revival of the clauses of the Mandate dealing with the "sacred trust". Moreover, Respondent had agreed on the fundamental principles which the Committee regarded as essential, the only exception being the handling of annual reports and petitions. In this last respect his Government, depending on satisfactory progress of the negotiations, would be prepared to go somewhat further; it would make available information on its administration to those with whom a new instrument would be concluded.

While the new instrument would be negotiated with the three Principal Allied and Associated Powers as principals, its general principles would have to be approved by the United Nations and, if found acceptable, the United Nations would ascertain whether the three Powers were prepared to act as the second party.[3] Before

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[1] *U.N. Doc.* A/2261, para. 7, in *G.A., O.R., Eighth Sess., Annexes* (Agenda item 36) p. 2.

[2] *Vide* para. 24 *et seq. supra.*

[3] The representative of the United States of America—the only one of the three Powers represented on the *Ad Hoc* Committee—had indicated his Government's willingness in principle to act as a member of the second party if the United Nations agreed. *Vide U.N. Doc.* A/AC.49/SR.4, p. 3.

the new instrument could come into force the United Nations would have to approve it, thus having a double opportunity of examining the instrument.[1]

34. The Committee enquired whether Respondent would make available annual reports as complete as those furnished to the League. The South African representative replied that under its proposal, his Government would supply annually to the three Powers information on South West Africa as complete as that furnished to the League of Nations on the basis of the Permanent Mandates Commission questionnaire.

Upon a further enquiry from the Committee, whether Respondent would recognise the principle of international supervision under a procedure as nearly as possible analogous to that under the League, the representative stated that Respondent's attitude would depend on the progress of the negotiations on all the other points.

He therefore again pressed the Committee for its views on the merits of Respondent's proposal, stating that to facilitate agreement, Respondent had made considerable concessions and had indicated its readiness, under certain conditions, to make further proposals.[2]

35. While the Committee expressed its appreciation of the efforts made by Respondent and noted that Respondent had extended its 1951 proposal, the Committee insisted on accountability to and supervision by *the United Nations* because it felt that its terms of reference so required.[3]

36. Despite the fact that the negotiations were not conclusive, by the end of 1952 the Committee was able to record that there was agreement in principle on the following points:

(a) That a new instrument, replacing the former Mandate for South West Africa, should be concluded;

(b) That the new instrument should revive the "sacred trust" contained in Articles 2 to 5 of the Mandate, with minor modifications which would not affect in any way the principle of the "sacred trust";

(c) That, under certain conditions, Respondent would make available information on its administration of South West Africa;

(d) That such information would be as full as that once supplied under the Mandates System; and

(e) That there should be some form of supervision of the administration of South West Africa.[4]

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[1] *Vide U.N. Doc.* A/2261, paras. 11-13, pp. 2-3.
[2] *Ibid* paras. 15 and 16, pp. 3-4.
[3] *Ibid.*, para. 20, p. 4.
[4] *Ibid.*, para. 23, p. 5.

37. The points of difference, as also recorded by the Committee, were to the following effect:

(a) How supervision of the administration of South West Africa should be carried out:

The Committee insisted on United Nations supervision, "even though it should not exceed that which applied under the Mandates System". On the other hand Respondent had come to the conclusion that any obligation which would carry with it supervision by the United Nations, would be more onerous and would go beyond the obligations undertaken under the Mandates System.

(b) The second party to the proposed instrument:

Respondent could not contemplate concluding an agreement directly with the United Nations, although the agreement which it was prepared to negotiate and conclude, would have to be approved by the United Nations. On the other hand the Committee considered that the agreement should be concluded with the United Nations or with an agency appointed by it. [1]

38. From the above it is clear that, far from Respondent frustrating the *Ad Hoc* Committee's efforts at negotiation—as is alleged at page 58 of Applicants' *Memorials*—the substantial measure of agreement which had by the end of 1952 actually been reached between Respondent and the Committee was due to the fact that Respondent was prepared to make proposals and concessions in regard thereto. Whatever frustration there was, resulted, in fact, from the Committee's restrictive terms of reference.

1953

39. The inconclusive negotiations of 1952 were resumed in June, 1953, when the South African representative again requested that the Committee, as a whole, state its views with regard to the essential elements of Respondent's proposal.

The Committee intimated that, inasmuch as Respondent wished the three Powers to act as principals and not as agents of the United Nations, the proposal did not provide means for implementing the Advisory Opinion, and that the Committee was therefore unable to accept the proposal as a basis for detailed discussion.

40. The South African representative referred again to Respondent's view that it would be well-nigh impossible to devise any arrangement whereby Respondent would be accountable to the United Nations for its administration of South West Africa without extending the degree of supervision and, therefore, Respondent's obligations. And he enquired how the Committee proposed to cope with the difficulties in this regard, especially the absence of the unanimity rule in the United Nations voting procedure.

[1] *Ibid.*, para. 24, p. 5.

The Committee was, however, not prepared to enter into that enquiry until Respondent had accepted the principle of United Nations supervision. This Respondent could not do without the assurance that its obligations would not be extended. Respondent reiterated its willingness to consider proposals which would not involve such extension. The Committee, however, did not attempt to show how United Nations supervision could be devised without extending Respondent's obligations. [1]

The negotiations consequently did not lead to positive results.

41. At its Eighth Session the General Assembly, on 28th November, 1953, rejected Respondent's proposal to the *Ad Hoc* Committee and established the Committee on South West Africa with functions as set out in Resolution 749 A (VIII). [2]

These functions in essence amounted to

(a) exercising supervision over the administration of the Territory, and,

(b) negotiating with Respondent for the full implementation of the Advisory Opinion.

The South African representative explained to the Fourth Committee that Respondent could not support this resolution, as it required Respondent to submit to United Nations supervision as a basis for co-operation with the Committee, left the Committee no scope for negotiation beyond that basis, and combined a supervisory function with that of so-called "negotiations". [3]

In the circumstances, those who supported the adoption of Resolution 749 A (VIII) were aware that no co-operation with such a Committee could be expected from Respondent; and they must, therefore, have realized that the Committee's supervision would be one-sided and thus defective.

42. Furthermore, the proffered "negotiations" were again coupled with a resolution urging the conclusion of a United Nations trusteeship agreement. [4]

1954

43. When the Committee on South West Africa invited Respondent to confer with it, Respondent replied that it was

> "doubtful whether there is any hope that the new negotiations within the scope of your Committee's terms of reference will lead to any positive results".

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[1] *U.N. Doc.* A/2475, paras. 8-15, in *G.A., O.R., Eighth Sess., Annexes* (Agenda item 36), pp. 33-34.

[2] *G.A. Resolution* 749 A(VIII), 28th November, 1953, in *G.A., O.R., Eighth Sess., Sup.* No. 17(A/2630), pp. 26-27. (*Vide also* Applicants' *Memorials*, pp. 59-61).

[3] *G.A., O.,R., Eight Sess., Fourth Comm.*, 363rd Meeting, 12th November, 1953, para. 32, p. 306.

[4] *G.A. Resolution* 749 B(VIII), 28th November, 1953, in *G.A., O.R., Eighth Sess., Sup.* No. 17 (A/2630), pp. 27-28

This reply was communicated to the Chairman of the Committee in a letter dated the 25th March, 1954, wherein Respondent's reasons for its view were set forth in full.[1] The letter is quoted at pages 62 to 64 of the Applicants' *Memorials*.

The Committee confirmed Respondent's doubts by replying that it could not

> "enter into discussion of proposals which are not designed to implement fully the Advisory Opinion".[2]

Inasmuch as this reply signified that negotiations could only take place on the basis of acceptance by Respondent of United Nations supervision, Respondent had no alternative but to decline the Committee's invitation.

44. As regards the supervisory functions contemplated for the Committee on South West Africa, Resolution 749 A (VIII) directed that the practices and procedures which had applied to supervision of Mandates by the organs of the League of Nations should be observed as far as possible.[3]

It was, however, inevitable that supervision in pursuance of the said resolution would differ substantially from that which had applied under the League of Nations, particularly in the following respects:

(a) Unlike the Permanent Mandates Commission, which was "a commission of experts—of high standing and independent of Governments",[4] the Committee on South West Africa was composed of political representatives of Member States, the selection of individuals being left to the discretion of the States elected to serve on the Committee. The members of the Committee, in exercising their supervisory functions, thus did not stand apart from the political views of their governments.

(b) In the League the ultimate supervisory body was the Council, the voting procedure of which was subject to the unanimity rule. The corresponding supervisory organ in the United Nations, as contemplated by Resolution 749 A (VIII), was the General Assembly, in the voting procedure of which the unanimity rule did not apply—Article 18 of the Charter providing only for decisions by a majority, or in the case of certain matters, by a two-thirds majority.

The combined effect of the differences mentioned in (a) and (b) above would inevitably render supervision in pursuance of Resolution 749 A (VIII) more onerous for Respondent than that which had applied under the League.

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[1] *G.A., O.R., Ninth Sess., Sup.* No. 14(A/2666), Annex I(c), pp. 6-8.

[2] *Ibid.*, Annex I(d), pp. 7-8.

[3] *Vide* sub-paras. (a), (b), (c) and (d) of para. 12 of *G.A. Resolution* 749 A(VIII).

[4] "*South-West Africa—Voting Procedure, Advisory Opinion of June 7th, 1955: I.C.J. Reports 1955*", p. 95. *Vide* also Part A, para. 14 *supra*.

45. When the Committee on South West Africa requested Respondent to submit reports,[1] this request was declined for reasons fully stated in Respondent's letter of 25th March, 1954,[2] which is quoted in Applicants' *Memorials* at pages 62 to 64. Respondent's position in this regard was further explained to the General Assembly at its Ninth Session, where the South African representative pointed out that the Committee had been established despite Respondent's objections and that Respondent was then invited to co-operate on a basis unilaterally determined by a majority in the General Assembly. His Government could obviously not accept an arrangement which had been decided on against its wishes and which failed to take into account its essential requirements. It was, therefore, unable to recognise the Committee or the legitimacy of the report which the Committee had drawn up.[3]

With regard to petitions, Respondent's attitude was also clearly stated in the letter of 25th March, 1954; and, in fact, Respondent declined to participate in any United Nations proceedings concerning petitions.

46. In the absence of reports from Respondent, the Committee compiled its own report, relying on information from various official and unofficial sources. This report contained many inaccuracies and omissions of a serious nature, as well as erroneous conclusions.

The allegations contained in the extracts from the report, quoted in Applicants' *Memorials*,[4] will not be dealt with here.[5]

Respondent did reply, in the Fourth Committee, to certain allegations in order to indicate that some of the information on which the report was based was unreliable and that the report reflected serious misconceptions as to conditions in South West Africa.[6]

47. In 1954 the General Assembly once more adopted a resolution urging Respondent to place South West Africa under United Nations Trusteeship.[7]

48. The statement in the *Memorials*[8] alleged to have been made by Dr. Malan (then South African Prime Minister), on the 24th August, 1954, was in fact issued by a political party in South West Africa—the National Party for South West Africa. It was not made by the Prime Minister, although, as National Leader of the said party, he had approved thereof. The statement answered a claim

[1] *Vide U.N. Doc.* A/2666, Annex I(a), p. 6.

[2] *Ibid.*, Annex. I(c), pp. 6-7.

[3] *G.A., O.R., Ninth Sess., Fourth Comm.*, 407th Meeting, 15th October, 1954, para. 36, p.66.

[4] At pp. 64-65.

[5] *Vide* Part A, para. 1, *supra.*

[6] *Vide e.g. G.A., O. R., Ninth Sess., Fourth Comm.*, 407th Meeting, pp. 67-70.

[7] *G.A. Resolution* 852(IX), 23rd November, 1954, in *G.A., O.R., Ninth Sess., Sup.* No. 21(A/2890), p. 29.

[8] Quoted in the *Memorials*, p. 66.

of an opposition party to the effect that the Territory had acquired a status independent of South Africa.

49. The General Assembly in 1954 also adopted Resolution 904 (IX), in which it asked the International Court of Justice for an advisory opinion as to whether Special Rule F was a correct interpretation of the Court's 1950 Advisory Opinion: [1] this rule concerned voting procedure in the General Assembly on questions relating to reports and petitions regarding South West Africa. Respondent did not support this request for an advisory opinion for the reason that it had not accepted the 1950 Opinion, especially with regard to supervisory functions on the part of the United Nations. As Respondent had throughout denied that the General Assembly had any supervisory powers or functions in respect of the administration of South West Africa, Respondent was not concerned with the voting procedure adopted by the General Assembly in the exercise of the supervisory powers it had assumed in respect of the Territory and, consequently, Respondent did not participate in the proceedings before the Court in 1955. [2]

As the correctness or otherwise of the 1955 Advisory Opinion does *not arise for decision in the present proceedings*, Respondent refrains from commenting on the reasoning of the Court or its conclusions in that Opinion.

1955

50. In 1955 the Committee on South West Africa again invited Respondent,

(a) to confer with it on the implementation of the Court's 1950 Opinion; and

(b) to assist the Committee in its supervisory task; in particular to send a report. [3]

In response, Respondent referred to its letter of the 25th March, 1954, [4] and stated that as there had been no material change in the position outlined therein, Respondent could not see that negotiations on the basis of the Committee's restrictive terms of reference would lead to positive results. [5]

The Committee, in its reply of 10th June, 1955, stated that it could only conclude that Respondent "is unwilling even to enter into negotiations in order to implement fully the Advisory Opinion". [6]

While this was a correct conclusion, so far as it went, Respondent was not unwilling to negotiate with the United Nations on a basis

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[1] *G.A. Resolution* 904(IX), 23rd November, 1954, in *U.N. Doc.* A/2890, pp. 55-56.

[2] *Vide G.A., O.R., Tenth Sess., Fourth Comm.*, 491st Meeting, 31st October, 1955, para. 9, p. 130.

[3] *G.A., O.R., Tenth Sess., Sup.* No. 12(A/2913), Annex I(a), p. 6.

[4] *Vide* para. 43 *supra*.

[5] *U.N. Doc.* A/2913, Annex I(c), p. 7.

[6] *Ibid.*, Annex I(d), p. 7.

which did not as a prerequisite place impossible demands on Respondent—an attitude fully explained to the Fourth Committee by Respondent on the 31st October, 1955. [1]

51. The 1955 Report of the Committee (referred to at page 69 of Applicants' *Memorials*), suffered from the same defects and shortcomings as that of 1954. The South African representative, however, did not

> "attempt to explain where the Committee had erred in its conclusions, since the experience of the previous year had shown that to do so would produce no fruitful result. Nor would he comment on the inaccuracies and even untruths contained in the petitions considered by the South West Africa Committee. The previous year, without prejudice to his Government's standpoint on petitions, he had endeavoured to arouse the Fourth Committee to the serious implications involved in the adoption of the resolutions on petitions suggested by the South West Africa Committee. His statement, however, had not been discussed at all; the draft resolutions had simply been voted on without any examination of their contents and referred to the General Assembly". [2]

52. In regard to the admission of oral hearings to petitioners on South West Africa, Respondent's views were stated as follows:

> "In the first place, the Union of South Africa did not recognise the competence of the United Nations to consider petitions, whether written or oral. In the second place, the system established by the Charter made no provision for oral petitions except in the case of Trust Territories. Lastly, there had undoubtedly been no provision for hearings in the procedure applied by the League of Nations, and the Permanent Mandates Commission in particular had not granted any hearings properly so-called". [3]

There was, in the initial stages of the discussions at the Ninth Session of the General Assembly, a fairly general view in the Fourth Committee that to grant oral hearings to petitioners would not be in accordance with the procedure of the former Mandate System and therefore not admissible in the Committee on South West Africa.

A draft resolution to this effect was, however, withdrawn and, instead, the Court was requested for an advisory opinion as to whether it would be consistent with the Court's 1950 Opinion for the Committee on South West Africa to grant oral hearings to petitioners. [4]

In view of Respondent's attitude regarding the 1950 Advisory Opinion, and as to accountability to the United Nations, Respondent did not support the request for an advisory opinion on the

[1] *Vide G.A., O.R., Tenth Sess., Fourth Comm.*, 491st Meeting, pp. 134-136.
[2] *Ibid.*, para. 48, p. 135.
[3] *Ibid.*, 500th Meeting, 8th November, 1955, para. 42, p. 182.
[4] *G.A. Resolution* 942(X), 3rd December, 1955, in *G.A., O.R., Tenth Sess., Sup.* No. 19(A/3116), p. 24.

admissibility of oral hearings, inasmuch as the request was confined to an interpretation of the 1950 Opinion.

53. During the Tenth Session of the General Assembly, a further resolution was adopted urging Respondent to place South West Africa under United Nations Trusteeship. [1]

1956

54. In reply to a further invitation to Respondent by the Committee on South West Africa, to negotiate and to submit reports, Respondent again referred to its earlier replies in 1954 and 1955 (*Vide* paragraphs 43 and 50 *supra*) and stated, *inter alia*, "as there has in the meantime been no material change in the position outlined in my previous communications the attitude of the Union Government remains unchanged". [2]

55. Applicants quote extensively, at pages 70-71 of their *Memorials*, from the Report of the Committee on South West Africa for the year 1956. While denying that it failed in any way to observe the spirit of the Mandate, Respondent will not deal with the allegations contained in the report. [3] The same applies to the extracts from petitions contained in Chapter VI of the *Memorials* and referred to at the top of page 73 thereof.

56. For a proper understanding of the extract from the statement of the South African Prime Minister which is quoted at page 72 of the Applicants' *Memorials*, it should be read in the fuller context given hereafter, namely:

> "The hon. Senator Cowley suggested that in order to avoid troubles in future in so far as South West Africa is concerned, we should forthwith proceed to annex South West Africa ...
>
> May I say to him that the attitude of our Government and of the previous Government, the Smuts Government was that as a result of the disappearance of the old League of Nations both the Smuts Government, and the present Government have taken up the attitude that there is no other body that has anything to say insofar as South West Africa is concerned except South Africa itself and that therefore it is well within our power and fully within our power to incorporate South West Africa as part of the Union. Up to now we have declared unto the world that legally and otherwise that is the position, but that in the meantime we are prepared, although we do not for one moment recognize the rights of the United Nations Organization, even should we one day incorporate South West Africa, to govern South West Africa in the spirit of the old mandate. So, whether we will proceed at a later stage to carry out and put into effect what we regard as our rights over which nobody has anything to say, that will depend on how circumstances develop in the future". [4]

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[1] *G.A. Resolution* 940(X), 3rd December, 1955, in *U.N. Doc.* A/3116.
[2] *G.A., O.R., Eleventh Sess., Sup.* No. 12(A/3151), Annex I(b), p. 4.
[3] *Vide* Part A, para. 1 *supra*.
[4] *U. of S.A., Parl. Deb., Senate*, Vol. 15 (1956), Cols. 3631-32.

57. With regard to the extracts from the 1956 Advisory Opinion, which are quoted at p. 72 of the *Memorials*, Respondent refers to para. 52 above and will not deal with the reasons advanced by the Court for its conclusion.

1957

58. At the 11th Session of the General Assembly an attempt was made by some delegations in the Fourth Committee to find a new basis for negotiations; but as this attempt did not result in a concrete proposal, Resolution 1059 (XI) was adopted, requesting the Secretary-General "to explore ways and means of solving satisfactorily the question of South West Africa." [1]

At the same time, the Liberian representative introduced the usual resolution urging the placing of South West Africa under United Nations Trusteeship—eventually adopted by the General Assembly as Resolution 1055 (X). [2]

59. Also at that session a further step was taken in an attempt to compel Respondent to submit to the wishes of the majority in the Assembly, namely, the adoption of Resolution 1060 (XI) in terms whereof the Committee on South West Africa was requested to study the following question:

> "What legal action is open to the organs of the United Nations, or to the Members of the United Nations, or to the former Members of the League of Nations, acting either individually or jointly, to ensure that the Union of South Africa fulfils the obligations assumed by it under the Mandate, pending the placing of the Territory of South West Africa under the International Trusteeship System?" [3]

In Respondent's view this task could hardly be consonant with the functions of negotiation and supervision already entrusted to the Committee.

60. At the 12th Session of the General Assembly, in October, 1957, a number of delegations appealed for a new approach on the South West Africa question aimed at the resumption of negotiations between South Africa and the United Nations. This culminated in the establishment of the Good Offices Committee (United States, United Kingdom and Brazil) to "discuss with the Government of the Union of South Africa a basis for an agreement which would continue to accord to the Territory of South West Africa an international status" (Resolution 1143 (XII)). [4]

61. The wider terms of reference of this Committee extended the possibility of fruitful negotiations. The prospective negotiations

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[1] *G.A. Resolution* 1059 (XI), 26th February, 1957, in *G.A., O.R., Eleventh Sess.*, Sup. No. 17 (A/3572), p. 30.

[2] Of 26th February, 1957, in *U.N. Doc.* A/3572, pp. 28-29.

[3] *G.A. Resolution* 1060(XI), para. 1, 26th February, 1957, in *U.N. Doc.* A/3572, p. 30.

[4] *G.A. Resolution* 1143(XII), 25th October, 1957, in *G.A., O.R., Twelfth Sess., Sup.* No. 18(A/3805), pp. 25-26.

were, however, greatly jeopardised by the concurrent adoption of other resolutions sponsored, *inter alia*, by the Applicants. These included a further resolution calling for United Nations Trusteeship for South West Africa, [1] and a resolution calling for further study of legal action on the South West Africa question. [2]

The inherent conflict between the act of "good offices" and the adoption of these and other resolutions were pointed out by a number of delegations, but attempts to suspend action on them failed.

The attitude of Liberia is illustrated by the fact that, although supporting the establishment of the Good Offices Committee, the Liberian representative nevertheless "urged the members of the Committee to consider the possibility of compulsory jurisdiction of the Court". [3]

The Ethiopian representative sponsored the resolution on legal action and did not support the resolution establishing the Good Offices Committee.

62. Respondent nevertheless, in pursuance of its desire to arrive at an amicable arrangement, accepted the invitation of the Good Offices Committee to participate in discussions with it. The negotiations with the Good Offices Committee took place in 1958 and will be dealt with below under that year.

63. Regarding the contents of the Report of the Committee on South West Africa, referred to at pages 44 and 45 of the *Memorials*, and the statement of the representative of Liberia quoted at page 46, Respondent, while denying any violation on its part of the spirit of the Mandate, will for the reasons previously stated not deal with the factual questions involved therein. [4]

1958

64. In March, 1958, the Good Offices Committee invited Respondent to enter into discussions with it in terms of Resolution 1143 (XII). Respondent indicated that, while it could not reconcile the 1957 resolutions relating to legal action and urging a Trusteeship Agreement [5] with the act of "good offices", it was nevertheless impressed by the presence of a more conciliatory spirit, and invited the Good Offices Committee to come to South Africa for discussions. This the Committee did, and at the conclusion of the discussions in South Africa, the members of the Committee were invited by Respondent to visit South West Africa in their private capacities—which two of the members did. In the record of the discussions the Good Offices Committee paid tribute to the "spirit of frankness,

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[1] *G.A. Resolution* 1141(XII), 25th October, 1957, in *U.N. Doc.* A/3805, pp. 24-25

[2] *G.A. Resolution* 1142(XII), 25th October, 1957, in *U.N. Doc.* A/3805, p. 25.

[3] *G.A., O.R., Twelfth Sess., Fourth Comm.*, 659th Meeting, 2nd October, 1957, para. 14, p. 36.

[4] *Vide* Part A, para. 1 *supra*.

[5] *G.A. Resolutions* 1141 (XII) and 1142 (XII)

friendliness and desire to find a mutually acceptable basis for agreement which animated the [South African] Government's participation in the discussions".[1]

65. In the discussions Respondent expressed its preparedness to enter into an agreement concerning South West Africa which would specify that the territory possessed an "international character", and that this character could be modified only with the consent of both parties to the agreement—the agreement to contain provisions along the lines of Articles 2 to 5 of the Mandate, as well as the obligation to provide information on the administration of the territory.

Respondent was, however, for the reasons already stated, not prepared to accept the United Nations as the second party to such an agreement. The Good Offices Committee, on the other hand, felt itself precluded from considering any party other than the United Nations as the second party to an agreement.[2]

66. After discussing other possibilities the Good Offices Committee mentioned *inter alia* "a suggestion that the partitioning of the Territory might provide the basis for a solution".[3] Respondent intimated that it would be prepared to investigate the practicability of partitioning as envisaged and, if found feasible, Respondent would submit proposals to the United Nations.

In its report to the General Assembly, the Good Offices Committee expressed:

> "the opinion that some form of partition under which a part of the Territory would be placed under a trusteeship agreement with the United Nations and the remainder would be annexed to the Union, might provide a basis for an agreement"; and
> "the hope that the General Assembly will therefore encourage the Government of the Union of South Africa to carry out an investigation of the practicability of partition, on the understanding that if the investigation proves this approach to be practicable it will be prepared to submit to the United Nations proposals for the partitioning of the Territory".[4]

Respondent stressed, to the Good Offices Committee and the General Assembly at its 13th Session, that the envisaged investigation would have to be directed *inter alia* at ascertaining the view of all the inhabitants.[5] And Respondent explained that its willingness to contemplate, in this context, the United Nations as the second party to an agreement was due to Respondent's desire to find a compromise, and the fact that it was inherent in the suggestion that the area which would be placed under United Nations

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[1] *U.N. Doc.* A/3900, in *G.A., O.R., Thirteenth Sess., Annexes* (Agenda item 39), para. 10, p. 3.
[2] *U.N. Doc.* A/3900.
[3] *Ibid.*, para. 47, p. 8.
[4] *Ibid.*, para. 52(6) and (7), p. 10.
[5] *G.A., O.R., Thirteenth Sess., Fourth Comm.*, 745th Meeting, 29th September, 1958, paras. 20-23, p. 15.

trusteeship, would probably contain Bantu peoples only, thus eliminating the major difficulties which had prevented Respondent in the past from accepting United Nations accountability. [1]

67. When the Report of the Good Offices Committee came before the Fourth Committee at the 13th Session of the General Assembly, Respondent appealed for discussion thereof separately from the other aspects such as suggested legal action and the Report of the Committee on South West Africa, so as to avoid acrimonious debate which would not be conducive to constructive negotiation. The majority in the Fourth Committee, including both Applicants, however opposed a separate discussion, and moreover acceded to a request from petitioners for oral hearings specifically on the subject of the negotiations, despite the protests of Respondent and others.

It was in such circumstances that the South African representative stated:

> "Even before the vote it had been apparent from the procedural debate that a number of delegations had come to the Assembly determined to wreck the work of the Good Offices Committee. That course of events confirmed his Government's contention that the forum of the United Nations was being used for the purpose of waging propaganda and ideological warfare against a member State. The Union Government had not expected those developments when it had agreed to enter into discussions with the Good Offices Committee; on the contrary it had expected that its proposals would be considered seriously and without prejudice". [2]

68. A resolution was adopted (Resolution 1243 (XIII)); rejecting the Good Offices Committee's suggestion that the partition idea be investigated; and requesting it to renew discussions with Respondent to find a basis for an agreement which would continue to accord to "South West Africa *as a whole* an international status and which would be in conformity with the purposes and principles of the United Nations", bearing "in mind the discussions at the 13th Session of the General Assembly". [3] (Italics added.)

69. Again Respondent refrains from dealing with the extracts from the Report of the Committee on South West Africa referred to at pages 75 and 76 of Applicants *Memorials*. [4]

70. At the same Session, the General Assembly adopted a resolution, which had by now become standard, calling for South West Africa to be placed under United Nations Trusteeship. [5]

[1] *U.N. Doc.* A/3900, para. 50, p. 8.
[2] *G.A., O.R., Thirteenth Sess., Fourth Comm.*, 747th Meeting, 30th September, 1958, para. 27, p. 25.
[3] *G.A. Resolution* 1243(XIII), 30th October, 1958, in *G.A., O.R., Thirteenth Sess., Sup.* No. 18 (A/4090), p. 30.
[4] *Vide* Part A, para. 1 *supra*.
[5] *G.A. Resolution* 1246 (XIII), 30th October, 1958, in *U.N. Doc.* A/4090, p. 31.

1959

71. In its reply to an invitation by the Good Offices Committee to renew discussions, Respondent referred to the unfortunate developments at the 13th Session of the General Assembly which, in Respondents' view, showed that the essential elements of conciliation and goodwill on the part of the majority of members in the General Assembly, were absent. Respondent was nevertheless still prepared to act in accordance with the spirit which animated the resolution establishing the Good Offices Committee, and to collaborate with the Committee on the basis of the terms of reference contained in that resolution. It was difficult to see, however, what useful purpose could be served by renewing, under the Committee's new and more restricted terms of reference, the discussions which had been initiated in the previous year in such completely different circumstances. [1]

When, however, the Good Offices Committee [2] replied that its terms of reference were "not essentially different from those under the 1957 resolution", [3] Respondent indicated that, while it did not agree with this interpretation, it would meet with the Committee. [4]

72. The ensuing discussions showed, however, that the Good Offices Committee felt itself bound to consider only proposals which would involve acceptance by Respondent of accountability to the United Nations in respect of the Territory *as a whole*, and it proposed a formula in the following terms:

> "It is agreed that further talks might be concentrated on the negotiation of some form of agreement to which the United Nations must be a party for the supervision of the administration of South West Africa in a manner which would not impose greater responsibilities on the Union Government or impair the rights enjoyed by it under the Mandate". [5]

Respondent could not accept this formula because of its conviction that it would be impossible to devise, within the framework of accountability to the United Nations, a procedure which would not impose on Respondent obligations greater than those which had existed under the League.

In an effort to meet the view of the Good Offices Committee, Respondent in turn proposed the following formula as a basis for further discussion:

> "It is agreed that further talks with the Union Government should be concentrated on negotiation with the United Nations, through its Good Offices Committee, of some form of settlement

[1] *Vide U.N. Doc.* A/4224, Annex II, in *G.A.,O.R., Fourteenth Sess., Annexes* (Agenda item 38), pp. 4-5.
[2] In its letter of 19th June, 1959.
[3] *U.N. Doc.* A/4224, Annex III, p. 5.
[4] *Ibid.*, Annex IV, p. 5.
[5] *Ibid.*, para. 10, p. 2.

regarding South West Africa, which would not impose greater (or more onerous) responsibilities on the Union Government or impair any of the rights conferred upon it by the Mandate in 1920, it being understood that such discussions will be without prejudice to the juridical position taken up by the Union in the past".[1]

The Good Offices Committee felt that this proposal did not improve the position, and reported to the General Assembly that "it has not succeeded in finding a basis for an agreement *under its terms of reference*".[2] (Italics added).

Thus negotiations were once more frustrated by the restrictive terms of reference of the negotiating agency.

73. When the report of the Good Offices Committee[3] was discussed at the 14th Session of the General Assembly, the South African representative expressed his Government's "real regret" that it had not been possible to find a basis for agreement, and informed the Fourth Committee that:

(a) The South African delegation would at the next session, as it had done at the 14th Session, again participate in the discussion of the report of the Committee on South West Africa.

(b) The South African Government would *make available to the United Nations* blue books (official reports) and other reports issued by the South West Africa Administration, Hansards (Parliamentary Proceedings), of both the South African Parliament and the Legislative Assembly of South West Africa; and other documents concerning the administration of the Territory which are required to be laid before the South African Parliament and the Legislative Assembly.

(c) The South African Government *remained ready to enter into discussions* with an appropriate United Nations *ad hoc* body that might be appointed after prior consultation with the South African Government and which would have a full opportunity to approach its task constructively, providing for fullest discussion of *all possibilities*.[4]

In giving these undertakings the South African representative emphasised that Respondent could only carry them out within a framework of co-operation and he expressed the hope that further developments would not force Respondent to re-assess its attitude.[5]

74. The atmosphere was unfortunately marred by subsequent developments including the following:

(a) Resolution 1360 (XIV)[6] (sponsored, *inter alia*, by Ethiopia) was adopted which, although apparently designed to create machin-

[1] *Ibid.*, para. 14, p. 3.
[2] *Ibid.*, para. 16, p. 4.
[3] *U.N. Doc.* A/4224.
[4] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 924th Meeting, 26th October, 1959, para. 2, p. 221.
[5] *Ibid.*
[6] *G.A. Resolution* 1360(XIV), 17th November, 1959, in *G.A., O.R., Fourteenth Sess., Sup.* No. 16(A/4354), pp. 28-29.

ery for negotiation, contained paragraphs condemnatory of Respondent. On the "negotiation" aspect Respondent was invited to

> "enter into negotiations with the United Nations through the Committee on South West Africa, which is authorized under its terms of reference to continue negotiations with the Union, or through any other committee which the General Assembly may appoint, with a view to placing the Mandated Territory under the International Trusteeship System";

and requested to

> "formulate for the consideration of the General Assembly, at its fifteenth session, proposals which will enable the Mandated Territory of South West Africa to be administered in accordance with the principles and purposes of the Mandate, the supervisory functions being exercised by the United Nations according to the terms and intent of the Charter". [1]

The South African representative pointed out to the Committee that Respondent could hardly be expected to enter into negotiations when the resolution also contained paragraphs censuring the South African Government. Furthermore the terms of reference laid down for the negotiations implied only trusteeship. He continued,

> "the Committee was well aware of the Union's attitude towards a possible trusteeship agreement; even the Court's opinion, adopted by the General Assembly, indicated that the Union was not obliged to enter into a trusteeship agreement. There was therefore, no question of the Union considering a trusteeship agreement. As operative paragraph 3 envisaged supervision according to the terms and principles of the Charter, it also aimed at supervision by the Trusteeship Council. Moreover, the terms of reference of the United Nations body which was to be entrusted with those negotiations seemed much too restrictive, more restrictive in fact than the present terms of reference of the Good Offices Committee. The South African delegation would therefore... vote against the draft resolution as a whole". [2]

(b) Together with others, both Applicants also sponsored a resolution designed to encourage Member States to institute legal action against Respondent. This resolution, *inter alia*, drew

> "*the attention* of Member States to the conclusions of the special report of the Committee on South West Africa covering the legal action open to Member States to refer any dispute with the Union of South Africa concerning the interpretation or application of the Mandate for South West Africa to the International Court of Justice for adjudication in accordance with Article 7 of the Mandate read in conjunction with Article 37 of the Statute of the Court". [3]

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[1] *Ibid.*, paras. 2 and 3, p. 29.

[2] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 931st Meeting, 29th October, 1959, para. 48, p. 254.

[3] *G.A. Resolution* 1361(XIV), 17th November, 1959, in *U.N. Doc.* A/4354, p. 29.

The South African delegation had pointed out in vain that this resolution was not consonant with a conciliatory spirit necessary for successful negotiation. [1] Other delegations also feared that this resolution would have a deleterious effect and a formal proposal was made to postpone consideration thereof until the 15th Session; but after an appeal to the sponsors by the representative of Liberia, the proposal to postpone consideration was withdrawn. [2]

75. The General Assembly also adopted the annual resolution (sponsored, *inter alia*, by Liberia) calling for the Territory to be placed under United Nations Trusteeship. [3]

76. With regard to the extracts from the Report of the Committee on South West Africa referred to at page 79 of Applicants' *Memorials*, it is desired merely to record that, without prejudice to its juridical position, Respondent did at the 14th Session of the General Assembly deal with certain allegations and information contained in the Report. This was done to draw attention to the mis-statements and the unjustified conclusions in the Report, as well as to show that Respondent's refusal to supply information was due to its inability to accept United Nations accountability and not to a desire to hide the facts. [4]

The Applicants allege at page 81 of the *Memorials* that the South African Representative "made no real attempt to deal with the practice of *apartheid*. Nor did the Union dispute the existence of an interlocking series of legislation which the Committee deemed oppressive". Respondent did not intend or attempt to deal fully with the various allegations and conclusions in the Report of the Committee on South West Africa, inasmuch as Respondent did not recognise supervisory authority as vested in the United Nations, and was not accounting to the United Nations in that sense.

Respondent will not deal here with the allegations in the said Report. [5]

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77. When the Committee on South West Africa invited Respondent to negotiate with it in terms of Resolution 1360 (XIV), [6] Respondent on 29th July, 1960, replied:

> "The Union Government have repeatedly expressed their desire to find a solution which would be acceptable to all the parties concerned. To this end the Union Government have, over a period of years, made concrete proposals and expressed their willingness to examine others. The Union Government continue to desire that

[1] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 931st Meeting, para. 50, p. 254.

[2] *Ibid.*, 932nd Meeting, 30th October, 1959, para. 1, p. 259.

[3] *G.A. Resolution* 1359 (XIV), 17th November, 1959, in *U.N. Doc.* A/4354, p. 28.

[4] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 883rd, 914th, 915th, 916th and 918th Meetings.

[5] *Vide* Part A, para. 1 *supra*.

[6] *Vide* para. 74(a) *supra*.

this matter be settled and in addition to making certain helpful offers to the Fourth Committee last year, recorded once more the Union's readiness to enter into discussions with an appropriate United Nations *ad hoc* body that may be appointed after prior consultation with the Union Government, and with terms of reference which would allow the fullest discussion and exploration of *all possibilities*.

This offer did not, however, find a positive response and the Assembly instead adopted resolution 1360 (XIV) which laid down terms of reference for negotiation with the Union which were most restrictive. The Union's representative pointed out, before the adoption of the resolution, that the terms of reference were far more restrictive than those of the Good Offices Committee and he voted against the adoption of the resolution. You will therefore understand that the Union Government could not see any possibility of fruitful results flowing from negotiations which required the Union to place 'South West Africa under the International Trusteeship System'—terms of reference which prescribed the end result in advance.

The Union Government still believe that negotiations on the basis proposed would not lead to any positive results.

The Union Government would, however, wish to reiterate their readiness to enter into discussions with an appropriate United Nations *ad hoc* body that may be appointed after prior consultation with the Union Government and which would have a full opportunity to approach their task constructively, providing for fullest discussion and exploration of all possibilities—on the understanding of course, that this is without prejudice to the Union's consistently held stand on the judicial [juridical] aspect of the issue".[1] (Italics added.)

78. Respondent had intended reiterating the above offer at the 15th Session of the General Assembly which was to meet some weeks later. A request by Respondent for early consideration of the South West Africa question was, however, not acceded to by the Fourth Committee and by the time it did come up for discussion, Applicants had instituted these proceedings.

In the light of this event the South African representative informed the Fourth Committee that, since the Committee's discussion on South West Africa was likely to traverse the same field as that covered by the proceedings instituted by Applicants, the matter was, in Respondent's view, *sub judice* and should, therefore, not be discussed by the Committee. The South African representative argued his contention at some length, pointing out that discussion, and adoption of resolutions, might have a prejudicial effect on the judicial proceedings and could be construed as an attempt to usurp the functions of the Court. The Committee rejected Respondent's proposal for an adjournment of the debate pending the conclusion of the judicial proceedings—the Applicants voting against the proposal for adjournment.

[1] *G.A., O.R., Fifteenth Sess., Sup.* No. 12(A/4464), Annex II C, p. 58.

The South African representative then informed the Committee that his delegation could not be a party to discussion of a matter which was the subject of a judicial action pending in the Court, since in doing so it would itself be violating the *sub judice* rule. [1]

In view of these events it was not possible for Respondent to deal further with its offer to explore "all possibilities"

79. At page 82 of the *Memorials*, Applicants give an account of certain events at the "Second Conference of Independent African States" at Addis Ababa in June, 1960. The relevance of these events to the proceedings before the Court is not apparent, save that the Liberian Representative's reference to the determination of his Government "on behalf of all African States to pursue further action to get this territory placed under the Trusteeship provisions of the Charter", appears to confirm that in the so-called negotiations with Respondent over the years, there had been but one objective on the part of Applicants, namely, United Nations Trusteeship for South West Africa.

80. Applicants also refer at page 84 of their *Memorials* to General Assembly Resolution 1565 (XV). [2] This Resolution was adopted after the filing with the Court of the Applications in these proceedings. Respondent therefore does not intend dealing with the contents thereof, save to state its strongest objection to the reliance which Applicants, in referring to this Resolution, apparently place on the conclusion of the majority in the General Assembly that "the dispute which has arisen between Ethiopia, Liberia and other Member States on the one hand, and the Union of South Africa on the other, relating to the interpretation and application of the Mandate has not been and cannot be settled by negotiation". [3]

81. Respondent refrains from dealing with the extracts from the Report of the Committee on South West Africa as quoted at pages 83 and 84 of the *Memorials*. [4]

SUMMARY

82. Respondent's submissions with regard to the facts dealt with in this Chapter are stated in Chapters III to VI below, in each case to the extent relevant to the Objection considered in such Chapter.

There remains, however, to be dealt with the following statements by the Applicants in a summary at the end of Chapter II of their *Memorials*:

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[1] *G.A., O.R., Fifteenth Sess., Fourth Comm.*, 1049th Meeting, 14th November, 1960, paras. 39-66, pp. 296-99.

[2] Of 18th December, 1960, in *G.A., O.R., Fifteenth Sess., Sup.* No. 16(A/4684), pp. 31-32.

[3] *Vide* also para. 8 of Chap. VI *infra*.

[4] *Vide* Part A, para. 1 *supra*.

(a) *"Upon the dissolution of the League of Nations the Union did not conceal its desire to annex the Territory".* [1]

In paragraphs 1 to 10 of Part A above, Respondent indicated that the Mandate for South West Africa gave effect to a compromise arrangement which involved, *inter alia,* that C Mandates were, in their practical effect, not far removed from annexation. Respondent has further shown in this Chapter that it considered closer association between South Africa and the Territory to be a natural development and that it never made a secret of its conviction that the interests of the inhabitants would best be served thereby. At the time of establishment of the United Nations and even before the dissolution of the League, Respondent clearly announced its view that the Mandate should be terminated and the Territory incorporated in the Union. Respondent's proposal to that effect, supported by the wishes of the inhabitants, was however rejected by the United Nations in 1946.

(b) *"Instead, shortly after the United Nations refusal to permit incorporation of the Territory, the Union contended that the United Nations had no rights of supervision, or other powers, with respect to the Territory".* [1]

Respondent's contention was in conformity with a general understanding to that effect amongst Members of the League and of the United Nations, and given expression to *before and after* dissolution of the League. [2]

(c) *"The Opinion of the Court being unsatisfactory to the Union, the latter denounced the Opinion as being in error, and proclaimed its intention not to comply therewith".* [1]

Respondent did not "denounce" the Opinion, nor did it "proclaim" an "intention not to comply" therewith.

Respondent advanced reasons why it could not accept *certain of* the conclusions in the Opinion, the most important reason being that certain vital information was not before the Court when the Opinion was given. Although Respondent could not accept the Opinion *in toto,* it nevertheless made concrete proposals and considered counter-proposals in an endeavour to find an acceptable arrangement.

(d) *"There followed years of patient, though unavailling (*sic*), efforts on the part of the General Assembly to obtain implementation of the Opinion, by means of negotiation and appeal".* [1]

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[1] Applicants' *Memorials,* p. 86.

[2] As will be further dealt with in Chap. III, paras. 32(c) and (d) and 34 *infra.*

and,

> *"Having concluded after fourteen years of fruitless efforts to obtain compliance on the part of the Union with the Mandate, that its dispute with the Union has not been and cannot be settled by negotiation ..."* [1]

As regards the implication contained in the last-mentioned statement, to the effect that there has not been compliance with the Mandate on the part of Respondent, reference is made to sub-paragraph (e) below.

The allegations concerning "unavailing efforts" and "fruitless efforts", and the conclusion that there is a dispute which cannot be settled by negotiation, are dealt with in Chapters V and VI below.

> (e) *"The Committee's repeated findings of Union violations of the Mandate and recommendations thereon have been as unavailing as the Committee's efforts to negotiate", and other allegations at page 86 concerning alleged violations of the Mandate.*

Respondent denies that its administration of the Territory has not been in conformity with the provisions of the Mandate. For the reasons stated in paragraph 1 of Part A above, Respondent refrains from dealing with the substance of the Applicants' allegations in this regard.

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[1] *Ibid.*, p. 87.

CHAPTER III

FIRST OBJECTION

THE MANDATE, AS A "TREATY OR CONVENTION IN FORCE", HAS LAPSED.

INTRODUCTORY

1. Respondent deals in this Chapter with its First Objection, namely, that the "Mandate for German South West Africa", upon Article 7 of which the Applicants' claim to jurisdiction is founded, has lapsed, in the sense and to the extent that it is no longer "a treaty or convention in force" within the meaning of Article 37 of the Statute of the Court.

2. Applicants seek to found their claim to jurisdiction of the Court upon Article 7 of the Mandate agreement and Article 37 of the Statute of the Court. [1] They suggest that regard is also to be had to Article 80, paragraph 1, of the United Nations Charter; but inasmuch as the latter is an interpretation clause only, to the effect that Chapter XII of the Charter is not to be construed as altering certain existing rights or instruments, Applicants could not seek to base anything positive thereon.

Article 7 of the Mandate agreement, in its second paragraph, provided as follows:

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

Article 37 of the Statute of the Court reads:

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

Inasmuch as Article 7 of the Mandate agreement provided for reference to the Permanent Court of International Justice, which is no longer in existence, Article 37 of the Statute is a necessary link in the chain of Applicants' contention that jurisdiction is now vested in the International Court of Justice. For the purposes of

[1] *Vide* Applicants' *Memorials*, p. 88.

Article 37 it is necessary that Applicants establish not *generally*, that an obligation to submit to jurisdiction can be said to exist in some way or another, but *specifically* that it exists as a *provision* of a "*treaty or convention in force*". And thus the basic contention advanced by Applicants in regard to jurisdiction is, indeed, that

> "The Mandate, including Article 7 thereof, is in force, and is a 'treaty or convention' within the meaning of Article 37 of the Statute of the Court".[1]

Respondent submits that Applicants are unable to substantiate this contention.

3. That the Mandate agreement came into existence, and operated during the life-time of the League of Nations, as a "treaty or convention", can be regarded as common cause. The issue as raised in this Objection is whether such operation continued after the dissolution of the League.

In the 1950 Advisory Opinion the Court in effect held that, in addition to its operation as a treaty or convention, the institution known as the Mandate for South West Africa acquired an objective or "real" existence, as constituting a special status for the Territory, and that in this objective or "real" aspect the Mandate survived the dissolution of the League. [2]

The correctness or otherwise of this proposition does not require to be reviewed for the purpose of Respondent's Objection to jurisdiction—as will appear from reasons dealt with hereinafter. Irrespective of the question whether the Mandate as an institution survived the League in an objective or "real" sense and, if so, with what exact content and to what exact extent, Respondent contends that in its aspect of operating as a treaty or convention the Mandate for South West Africa lapsed upon dissolution of the League, and that for this reason Applicants' claim to jurisdiction must fail.

4. In developing this contention, Respondent will deal with the matter in the following parts:

A. The contractual nature of the origin of the Mandate and of the obligations created thereby for the Mandatory (the word "contractual" being used in the sense of relating to international agreement, whether bilateral "treaty" or multilateral "convention"). This part will also refer to the two broad categories into which the obligations may be said to fall, *viz*:

(i) *Substantive*, relating directly to the administration of the Territory; and

(ii) *Procedural*, relating to supervision by League organs regarding observance of the substantive obligations.

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[1] *Ibid.*

[2] "*International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*", pp. 132, 154-57, 165-66.

B. The International Person or Persons for whom the Mandate as a treaty or convention involved rights or legal interests correlative to the Mandatory's obligations. Respondent's submission will be that the circle in this respect was limited to

(i) the League of Nations, regarded as an international legal *persona*, or

(ii) the Members of the League, in their capacity as such, or

(iii) both (i) and (ii).

C. The effect of dissolution of the League upon the Mandatory's procedural obligations (A (ii) *supra*). Respondent's submission will be that these obligations were by their very content dependent for their fulfilment upon the existence of the League, that on dissolution of the League they lapsed through impossibility of performance, and that they were not replaced by, or modified into, similar obligations to submit to supervision by the United Nations or any other organisation.

D. The effect of dissolution of the League upon the Mandatory's *substantive* obligations (A (i) *supra*). Respondent's submission will be that although these obligations were not by their content dependent for fulfilment upon the existence of the League, the only International Person or Persons for whom the Mandate as a treaty or convention involved rights correlative to the said obligations, were the League of Nations and/or its Members in their capacity as such; that due to dissolution of the League its rights lapsed; and that for the same reason States that had been Members of the League, could no longer claim to possess rights or legal interests by virtue of a treaty or convention that had rendered such rights or legal interests dependent on membership in the League.

E. Final observations on the effect of the conclusions arrived at in Parts C and D upon Applicants' claim to jurisdiction. Respondent's submission will be that whether or not objective or "real" obligations survived the League, and whatever the possible nature and scope of such obligations, the Mandate agreement is no longer "in force" as a "treaty or convention" within the meaning of Article 37 of the Statute.

A. Contractual Origin and Effect

5. By Article 22 of the Covenant of the League of Nations, the Signatory Powers agreed that what subsequently came to be known as the "Mandate System" was to be applied to certain colonies and possessions, including South West Africa.

As was indicated in Chapter II above, [1] the agreement as eventually set forth in Article 22 was a compromise arrived at after

[1] Part A, paras. 2-10.

much travail at the Paris Peace Conference of 1919. The history of the Article explains also why its provisions were in certain respects vague and lacking in legal precision. Nevertheless the broad trends of what was intended, as distinct from certain questions of detail, seem reasonably clear.

The Article commenced with setting out the signatories' agreement that to the colonies and territories in question "there should be applied the principle that the well-being and development of [the inhabitants] form a sacred trust of civilization". It further recorded their agreement that "securities for the performance of this trust" should be embodied in the Covenant.

The second paragraph of the Article stated that "the best method of giving practical effect to this principle" would be to "entrust" the "tutelage" of the "peoples" concerned to suitable "advanced nations", willing to accept it, who would "exercise" it "as Mandatories on behalf of the League".

The wording of the Article as a whole, as well as its historical background, suggest strongly that these references to "trust", "tutelage" and "Mandatory" were not intended to bear technical legal meanings, by exact or close analogy to municipal law institutions of *trust, tutelage* and *mandatum*. So, for instance, the English word "trust", which is capable of a technical legal meaning as well as of a more general ordinary meaning, depending on context, was rendered in the French version by the word "*mission*", meaning in this context "task" or "undertaking", and thus confirming that a non-technical connotation of "trust" was intended. The conception, also, of the "tutelage" of a backward people or community by an "advanced nation" could at most have been intended in a broad, metaphorical sense. It is significant that in the actual Mandate agreements later entered into, the words "trust" and "tutelage" did not appear at all. Even in the case of the words "Mandatory" and "Mandate", which were retained in the Mandate agreements themselves, the analogy, if any, with a private law *mandatum* was probably intended to be of the broadest and most general nature only. The more detailed and technical aspects of the private law institution could hardly have been known to the Peace Conference as a whole—as distinct possibly from certain of its members—and cannot therefore fairly be presumed to have been intended to be incorporated in its covenants It was probably by reason of considerations such as these that the Majority of the Court, in the 1950 Advisory Opinion expressed the view that it was

> "not possible to draw any conclusions by analogy from the notions of mandate in national law or from any other legal conception of that law". [1]

It seems, then, that what was said in the opening paragraphs of Article 22 concerning a "sacred trust" and "tutelage", must be

[1] "*International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*", p. 132.

regarded as being descriptive of the idealistic or humanitarian objectives involved in the Mandate System, and that the reference to "Mandatories on behalf of the League" is to be understood as affording a broad indication of the method whereby those objectives would be sought to be attained. It is, therefore, to the more detailed provision in Article 22 for "securities for the performance of this trust" that regard must be had in order to determine the juridical content of the Mandate System as envisaged by the signatories to the Covenant.

6. On analysis the following "securities" are found embodied in the further provisions of Article 22:

(a) Although the Mandatories were to have authority and control in respect of the territories concerned, [1] in other words (at any rate in the case of B and C Mandates) title or power of government and administration, [2] this would vary according to circumstances [3] and would be subject to conditions. [1]

(b) The said conditions would be directed towards a two-fold purpose, namely,

(i) to provide certain "safeguards in the interests of the indigenous population", and

(ii) to secure certain interests or benefits for Members of the League and their nationals. [4]

(c) More particularly, the conditions mentioned in regard to B and C Mandates as directed towards safeguarding the interests of the indigenous population were:

> "... conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of the territory..." [5]

(d) Specifically directed towards the interests or benefit of Members of the League and their nationals, would be conditions to "secure equal opportunities for the trade and commerce of other Members of the League". [6] This so-called "open door" clause would not, however, apply in regard to C Mandates. [7] It is further evident that certain of the conditions mentioned in (c) above as directed towards indigenous interests, could in addition serve the

[1] Art. 22(8).
[2] *Ibid.*, (5) and (6).
[3] *Ibid.*, (3) and (8).
[4] *Ibid.*, (6) and (5).
[5] *Ibid.*, (5) read with (6).
[6] *Ibid.*, (5).
[7] *Vide* limitative words at the end of Art. 22(6).

interests of League Members (e.g. the restrictions upon traffic in arms and ammunition and upon fortification and armament).

(e) The Mandatory was to be under an obligation to render to the Council of the League "an annual report in reference to the territory committed to its charge".[1] A Permanent Mandates Commission would receive and examine the reports and advise the Council "on all matters relating to the observance of the mandates".[2]

(f) The "degree of authority, control, or administration" to be exercised by the Mandatory was to be "explicitly defined" in each case—by agreement between Members of the League or by the Council.[3]

7. It will be observed that Article 22 did not itself purport to put the Mandate System into operation. It set forth the agreed idealistic objectives of the System, agreed methods whereby it would be put into operation and agreed features which would be incorporated therein. The provisions of Article 22 clearly envisaged that concrete steps would have to be taken for the complete constitution of the System, namely, towards entrusting the "tutelage" of the inhabitants of particular territories to particular "advanced nations",[4] constituting those "nations" as "Mandatories on behalf of the League",[5] and explicitly defining the degree of authority, control or administration to be exercised by them;[3] and those provisions prescribed conditions which were in this process to be imposed as obligations upon the Mandatories, *substantively* in the interests of the Mandated peoples and Members of the League,[6] and *procedurally* with a view to international supervision over the "observance of the mandates," i.e. over the exercise of the substantive powers and compliance with the substantive obligations.[7]

In other words, Article 22 was *an agreement between Members of the League as such*, regarding a Mandate System *to be constituted* in pursuance thereof. The System itself, however, would begin to operate only upon *the agreement of the respective Mandatories as such* (not necessarily Members of the League) *to undertake specific Mandates* in respect of particular territories, and *to accept specifically defined rights and obligations* in connection therewith.

8. The concrete steps envisaged by Article 22 were duly taken, in the following order:

(a) The Principal Allied and Associated Powers (in whose favour Germany was to renounce her overseas possessions by Articles 118

[1] Art. 22(7).
[2] *Ibid.*, (9).
[3] *Ibid.*, (8).
[4] *Ibid.*, (2).
[5] *Ibid.*
[6] *Vide* Art. 22(5) and (6) and para. 6 *supra*.
[7] Art. 22(7) and (9).

and 119 of the Treaty) allocated the various territories to different Mandatories, and, *inter alia*, decided on May 7th, 1919, that the Mandate for South West Africa should be held by Respondent. [1]

(b) Draft Mandate instruments were considered by the Principal Allied and Associated Powers and, after agreement with the designated Mandatories, submitted to the Council of the League. [2] In the case of South West Africa the agreement between the Principal Powers and the Mandatory appears from the second and third paragraphs of the preamble of the instrument as finally approved. [3]

(c) The Council of the League confirmed the Mandates, [4] thereby constituting the designated Mandatories as "Mandatories on behalf of the League".

(d) The Council further, in pursuance of Article 22 (8), defined the terms of the Mandates in the manner set out in the instruments of Mandate [5]. This was generally in accordance with the drafts submitted, subject to very minor alterations, if any. [6] And such alterations must also have received the assent of the Principal Powers and the Mandatories; for the final instruments record the defined terms as being in accordance with those "proposed" by the Principal Powers and "agreed" to and "undertaken" by the Mandatories. [7]

9. The provisions of the Mandate for German South West Africa, as defined by the Council on 17th December, 1920, and agreed to by the Mandatory, were typical of C Mandates. They can, for convenience, be grouped as follows:

(a) *Mandatory's title:* The preamble set out that there was conferred and confirmed, in accordance with Article 22 of the Covenant "a Mandate ... to administer the territory aforementioned", which the Mandatory had undertaken "to exercise ... on behalf of the League". [8] Article 2 provided that "the Mandatory shall have full power of administration and legislation over the Territory ... as an integral portion of the Union of South Africa, and may apply the laws of the Union to the territory, subject to such local modifications as circumstances may require".

(b) *Mandatory's substantive obligations:* These were set out in Articles 2 to 5. Article 2 imposed the general obligation to "promote to the utmost the material and moral well-being and the social progress of the inhabitants". Articles 3, 4 and 5 imposed

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[1] *Vide* Chapter II, Part A, para. 7 *supra*.

[2] *Ibid.*

[3] Annex B *infra* and *L. of N., O.J.*, 1921, p. 89. *Vide* also Preambles to other C Mandates in *L. of N., O.J.*, 1921, pp. 84-94.

[4] End of Preamble of Mandate for South West Africa and also of other C Mandates, footnote 3 *supra*.

[5] *Vide* end of Preamble.

[6] Wright, *op. cit.*, p. 114.

[7] *Vide* Preambles of C Mandates.

[8] Paras. 2 and 3 of Preamble.

conditions as contemplated in the portion of Article 22 (5) of the Covenant cited in paragraph 6 (c) above—those in Article 3 relating to "the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic"; those in Article 4, to the prevention of fortification and military training of natives other than for police and defence purposes; and those in Article 5, to freedom of conscience and religion. Article 5 was worded with reference, not only to freedom of conscience and worship on the part of the inhabitants, but also to allowing all missionaries who were "nationals of any State Member of the League of Nations" to enter into, travel and reside in the Territory for the purpose of prosecuting their calling. While all the obligations imposed by Articles 2 to 5 were "safeguards ... in the interests of the indigenous population", certain of the provisions (e.g. those of Article 5 relating to missionaries) appear to have been intended to secure and serve in addition the interests of Members of the League and their nationals.

(c) *Mandatory's Procedural Obligations:* Article 6 imposed the obligation to render to the Council of the League, to its satisfaction, an annual report "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".

(d) *Amendment of Mandate Provisions:* Article 7 provided that the consent of the Council of the League was required for any modification of the terms of the Mandate.

(e) *Compulsory Jurisdiction for Adjudication of Disputes:* Article 7 also set out the Mandatory's agreement to the submission to the Permanent Court of International Justice of disputes between itself and another Member of the League of Nations, insofar as they related to the interpretation or application of the provisions of the Mandate and could not be settled by negotiation. It will be observed that in Article 22 itself there was no such provision for compulsory jurisdiction. In the Mandate instruments the relevant clause providing for such jurisdiction in each case commences with the words: "The Mandatory agrees ..."

10. That the Mandate for German South West Africa operated, during the lifetime of the League, as *an international treaty or convention*, cannot admit of doubt. Indeed, from what Applicants state at page 88 of their *Memorials*, this appears to be common cause. [1]

Respondent wishes to stress both the contractual origin of the Mandate agreement and the fact that it gave rise to contractual international rights and obligations.

(a) *Contractual Origin:*

As was observed above (paragraph 8), the Mandate agreements received the assent or approval of the Principal Allied and Associated

[1] *Vide* para. 2 *supra*.

Powers, the respective Mandatories and the Council of the League. The Principal Powers acted in pursuance of the power of disposal conferred upon them by Articles 118 and 119 of the Treaty of Versailles. And the Council of the League acted in terms of authorisation conferred upon it by Article 22 (8) of the Covenant, which was a convention between all League Members.

(b) *Contractual Consequences:*

It was by agreement to the terms of the respective Mandate instruments that the Mandatories obtained the rights and accepted the obligations set forth therein. These rights and obligations were international in that they were valid against, and owed to, other International Persons (as will be further discussed in paras. 13 to 17 below); and they were contractual through being contained in the provisions of the Mandate agreements, to which they owed their legal force.

11. Insofar as the 1950 Advisory Opinion stressed the objective or "real" aspect of the Mandate institution, as involving a special status for the Territory,[1] it seems clear that such "real" aspect was *additional* to the contractual and did not displace it. In other words *all* the rights and obligations provided for in the Mandate agreement were contractual—in the sense of existing between subjects of International Law by reason of an operative treaty or convention. But *some* only of those rights and obligations *in addition* acquired a "dispositive" or "real" aspect. This is rendered clear particularly by Sir Arnold McNair at page 156 of the Opinion where, after citing or stating the effect of *all* the provisions of the Mandate for South West Africa, he said:

> "In addition to *the* personal rights and obligations referred to above, it also created *certain* 'real' rights and obligations". (Italics added. [2])

The learned Judge proceeded to indicate that the latter were "*certain* rights of possession and government . . ." and "*certain* obligations binding every State that is responsible for the control of territory. . ." [3] (Italics added.)

On this approach to the matter, there could be controversy as to which rights and obligations fell into the "real" category as pertaining to status, and which did not; there can, however, be no controversy about the fact that *all* rights and obligations contained in the provisions of the Mandate agreement were contractual.

12. The obligations were imposed by Articles 2 to 6 of the Mandate agreement and, as was noted above, [4] fell into the following two categories, namely:

[1] *Ibid.*, para. 3.

[2] "*International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*", p. 156.

[3] *Ibid.*

[4] *Vide* paras. 9(b) and (c) *supra.*

(a) *Substantive*, relating directly to the administration of the Territory (Articles 2 to 5); and

(b) *Procedural*, relating to supervision by the Council of the League in respect of observance by the Mandatory of the substantive obligations (Article 6).

The *substantive* obligations can again be subdivided into two groups, as follows:

(i) All the obligations involved benefit for the inhabitants of the area;

(ii) Some of them, however, at least potentially involved benefit also for Members of the League and their nationals.

It would be somewhat difficult to draw a hard and fast line as far as group (ii) is concerned. Clearly falling within its ambit would be the provision in Article 5 for freedom of entry into and travel and residence in the Territory to be allowed to "all missionaries, nationals of any State Member of the League of Nations"; the restriction in Article 4 upon military training of the natives and fortification of the Territory; and possibly also the provision in Article 3 for the control of traffic in arms and ammunition.

But even this list is not necessarily exhaustive. Certain of the other obligations, primarily intended for the benefit of the inhabitants, might well under particular circumstances of application or breach affect the interests of a Member State or its nationals: thus, for instance, widespread liquor traffic in the Territory might sometimes affect the nationals or dependents of a League Member in a neighbouring territory.

B. International Person or Persons that Acquired Rights or Legal Interests

13. The question of the International Person or Persons that acquired contractual rights or legal interests, correlative to the Mandatory's aforesaid contractual obligations, can best be answered with reference to the following potential holders of rights or legal interests:

(a) The Principal Allied and Associated Powers;

(b) The League of Nations, viewed as an entity distinct from its Members and endowed with international legal capacity; and

(c) The Members of the League of Nations.

The situation concerning the inhabitants of the Territory as possible holders of rights or legal interests is dealt with in Part E below.

14. *The Principal Allied and Associated Powers:*

Although the group of States known at the time as the Principal Allied and Associated Powers participated, under that name, in the

establishment of the Mandate System, in the manner and to the extent indicated above, [1] the terms of the respective Mandate agreements did not, either by themselves or as read against the background of Article 22 of the Covenant, provide for any function to be fulfilled by the Principal Powers as such. In other words the agreements did not confer rights or impose obligations upon the Principal Powers as a body or group, or as individual States because of their membership of that body or group. Their role as Principal Powers was apparently intended to be transitional only, *viz.* to exercise their power of disposal over the ex-enemy territories in such a way as to get the Mandate System established in respect of the territories. Their co-operation was particularly necessary with a view to the establishment of the respective Mandatories' title to the territories. Having done what was necessary from their side to achieve that purpose, their function as Principal Powers in this respect was fulfilled; in the operation of the System itself the role contemplated for them would be that of individual Mandatories, or of Members of the League, [2] or of both.

15. *The League of Nations:*

In determining whether the League was a party to and derived contractual rights from the Mandate agreements, the first question of importance is whether the League was to be regarded as a legal *persona* and a subject of International Law.

There is a strong body of juridical opinion in favour of an affirmative answer to this question.

As Schwarzenberger states:

> "*In the case of comprehensive international institutions, such as the League of Nations* or the United Nations, 'at present the supreme type of international organisation', *it is reasonable to assume that such an institution is intended to exercise and enjoy 'functions and rights which can only be explained on the basis of the possession of a large measure of international personality* and the capacity to operate upon an international plane' ". [3] (Italics added.)

Schwarzenberger's quotations are from the *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion of April 11th, 1949.* [4]

This Opinion dealt with the 1946 "*Convention on the Privileges and Immunities of the United Nations*", the terms of which created rights and duties between each of the signatories and the United Nations Organisation.

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[1] Para. 8.

[2] Art. 4 of the Covenant provides that they will also be permanent members of the Council of the League.

[3] Schwarzenberger, G. *International Law* (3rd ed.), Vol. I, p. 138.

[4] "*Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*", p. 179.

The Court held:

> "It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.
>
> In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.
>
> Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is 'a super-State,' whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims". [1]

That the League of Nations was an international legal *persona*, was accepted in the *"Communications from the Swiss Federal Council concerning the diplomatic immunities to be accorded to the staff of the League of Nations and of the International Labour Office"*, of September 18th, 1926. [2]

Article 1 thereof read:

> "The Swiss Federal Government recognises that the League of Nations, which possesses international personality and legal capacity, cannot, in principle, according to the rules of international law, be sued before the Swiss Courts without its express consent".

On 20th September, 1926, the Council took note of this arrangement. [3]

Quincy Wright stated:

> "There remains the possibility that the League is itself a personality capable of contracting obligations and acquiring rights, apart from its members. This is the most generally accepted theory..." [4]

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[1] *Ibid.*

[2] *L. of N., O.J.*, 1926, p. 1422.

[3] *Ibid.*, pp. 1407, 1422.

[4] Wright, *op. cit.*, p. 366. *Vide* the various authorities quoted in footnote 52(a) on that page. *Vide* also Starke, J. G. *An Introduction to International Law* (3rd ed.), p. 57; Verdross, A. *Die Verfassung der Völkerrechtsgemeinschaft* (1926), p. 51; Williams, J. F. "The status of the League of Nations in International Law", *I.L.A., Rep.*, XXXIV (1926), p. 688-89.

Oppenheim stated:

> "The question of the legal nature of the League was a matter of considerable controversy. The predominant opinion was that the League, while being a juristic person *sui generis*, was a subject of International Law and an International Person side by side with the several States". [1]

If, in consonance with the above authorities, the view is accepted that the League was an international legal *persona*, it must follow that the League itself was a party to the Mandate agreements and derived contractual rights therefrom correlative to the obligations imposed upon the respective Mandatories. Article 22 (2) of the Covenant rendered clear that the respective Mandatories would fulfil their functions "as Mandatories on behalf of *the League*". Consequently, on the premise of "the League" being a legal *persona*, the Council's role in entering into the Mandate agreements with the respective Mandatories, in pursuance of Article 22 (8) of the Covenant, would be of the nature of an agency performed on behalf of the League, whereby the latter would be constituted a party to the Mandate agreements. In fact, each of the Mandate instruments records in its preamble the Mandatory's undertaking to exercise its Mandate "on behalf of the League of Nations"; and it was such a Mandate that was in each case *confirmed* by the Council as "the said Mandate", and the terms of which were *defined* by the Council in pursuance of Article 22 (8) of the Covenant.

Briefly, then, the situation is that if the League was a legal *persona*, it would through the agency of its Council have been a party to the Mandate agreements, and the obligations imposed upon the respective Mandatories by those agreements would, as contractual obligations, be owed to the League.

16. *The Members of the League:*

(a) If the League of Nations should for any reason be regarded not as a legal *persona* but as a voluntary association of States having no legal personality distinct from that of its Members, then the expression "Mandatories on behalf of the League" would from a strictly legal point of view have to be regarded as inexact. It would then have to be construed as meaning *Mandatory on behalf of the States associated in the League as Members thereof*. And the Council's action in entering into the Mandate agreements with the respective Mandatories in pursuance of Article 22 (8) of the Covenant, would have to be seen as an agency performed on behalf of the Members of the League, in their capacity as such, authorised by them through their agreement to Article 22 (8) of the Covenant.

(b) On the basis, however, of the League of Nations being regarded as a legal *persona*, on whose behalf the Council acted in

[1] Oppenheim, L. *International Law* (8th ed.), Vol. I, p. 384. *Vide* the authorities quoted in footnote 2.

entering into the Mandate agreements, the position of Members of the League with regard to those agreements becomes more difficult to define. That the League Members did not participate directly in the conclusion of those agreements, is clear. They did not through their Governments sign the Mandate agreements, or observe the ordinary processes of ratification in regard thereto, or in any other manner signify their assent as individual parties to the agreements. Were they then, on the basis under discussion, *to be regarded as having acquired any rights or legal interests* under, and in pursuance of, the Mandate agreements? Various possibilities fall to be distinguished in this regard:

(i) Insofar as the League itself, as a legal *persona*, was a party to whom the Mandatories' obligations were owed, it could take no decision or action without participation therein by its Members, in accordance with the provisions of the Covenant and rules of procedure made thereunder. In other words, Members of the League could participate in the proceedings of the League and thereby influence or determine the League's decisions and actions as a party to the Mandate agreements. In this sense, then, and to this extent, Members could be said to have had a certain right or *locus standi* in regard to League proceedings concerning Mandates. But this would be a right of League Members in their relationship *inter se* and with the League: it would not be a right or legal interest derived from the Mandate agreements and exercisable as against the Mandatories.

(ii) Reference was made in paragraph 12 above to the fact that certain of the substantive obligations imposed upon the Mandatory for South West Africa involved potential benefit for Members of the League and their nationals as well as for the inhabitants of the Territory; it is possible that they were intended to achieve such a result. This applied in the case of all Mandates, and included in the A and B Mandates the important "open door" obligation to allow "equal opportunities for the trade and commerce of other Members of the League". In the case of obligations of this nature there may well have been a contemplation of rights or legal interests on the part of League Members *vis-à-vis* the respective Mandatories.

If League Members are to be said to have acquired contractual *rights* in this regard, the basis would have had to be agency by the Council of the League. In other words, Article 22 (8) of the Covenant would have to be viewed as authorising the Council to act not only on behalf of the League (in respect of *all* terms of the prospective Mandate agreements), but also on behalf of Members of the League to the extent of securing for them such rights as may fairly be said to have been contemplated for Members in Article 22. On this basis, then, rights correlative to the obligations in question would have been acquired by League Members through the agency of the Council of the League, and League Members would be *pro tanto* co-parties to the Mandate agreements.

Failing this basis, however, the provisions imposing the obligations under discussion could possibly be regarded as stipulations by the League Council in favour of League Members, available for acceptance and utilization by them if and when they wished—in which sense then it could be said that Members of the League, though not parties to the agreements, had legal interests in respect thereof.

(iii) Insofar as the substantive obligations discussed in paragraph 12 above could operate for the benefit of the inhabitants only, there would be no potential reasons, corresponding to those discussed in (ii) above, for regarding the Members of the League either as co-parties with rights under the Mandate agreements, or as the holders of legal interests stipulated for their benefit.

17. The situation as regards the International Person or Persons who acquired contractual rights or legal interests from the Mandate agreements, can therefore in Respondent's submission be summarised as follows:

(a) On the basis that the League of Nations was not *a legal* persona.

All the contractual obligations imposed upon the Mandatory would have been owed to the *Members of the League, in their capacity as such,* who would consequently have held the rights correlative to the obligations.

(b) On the basis that the League of Nations was a legal persona.

(i) All the contractual obligations imposed upon the Mandatory would have been owed to the *Leaque of Nations*, who would have held the rights correlative thereto.

(ii) *The Members of the League, in their capacity as such,* could have had contractual rights or legal interests *vis-à-vis* the Mandatory only insofar as the latter's obligations were intended to operate for the benefit of Members and their nationals as well as of the inhabitants of the Territory. Insofar as the obligations were imposed for the benefit of the inhabitants only, the Members would have had no right or legal interest *vis-à-vis* the Mandatory: they would merely have had a right *inter se* and *vis-à-vis* the League to participate in League proceedings regarding Mandates.

In Part D below Respondent will further develop the argument that insofar as Members of the League acquired rights or legal interests from the Mandate agreements, they did so only in their capacity as Members of the League and for such time as they might remain Members.

C. Effect of Dissolution of the League upon the Mandatory's Procedural Obligations (Obligations Relative to League Supervision)

18. Although, as submitted in paragraph 5 above, the authors of the Covenant did not intend any close or technical analogy with

municipal law institutions of trust, tutelage and *mandatum*, the Mandate System did provide certain features of broad resemblance to those institutions. The resemblance to trust and tutelage lay in the vesting in the Mandatories of title and powers of administration, subject to conditions which involved obligations to utilize the powers for the benefit and progress of under-developed peoples. The resemblance to *mandatum* was supplied by the notion that the Mandatories would, in the exercise of these civilising functions, act "as Mandatories on behalf of the League", and more specifically by the provision requiring them to report to the Council of the League relative to observance of their obligations in that regard.

19. In the history of the government and development of backward countries and their inhabitants, this element of League supervision provided for in the Mandate System was an innovation generally recognised to be of great importance.

The application of the "sacred trust" and "tutelage" conceptions in this sphere was nothing new. Following on views expressed by earlier writers, [1] the colonial policies of western powers were, as from the 18th century, described by various statesmen as civilizing missions involving duties of trusteeship and guardianship towards the colonies and their inhabitants. [2]

These declarations were generally recognised to be of a moral character and as involving no consequences in International Law. P. T. Furukaki expressed the position thus:

> "Heretofore certain powerful states of superior civilization have attributed to themselves a civilizing mission among backward peoples. France, for example, admits and practices the theory of the colonization-tutelage. But this is a purely moral duty, voluntarily accepted by the colonizing state as a politic means of justifying in the name of civilization the conquest and the administration of colonial territories difficult to justify from the democratic point of view. This duty has been envisaged as the consequence of the suzerainty over the colony. It allows sovereignty in its full integrity to remain in the colonizing government which has to render account to no one for its action". [3]

Towards the end of the 19th century, during the period of the so-called "scramble for Africa" on the part of colonial powers, various international conventions were entered into between them in relation to, *inter alia*, the welfare of native peoples. The General Act of the Berlin African Conference of 1885 provided in Article 9 thereof that the slave trade was "forbidden" by "the principles

[1] *Vide* Chowdhuri, R. N. *International Mandates and Trusteeship Systems*, (1955), pp. 16-18.

[2] *Ibid.*, pp. 18-22. *Vide* also Toussaint, C. E. *The Trusteeship System of the United Nations* (1956), pp. 5-8; Hall, *op. cit.*, pp. 97-100; Bentwich, N. *The Mandates System* (1930), p. 4.

[3] Furukaki, P. T. "Nature juridique des mandats internationaux de la Société des Nations", *Bib. Un.* (July-December, 1926), p. 385, as cited by Wright, *op. cit.*, pp. 536-37.

of international law as recognised by the signatory Powers"; and in regard to the area known as the Conventional Basin of the Congo the powers undertook towards each other not only to apply the "open door" principle but also

> "to watch over the preservation of the native tribes and to care for the improvement of the conditions of their moral and material wellbeing, and to help in suppressing slavery, and especially the slave trade". (Article 6.) [1]

Later international conferences, mainly at Berlin and Brussels, in the years 1890, 1899, 1900, 1906, 1907 and 1912, resulted in the recognition as between the signatory powers of principles and rules relating to abolition of slavery and the slave trade and to regulation of the importation of arms and trade spirits into Africa. [2]

Although it is in a sense correct to say that by these conventions the welfare of backward peoples was rendered "a matter of international concern", [3] there were as yet no sanctions to the conventions. As Bentwich puts it:

> "The signatory Powers had no defined means of intervening if things were done contrary to the convention; and, in fact, they did not interfere". [4]

According to commentators this weakness led to evasion and inadequate observance of the conventions. [5] Moreover it gave rise to uncertainty as to the exact manner in which certain aspects of the conventions were to be viewed—more particularly whether, in providing for native welfare in covenants as between civilized States, the conventions were to be regarded as giving rise to legal obligations in International Law or whether they resorted in the sphere of morality only.

The Mandate System, whilst also containing provisions in accordance with the "sacred trust" and "tutelage" ideals, sought to overcome this weakness and uncertainty by the introduction, in accordance with the *mandatum* conception, of international accountability in the form of League supervision. And thus it was that Wright commented:

> "The distinctive feature of the system is undoubtedly the League's supervision. The principles of trusteeship and tutelage have often been avowed before and sometimes practised but only as self-limitations". [6]

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[1] General Act of the Berlin African Conference, Art. 6. (Referred to in Hall, *op. cit.*, p. 104.)

[2] *Vide* Hall, *op. cit.*, pp. 102-04; Toussaint, *op. cit.*, pp. 8-9; Chowdhuri, *op. cit.*, pp. 20-22; Bentwich, *op. cit.*, p. 5.

[3] Toussaint, *op. cit.*, p. 9.

[4] Bentwich, *op. cit.*, p. 5.

[5] *Vide* Hall, *op. cit.*, p. 104-05.

[6] Wright, *op. cit.*, p. 64.

And commentators generally are agreed that it was through the provision for League supervision that the Mandatories' obligations in respect of the welfare of the mandated communities became "juristically sanctioned". [1]

20. Although commentators frequently employ the broad descriptive terms "League supervision" and "supervisory functions of the League", such phraseology did not occur in the relevant provisions of Article 22 of the Covenant or of the Mandate agreements. These provisions were as follows:

(a) *Article 22 (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".

(b) *Article 22 (9) of the Covenant:* "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".

(c) *Article 6 of the Mandate for South West Africa,* (and corresponding provisions in other Mandate instruments). "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".

(d) These specific provisions are further to be read in the light of

(i) the provision in Article 22 (2) that the "tutelage" should be exercised by advanced nations "as Mandatories on behalf of the League", and

(ii) the Mandatories' undertakings (as set out in the preamble of the Mandate instruments) to exercise their Mandates "on behalf of the League of Nations".

The "supervisory functions of the League" spoken of by commentators was a concept in essence derived from the *obligation,* imposed upon the Mandatories by the above provisions, *to report* with reference to the Territory and to the measures taken to carry out the substantive obligations. The reports would (by implication) regularly be considered by the Permanent Mandates Commission and the Council of the League with a view to ensuring observance of the Mandates, if necessary by Council resolutions directed to that end.

Moreover the Council, without express provision to that effect in the Covenant or the Mandate instruments, accepted that the consideration of petitions regarding alleged grievances about observance of the Mandates by the Mandatories would form part of its functions as the supervisory organ. And it laid down in that regard the rules of procedure already referred to above. [2] Briefly

[1] *Vide e.g.* Furukaki, as cited by Wright, *op. cit.,* p. 537; Bentwich, *op. cit.* p. 5.

[2] *Vide* Chap. II, Part A, para. 14 *supra.*

these involved that petitions from inhabitants were to be forwarded through the respective Mandatories, who could then at the same time furnish their comments, and that petitions from other sources were to be addressed to the Chairman of the Permanent Mandates Commission, who was to decide whether they merited attention and, if so, to forward them to the Mandatory concerned for comment.

Thus the regular consideration of reports and of petitions and the Mandatories' comments thereon, with a view to securing observance of the Mandates, constituted League supervision correlative to the Mandatories' obligations to report and account to the Council. Without the imposition of this obligation on the Mandatories, there would be no justification for an inference that the League Council was intended to exercise a "supervisory function", or for speaking of any obligation to submit to such supervision.

So, by contrast, Article 23 (b) of the Covenant of the League imposed upon League Members the obligation "to secure the just treatment of the native inhabitants of territories under their control". But in the absence of any additional provisions requiring the Members affected by Article 23 (b) to act in this respect as Mandatories on behalf of the League, and to render reports to the League indicating the measures taken to comply with the obligation undertaken in that sub-article, nobody has ever suggested that the League was given a supervisory function with reference to that obligation or that the Members in question were obliged to submit to any such supervision.

It is evident, therefore, that the essence of *League supervision* or *the supervisory functions of the League* was the Mandatories' *obligation to report and account* to the Council of the League in respect of compliance with the substantive obligations pertaining to administration of the territories and protection and development of the inhabitants. The further obligation relative to supervision, *viz.* to forward petitions, was purely subsidiary and dependent on the fact that the Council was the supervisory organ—which fact in turn depended on the obligation to report and account.

21. The *source and origin* of this obligation to report and account was *contractual*, the Mandatories becoming bound thereto by their agreement to the Mandate instruments. [1] The other party or parties to the agreements would have been,

(a) the League of Nations, viewed as a legal *persona*, or

(b) the States associated in the League as Members thereof—if the League should not be viewed as a legal *persona*. [2]

Even on the basis of the League being viewed as a legal *persona*, the obligation to report and account might be regarded as being intended, *inter alia*, for the benefit of Members of the League, insofar as their substantive rights or legal interests might be affected

[1] *Vide* particularly para. 10 *supra*.
[2] *Vide* paras. 13-17 *supra*.

thereby. A third possibility is therefore that Members, in addition to the League, could have had a right or legal interest correlative to the Mandatories' *obligation to report* and account—on the same principles as discussed in paragraph 16 (b) (ii) *supra* relative to the substantive obligations there dealt with.

Thus the other party or parties to the Mandate agreements may briefly be said to have been the League and/or its Members.

22. By *nature and content,* too, the obligation and the right correlative thereto were of a purely *contractual* or "*personal*" nature, as distinct from "real" rights and obligations. The obligation was not in any way constitutive of the *status* of the Territory or of the Mandatory's *title* thereto, as might be said of other aspects of the Mandate System. It was not part and parcel of the substantive obligations involved in the "sacred trust" and "tutelage", but an obligation to report and account in respect of the observance of those substantive obligations. Although considered of great practical importance, as has been indicated above, [1] its severability from the substantive obligations involved in the "trust" and "tutelage" is manifest—as is also illustrated by the examples of earlier international conventions mentioned in paragraph 19 *supra*.

In the Advisory Opinion of 1950 there seemed to be general agreement (in Respondent's respectful submission, correctly,) that the obligation to report and account did not fall within the category of "real" rights and obligations relating to the status of the Territory. Sir Arnold McNair expressly classified it as "personal", and did not include it amongst "real" rights and obligations involved in status. [2] The same distinction seems to have been intended in the Majority Opinion at page 133, where a line was drawn between obligations "directly related to the administration of the Territory", representing the "very essence of the sacred trust of civilization", and on the other hand those "related to the machinery for implementation", "closely linked to the supervision and control of the League", and corresponding to "the securities for the performance of this trust". From page 136 it appears that by this latter class was meant particularly the obligation to report and account to the Council, there described by the Court as "an important part of the Mandates System". Similarly, Judge Read distinguished the "legal duties which were concerned with . . . supervision and enforcement" as a special class, and rendered it clear that they were severable from the rights and duties pertaining to status. [3]

23. By its *content* the obligation required the Mandatories to report and account to *a specific supervisory body,* constituted and functioning under the provisions of a particular international con-

[1] *Vide* para. 19 *supra*.

[2] *"International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950"*, pp. 156-57.

[3] *Ibid.*, pp. 164-66.

vention. It was *not* an obligation to submit generally to "international supervision" or to supervision by the "international community" or "the Family of Nations" or "the civilized nations of the world" or the like. It was an obligation to report and account to a specific organ of a specific organisation of *certain of* the nations of the world, *viz.* the Council of the League of Nations.

The implications of this feature are of major importance. The League was constituted by a Covenant, the provisions of which were known to the Mandatories, and to which all Mandatories were, initially, signatories. The constitution of the Council and the manner in which it was to function were laid down in the Covenant. As has been noted above, [1] the provisions of the Covenant in that regard required, *inter alia*, unanimity, as a general rule, for Council decisions (Article 5), and an invitation to any Member of the League not represented on the Council to be represented at any meeting during the consideration of matters specially affecting the interests of that Member (Article 4). The Council would in regard to Mandates be assisted and advised by a permanent Commission (Article 22 (9)). It was to supervision through machinery governed, *inter alia*, by these provisions of the Covenant, and to no other, that the Mandatories consented to submit.

The practical importance of the fact that the obligation related to specific supervisory machinery, is illustrated by certain statements made by delegates at the Paris Peace Conference. It will be recalled that on 30th January, 1919, when the compromise arrangement regarding the Mandate System was arrived at, the South African Prime Minister, General Louis Botha, stated that:

> "Personally he felt very strongly about the question of German South-West Africa. He thought that it differed entirely from any question that they had to decide in this conference, but he would be prepared to say that he was a supporter of the document handed in that morning, *because he knew that, if the idea fructified, the League of Nations would consist mostly of the same people who were present there that day, who understood the position and who would not make it impossible for any mandatory to govern the country.* That was why he said he would accept it". [2] (Italics added.)

To this explanation by General Botha, added significance is lent by earlier statements of the British Prime Minister, Mr. Lloyd George, and President Wilson of the United States of America, in the Council of Ten on 28th January, 1919, as follows:

> "MR. LLOYD GEORGE said that he agreed with M. Clemenceau that if the League of Nations were made an executive for purposes of governing, and charged with functions which it would be unable to perform, it would be destroyed from the beginning. But he had not so interpreted the mandatory principle when he had accepted it.

[1] *Vide* Chap. II, Part A, para. 12 *supra*.
[2] *Ibid.*, para. 6.

PRESIDENT WILSON said he too had not so interpreted it.

MR. LLOYD GEORGE, continuing, said that he regarded the system merely as a general trusteeship upon defined conditions. Only when those conditions were scandalously abused would the League of Nations have the right to interfere and to call on the mandatory for an explanation. For instance, should a mandatory allow foul liquor to swamp the territories entrusted to it, the League of Nations would have the right to insist on a remedy of the abuse". [1]

This contemplation of a conservative approach to the possibility of League interference with Mandatory government, became a reality upon the establishment of the League. On 5th August, 1920, the Council of the League unanimously adopted a report by M. Hymans, which included the following passage:

"The Annual Report stipulated for in Article 7 should certainly include a statement as to the whole moral and material situation of the peoples under the Mandate. It is clear, therefore, that the Council also should examine the question of the whole administration. *In this matter the Council will obviously have to display extreme prudence, so that the exercise of its rights of control should not provoke any justifiable complaints, and thus increase the difficulties of the task undertaken by the Mandatory Power*". [2] (Italics added.)

The Permanent Mandates Commission was constituted with a view specially to securing an impartial and non-political approach to the exercise of the supervisory functions. Reference has been made above to the independence and the individual merit of the members of the Commission, and to their expressed endeavour to exercise their authority

"less as judges from whom critical pronouncements are expected, than as collaborators who are resolved to devote their experience and their energies to a joint endeavour". [3]

The dual function of supervision and co-operation was again stressed in later reports, [4] and observed in practice. [5]

The Council of the League seldom took any action in regard to Mandates supervision save on the basis of the Commission's advice, and usually accepted it when given; resolutions were tactfully worded as suggestions or invitations to Mandatories; [6] and due to the considerable representation of Mandatory Powers on the Council, it was in general likely to be sympathetic to the Mandatories' point of view. [7] Thus the agreed supervisory machinery was in fact very carefully checked and balanced so as to render unlikely any injurious, biassed or unfair interference with Mandatory government.

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[1] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, pp. 769-70.

[2] *L. of N., Council, Min.*, VIII, p. 187.

[3] *L. of N., O.J.*, 1921, pp. 1124-25. *Vide* also Chap. II, Part A, para. 14 *supra*.

[4] *P.M.C., Min.*, VIII, p. 200 and Wright, *op. cit.*, pp. 196-97.

[5] Wright, *op. cit.*, pp. 199-200 and Hall, *op. cit.*, p. 209.

[6] Wright, *op. cit.*, p. 128.

[7] *Ibid.*, pp. 87-89.

24. In paragraphs 21 to 23 above emphasis has been laid on:

(a) the *contractual origin* of the obligation to report and account, being agreement between the respective Mandatories and the League of Nations and/or its Members;

(b) the *purely contractual or "personal" nature* of the obligation; and

(c) its *specific content* as relating to *particular and carefully devised supervisory machinery*, with important *practical implications* tending towards *considerate treatment* of the Mandatories in the exercise of the supervisory functions.

It seems self-evident that during the lifetime of the League no Mandatory could have been required to submit to supervision by any other international organisation as regards performance of its functions under the Mandate. If, for example, a group of Nations which did not join the League had formed an organisation of their own, with objectives similar to those of the League and with organs capable of exercising a supervisory function in regard to the government of Mandated territories, it could surely not have been contended that the Mandatories, having agreed to submit to "international supervision" by League organs, must for that reason be regarded as obliged to submit to "international supervision" by some organ of the parallel organisation. Such a contention would seek to attribute to the Mandatories an obligation to which they had never agreed. Similarly it could not have been contended that the Mandatories would, without fresh consent on their part, be obliged to submit to "international supervision" by some other international organisation in fact established and having for its members largely the same States as the League of Nations—such as, for instance, the International Labour Organisation. Again such a contention would seek to attribute to the Mandatories an obligation substantially different from that agreed to by them in the Mandate instruments.

Even within the League of Nations organisation, an alteration in the supervisory machinery provided for in the Covenant could not be imposed upon the Mandatories without their consent—*e.g.* an alteration transferring the supervision from the Council to the Assembly, or providing that the Council could in matters of Mandate supervision arrive at valid decisions by a simple majority or by a two-thirds vote. For again such an alteration would seek to impose upon the Mandatories an obligation of a content different from that agreed to by them in the Mandate instruments. Article 26 of the Covenant did provide for amendments to the Covenant, through ratification by the Members whose representatives composed the Council and a majority of the Members whose representatives composed the Assembly: but it proceeded to provide that no such amendment would bind a Member signifying dissent therefrom, although the dissentient would then cease to be a Member of the League. At worst, therefore, a Mandatory refusing to agree

to an alteration in supervisory machinery could lose its membership in the League, but the alteration could not be rendered binding upon it as a Mandatory without its consent—given either expressly, or tacitly through acquiescence without dissent in a Covenant amendment in terms of Article 26.

25. Regard has been had above to the resolution adopted by the Assembly of the League of Nations on 18th April, 1946, whereby the League was dissolved with effect as from the next day, save for the purpose of the liquidation of its affairs. [1]

As a result of this resolution the League of Nations and all its organs ceased to exist, and it accordingly became impossible for any Mandatory to comply with the obligation that had been imposed upon it by the Mandate agreements to report and account to the Council of the League, or with the subsidiary obligation to forward petitions to it from inhabitants of the Territory. Respondent contends that in the result the said obligations lapsed. As was stated by Judge Read in his Separate Opinion, 1950:

> "It was no longer possible for the Union to send reports to a non-existent Council, or to be accountable to, or supervised by, a non-existent Permanent Mandates Commission". [2]

26. Applicants, however, in their *Memorials* in effect contend that the obligations "continue" in force in a modified form, *viz.* as obligations to report and account and forward petitions to the General Assembly of the United Nations, which must for the purposes of the said obligations be regarded as the new supervisory authority. [3] Applicants rest their case in this regard entirely on the Majority Advisory Opinion of 1950 and ask for re-affirmation thereof. [4]

Respondent contends respectfully that the general considerations which normally operate in favour of affirmation of a previous advisory opinion, are in this case outweighed by certain special considerations to the contrary. The first and foremost of these is that vital factual information was not placed before the Court for the purposes of its Advisory Opinion in 1950. The information in question casts clear light on the real intent involved in the final resolution of the Assembly of the League of Nations regarding Mandates, dated 18th April, 1946, and also on the corresponding general intent and understanding on the part of the Members of the United Nations at the time of its formation and during the early years of its existence. Knowledge on the Court's part of the facts in question would, in Respondent's submission, almost certainly

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[1] *Vide* Chap. II, Part A, para. 32 *supra*.

[2] "*International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*", p. 166.

[3] *Vide* Applicants' submission No. 2 (p. 197 of the *Memorials*) read with pp. 52, 53, 95-103 of the *Memorials*.

[4] *Vide* Chap. IV of the *Memorials*.

have led to a conclusion contrary to that arrived at in the Majority Opinion. The information and its significance will be dealt with below. Respondent must also point out, with respect, that there were in any event two Minority Opinions on this question. In the critical comment of writers on International Law—which may also have been based on fuller information regarding the relevant facts than the Court had at its disposal in 1950—the weight of opinion appears to favour the reasoning and the conclusions arrived at in this regard in the Minority Opinions. In all the circumstances a *de novo* and thorough consideration of the whole question seems essential.

27. It will be recalled that the United Nations Charter was drafted at San Francisco during the period 25th April to 25th June, 1945, and came into force on 24th October, 1945—*i.e.* some six months before the League of Nations was dissolved. As was indicated in Chapter II above, the United Nations was a new international organisation which had for its Members some, but not all, of the Members of the League of Nations at that time, plus some States that were not then, and a large number that never had been, Members of the League. [1] Although it in many respects adopted principles and objectives identical or similar to those of the League of Nations, it was not a successor in law to the League; indeed two of its major founder Members were known to be strongly averse to succession in law. [2] After the Charter and the new organisation had commenced to function, and upon dissolution of the League, certain League assets were taken over by the United Nations and certain League activities were "assumed" and continued by it; but this was effected by special agreements and arrangements pertaining to those assets and activities, and again in language which intentionally avoided any impression of succession in law. [3]

In providing for the establishment of a Trusteeship System which would, in a broad sense, correspond to the Mandate System of the League of Nations, the United Nations Charter created supervisory machinery which differed very materially from that which had operated under the Covenant in respect of Mandates. In the Trusteeship System the supervision of first instance would not be by a commission of independent experts, but by a Trusteeship Council consisting of governmental representatives of Member States. [4] And the ultimate supervisory authority would not be a Council in which Mandatory Powers exercised strong influence and in which a unanimity rule prevailed, but either the General Assembly of the United Nations, [5] which could arrive at decisions by a bare majority or, on important questions, by a two-thirds

[1] *Vide* Chap. II, Part A, paras. 23 and 24 *supra*.
[2] *Ibid.*, para. 24.
[3] *Ibid.*, paras. 28 (c), 31-34.
[4] Art. 86 of the Charter.
[5] *Ibid.*, Arts. 85, 87-89.

majority, [1] or the Security Council in the case of trusteeship over "strategic areas", [2] in which event decisions could be taken by seven affirmative votes including those of the five permanent members [3] out of a total of eleven. [4]

By the same reasoning as is set forth in paragraph 24 above, it seems evident that no Mandatory could, by reason of its agreement in 1920 to report and account to, and thus to submit to the supervision of, the Council of the League of Nations, now be held obliged to report and account to, and submit to the supervision of, the United Nations or any of its organs. The *content* of the latter obligation would be *materially different, in substance as well as in form,* from that agreed to in 1920 by the Mandatories; and for this reason alone it follows that a Mandatory could only have become bound to such an obligation by *fresh agreement and consent* thereto.

28. The question, therefore, whether Respondent is obliged to report and account to, and submit to the supervision of, the General Assembly of the United Nations, in essence resolves itself into an enquiry whether Respondent by any binding juristic act has consented to such an obligation.

29. Although the enquiry as thus posed essentially concerns Respondent's consent to an obligation as postulated, it must of necessity also have reference to another aspect, *viz. to whom* such an obligation if any, would now be owed by Respondent. (The Majority Advisory Opinion of 1950 does not expressly refer to this aspect of the question.) As was demonstrated above [5] the obligation to report and account to the Council of the League of Nations was, by the Mandate agreement, owed by the Mandatory to the League and/or its Members. As from the dissolution of the League in 1946, there was no longer such a conception as "the League and/or its Members". The new obligation would consequently also have to be owed to new parties.

It is theoretically possible that, in contemplation of the dissolution of the League in 1946, the Mandatory could have agreed with the League, as representing its Members, or directly with the then Members of the League, to continue to be bound *to them, i.e.* the then League Members, by an obligation to report and account, and that the supervisory authority in terms of such an obligation would be some organ of the United Nations. But such an agreement, in order to be effective after the dissolution of the League, would have had to bind the Mandatory to the States in question independently of their membership of the League, in other words to those States individually or as an *ad hoc* group or as Members of the new

[1] *Ibid.*, Art. 18.
[2] *Ibid.*, Art. 83.
[3] *Ibid.*, Art. 27 (3).
[4] *Ibid.*, Art. 23.
[5] Para. 21 read with paras. 13-17.

organisation, the United Nations. (In this last event the obligation would not be owed to all States that were Members of the League at the time of its dissolution, inasmuch as all of them did not join the United Nations).[1]

A second theoretical possibility is that the new obligation could be owed to the United Nations and/or its Members. To that end would be necessary an agreement between the Mandatory and the United Nations and/or its Members, casting upon the Mandatory the obligation to report and account to some organ of the United Nations.

A third possibility would be something of the nature of a tripartite agreement involving *consensus* as between (i) the Mandatory, (ii) the League and/or its Members at the time of its dissolution, and (iii) the United Nations and/or its Members. The result could be an obligation owed by the Mandatory to one or to both of the other groups of parties to the agreement (except for the League itself), depending on the intent apparent from the agreement.

Any other possibilities would have to be mere variants of the above three. And the enquiry is therefore directed towards ascertaining whether Respondent at any time bound itself by agreement, either with the Members of the League at the time of its dissolution (directly or *via* the League as representing them), or with the United Nations and/or its Members, or with both these groups, to an obligation as postulated. Such an agreement could conceivably have been either part and parcel of *general* multipartite conventions concerning the formation of the United Nations and/or the dissolution of the League, *or special* as between Respondent and others who could conceivably be parties thereto as aforestated.

30. *The United Nations Charter:*

There has never been any suggestion that the provisions of the Charter of the United Nations by themselves rendered Respondent obliged to the United Nations or the other Members thereof to report and account to, or to be subject to the supervision of, any organ of the United Nations with regard to performance of its functions under the Mandate for South West Africa. In this respect there appears to have been general agreement in the Advisory Opinion of 1950. The Majority Opinion particularly emphasised that:

> "The Charter has contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System".[2]

The whole of the portion of the Opinion in which this statement occurred (answer to Question (b)) was concurred in by Judge

[1] *Vide* Chap. II, Part A, para. 24 *supra*.
[2] *"International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950"*, p. 140.

McNair and Judge Read; [1] and the particular statement was agreed to by Judge de Visscher, [2] Judge Krylov [3] and apparently also Judges Zoričić and Badawi Pasha (who concurred in the dissenting opinion of Judge de Visscher). [4] It is borne out entirely on reference to the Charter. The provisions of the Charter make no mention of anything pertaining to supervision in regard to Mandates. They do make provision for supervision of administration under the Trusteeship System, but render it clear that this would apply only to cases in respect of which trusteeship agreements are entered into. [5] Quite clearly they impose no obligation upon any Mandatory to enter into a trusteeship agreement, as was (with respect, correctly) held by the majority of Judges in the Advisory Opinion in 1950. In any event Respondent had at the San Francisco Conference when the Charter was being drafted, rendered clear and explicit that it did not intend to place South West Africa under United Nations Trusteeship. [6]

In the circumstances it is manifest that, by agreement to the Charter, Respondent did not agree to any United Nations supervision of the performance of its functions under the Mandate. Furthermore, inasmuch as the Charter provided for supervisory machinery only in respect of trusteeship agreements voluntarily entered into, there would have had to be some further appropriate arrangement, in amplification or possibly even amendment of the Charter, if United Nations supervision was to be brought about regarding any Mandate or Mandates not converted into Trusteeship.

31. *United Nations Resolutions of January-February, 1946, pertaining to assumption of certain League functions and establishment of the Trusteeship System.*

(a) These resolutions and their history, as dealt with in Chapter II above, [7] in the first place clearly demonstrate that the United Nations did not consider itself to be an automatic successor in law to any League functions, and consequently that in its contemplation the assumption and continuation of any League function by it would have to be a matter of active arrangement. Indeed, in contrast with assets, which were to be "transferred" in terms of the mutually adopted "common plan", [8] the earlier idea of a "transfer" of certain functions and activities was abandoned in favour of one of "assumption" by United Nations organs of certain functions and powers. [9]

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[1] *Ibid.*, pp. 146 and 164 respectively.
[2] *Ibid.*, p. 186.
[3] *Ibid.*, p. 191.
[4] *Ibid.*, p. 145.
[5] Arts. 77 and 79 of the Charter.
[6] *Vide* Chap. II, Part A, paras. 25-26 *supra*.
[7] *Ibid.*, paras. 27-29.
[8] *Ibid.*, paras. 28 (c) and 32.
[9] *Ibid.*, paras. 27-28.

(b) The second feature of importance is that in Resolution No. XIV as finally adopted by the General Assembly on 12th February, 1946, [1] the statement of *general willingness* to ensure the continued exercise of League functions was carefully limited to *functions of a non-political character.* [2] This would obviously not include the function of supervision regarding Mandates. The only portion of the Resolution under which such function could possibly fall would be Part I, 3, C which read as follows:

> "C. *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".[3]

In other words, for the assumption of a supervisory function regarding Mandates, the procedure envisaged by the Resolution would involve a "request from the parties" to the respective Mandates, and a *decision acceding to the request* by the General Assembly or other United Nations organ considered to be the appropriate one.

(c) Even, however, insofar as the said Part I, 3, C of Resolution No. XIV supplied a method whereby it might be *possible*, at the initiative of the parties to the Mandates themselves, to effect an assumption of supervisory functions in respect of Mandates by some United Nations organ, it seems unlikely that there could have been a real contemplation that the method would be utilized to that end at all. The procedure envisaged in the Resolution would be extremely cumbersome if applied to the case of Mandate agreements. For the parties to such agreements would include the League of Nations and/or all of its Members, some of whom did not join the United Nations: [4] consequently a "request from the parties" would not be a matter of easy accomplishment. It is in the circumstances not surprising to find in the history of Resolution XIV that it was not designed for Mandates supervision at all—at any rate as far as its proposers were concerned. For it will be recalled that the Resolution was based on a recommendation of the United Nations Preparatory Commission, which in turn had considered a prior report from its Executive Committee. [5] The relevant portion of the Executive Committee's Report, had stated, *inter alia*, that

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[1] *G.A. Resolution* XIV, 12th February, 1946, in *U.N. Doc.* A/64, pp. 35-36. Cited in Chap. II, Part A, para. 28 (c) *supra*.

[2] Part I, para. 3, A and B of the Resolution.

[3] *U.N. Doc.* A/64, p. 35.

[4] *Vide* Chap. II, Part A, para. 24 *supra*.

[5] *Ibid.*, para. 28 (a) and (b).

"Since the questions arising from the winding up of the Mandate system are dealt with in Part III, Chapter IV, no recommendation on this subject is included here". [1]

"Part III, Chapter IV" as there referred to formed part of the history leading eventually to Resolution No. XI, adopted at the same session of the General Assembly, on 9th February, 1946, which next requires consideration.

(d) The said "Part III, Chapter IV" of the Executive Committee's Report dealt with the establishment of the Trusteeship System. It will be recalled that a recommendation was made therein for the establishment of a Temporary Trusteeship Committee, one of whose functions would 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 recommendation regarding establishment of the Temporary Trusteeship Committee was, however, rejected by the Preparatory Commission; [3] and no other proposal regarding investigation of, or machinery for, the possible "transfer to" or "assumption by" the United Nations "of any functions and responsibilities hitherto exercised under the Mandates System", was substituted for the rejected proposal. Resolution XI as adopted [4] in effect merely urged expedition in the submission of proposed trusteeship agreements by "the States administering territories now held under Mandate".

(e) In adopting Resolution No. XI the Assembly knew beforehand that such proposed agreements would not be submitted in respect of all Mandated territories. Express reservations had been made by the South African representative [5] indicating an intention on the part of his Government to refrain from placing the Mandated Territory under United Nations Trusteeship and to seek recognition for incorporation thereof in the Union. From reservations made by the representative of the United Kingdom, [6] the future of the Palestine Mandate was known to be uncertain. Furthermore, the Pacific Islands under Japanese Mandate were occupied by the United States and no decision had been come to as to their future.

In addition the representatives of the United Kingdom and France had indicated that their Governments' willingness to place certain Mandated territories under United Nations Trusteeship depended upon their being able to obtain satisfactory terms. [6]

[1] *Doc.* PC/EX/113/Rev. 1, p. 110.
[2] *Ibid.*, p. 56.
[3] *Vide* Chap. II, Part A, para. 29 (c) *supra.*
[4] *Vide* text in Chap. II, Part A, para. 29 (g) *supra.*
[5] Chap. II, Part A, para. 29 (d) and (e) *supra.*
[6] *Ibid.*, para. 29 (f).

(f) In all the circumstances, the silence on the part of the United Nations in regard to supervision of Mandatory government is significant. Its Members were aware that time would elapse before the coming into effect of the Trusteeship System, and that there could be no certainty that all Mandated territories would end up as Trust territories (sub-paragraph (e) *supra*). Yet no attempt was made to arrive at a general arrangement either for *interim* supervision (after dissolution of the League) regarding Mandated territories until they should become Trust territories, or for any supervision at all in respect of Mandated territories which might not become Trust territories. The United Nations made elaborate provision for the "assumption" of certain League functions and powers, and transfer to it of League assets, knowing, however, that its Resolution (No. XIV) in this regard was neither designed for, nor really practically suited to, supervisory functions in respect of Mandates (sub-paragraph (c) *supra*). A specific proposal envisaging investigation and recommendation concerning possible "transfer" of "functions . . . under the Mandate System" was rejected and nothing substituted for it (sub-paragraph (d) *supra*). The inference seems inescapable that the omissions were deliberate. It is highly unlikely that it would have been possible to achieve a *general* arrangement applicable to all Mandated territories in view of the widely varying circumstances pertaining to them and the differing intentions of the Mandatory States in regard to their future—with the result that the matter perforce had to be left to *special* arrangement, if any, to be arrived at in each particular case.

(g) However that might be, the contents and history of Resolutions XI and XIV clearly show that, at the time of their adoption, being shortly prior to dissolution of the League of Nations

(i) there had been no agreement between Respondent and the United Nations and/or its Members whereby Respondent consented to United Nations supervision regarding the performance of its functions under the Mandate;

(ii) that the only provision made on the part of the United Nations whereby such agreement could possibly come about, if at all, was that contained in Part I, 3, C of Resolution XIV, envisaging a request therefor by the parties to the Mandate and agreement thereto by a United Nations organ; and

(iii) that in view of the repeated reservations made by Respondent, the Members of the United Nations must have realised that the prospects of Respondent being a party to such a special request were remote.

32. *Relevant League of Nations Resolutions during last Session of its Assembly, 8-18th April, 1946*:

The texts of the relevant Resolutions that were adopted by the League Assembly on 18th April, 1946, are set out above in Chapter II, Part A, paragraphs 33, 34 and 35 (f).

(a) As will appear from the preamble of the Resolution relating to assumption by the United Nations of League functions and powers arising out of international agreements,[1] the Assembly of the League had "considered" the United Nations General Assembly Resolution No. XIV of the 12th February, 1946, on the same subject.[2] The League Resolution in question, as did the one following upon it and set out in paragraph 34 of Part A of Chapter II above, specifically confined itself to functions, powers and activities of a *non-political character*, and contained provisions designed to facilitate assumption of such functions, powers and activities by the United Nations in terms of its Resolution XIV. It remained silent in regard to functions and powers arising out of international agreements of a *political* character, as dealt with in Part I, 3, C of the United Nations Resolution No. XIV. The inference seems clear that the League Assembly considered that that was a matter in regard to which it had no role to play, and which was to be left to the *ad hoc* treatment envisaged by Part I, 3, C of United Nations Resolution XIV. In other words, the League Assembly clearly knew that the United Nations wished each case involving political functions to be dealt with separately, by way of a request by the interested parties to the United Nations and consideration thereof by the United Nations Assembly or other appropriate organ: and if it contemplated or intended transfer of such functions to the United Nations in any other manner, it could be expected to have said so.

(b) This was exactly what had been contemplated in the *first* draft proposal by China concerning Mandates.[3] The second paragraph of the draft invited the League Assembly to express the view that "the League functions as supervisory organ for mandated territories should be *transferred to* the United Nations after dissolution of the League in order to avoid a period of *interregnum* in the supervision of the Mandated territories". The third paragraph invited it to recommend *submission of annual reports by the Mandatories to the United Nations* until the Trusteeship Council should be constituted. Here, then, was a proposal involving a course of action differing from that contemplated in Part I, 3, C, of the United Nations General Assembly Resolution No. XIV: instead of *separate* consideration by United Nations organs of *separate* requests from parties interested in *particular Mandates*, the proposal envisaged *transfer to* the United Nations of supervisory functions in respect of *all Mandated territories* and submission to the United Nations of reports by *all Mandatories*.

It seems quite clear that such a proposal could not have obtained the unanimous support required for a League Assembly Resolution.

[1] *Vide* Chap. II, Part A, para. 33 *supra*.
[2] The League resolution erroneously refers to the date as 16th February, 1946.
[3] *Vide* Chap. II, Part A, para. 35 (c) *supra*.

By reason of the reservation stated by South Africa in regard to South West Africa—being, in effect, that neither a Mandate System nor a Trusteeship System should in future apply to the Territory—the Union could not support the original Chinese proposal.[1] Nor does it seem that that proposal could have received the support of the United Kingdom, which, in terms of the statement by its representative, reserved its future intentions in regard to Palestine.[2] Furthermore, the reservation by the representative of Egypt[3] was to the effect that Mandates would, in his Government's view, terminate with the dissolution of the League, and that Palestine must in any event be considered to have outgrown the need for being governed under Mandate or Trusteeship: thus it also seems most unlikely that Egypt could have supported the original Chinese proposal.

(c) In the light of the above considerations, the significance of the fact that the original Chinese draft was dropped after informal discussions and replaced by an agreed draft, which was then unanimously adopted, is self-evident. It will be observed that in paragraph 3 of the Resolution, as adopted,[4] the Assembly "*recognises*" that on dissolution of the League its functions with respect to Mandated territories will come to an end, and it "notes" the existence in the Charter of the United Nations of principles "corresponding to" those of Article 22 of the League Covenant: but it says nothing in regard to transfer to the United Nations of the League's functions with respect to Mandates, or of assumption or continuation of such functions by the United Nations. In paragraph 4 it expresses a contemplation of "other arrangements" that may be "agreed between the United Nations and the respective mandatory powers"; and as regards the *interim* period, pending such agreement upon "other arrangements", it "*takes note*" of the "*expressed intentions*" of those powers to 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".

In all the circumstances, the only inference that can be drawn is that the omissions in the adopted Resolution, as compared with the original Chinese draft, were intentional. The proposer of that draft had also envisaged an *interim* period, described by Dr. Liang on the 9th April, 1946, as follows:

> "in view of the fact that the Trusteeship Council of the United Nations has not yet been appointed and was not likely to be set up for some time",[5]

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[1] *Vide* text of statement in Chap. II, Part A, para. 35 (b) (ii).

[2] *Vide* statement of Viscount Cecil of Chelwood as cited in Chap. II, Part A, para. 35 (b) (i) *supra*.

[3] *Vide* Chap. II, para. 35 (e) *supra*.

[4] *Vide* text in Chap. II, Part A, para. 35 (f) *supra*.

[5] *Vide* Chap. II, Part A, para. 35 (c).

and described in the last paragraph of the draft itself as

> "until the trusteeship council shall have been constituted". [1]

It was specifically in respect of this *interim* period that the *proposer of the original draft wished*

> "to avoid a period of *interregnum* in the supervision of the Mandated territories", [2]

and consequently invited the Assembly

> (i) to express the view "that the League functions as supervisory organ for mandated territories should be transferred to the United Nations",

and

> (ii) to recommend "that the mandatory powers ... shall continue to submit annual reports on these territories to the United Nations".

Instead, as indicated above, the adopted Resolution in respect of such *interim* period confined itself to stating that the Assembly "*takes note*" of "*expressed intentions*" "*to administer the territories*" in a certain manner.

That the representative of China was himself fully aware of the significance of the contrast, appears from what he said upon introducing the eventual agreed draft, on 12th April, 1946, [3] as compared with his earlier speech on the 9th April, 1946. [4] He emphasised (on 12th April) that the functions of the League in respect of Mandates "were not transferred automatically" to the United Nations and *that the Assembly "should therefore take steps to secure the continued* application of the principles of the mandates system". But instead of moving from this foundation to the earlier proposal "recommending that the mandatory powers should continue to submit annual reports ... to the United Nations", he then stated that, as the Australian representative had pointed out the previous day, the League "would wish *to be assured*" as to the future of Mandated territories. He referred to statements by representatives of other Mandatory States, and described as "gratifying" the fact that all had "announced their intention to administer the territories under their control in accordance with their obligations under the mandate system until other arrangements were agreed upon". His comment on the substance of the matter concluded that "it was to be *hoped*" that "the principles of trusteeship underlying the mandate system" "*would*" be applied to the territories "*in full*" by "the *future* arrangements *to be made*".

Clearly then, the conclusion is inescapable that there was in the final result a deliberate refrainment from attempting to secure a

[1] *Ibid.*
[2] *Ibid.*, *Vide* second para. of draft.
[3] *Ibid.*, para. 35 (d).
[4] *Ibid.*, para. 35 (c).

general transfer to the United Nations of League supervisory functions in respect of Mandates not converted into Trusteeship, and even from attempting to secure a recommendation that reports should in respect of such Mandates be rendered to the United Nations. The intention must have been to leave to such "other arrangements", if any, as may be "agreed" in each case, the possibility of the assumption by the United Nations of supervisory powers in respect of Mandates not converted into Trusteeship—in other words, to the *ad hoc* method which was the only possibility provided for by the United Nations General Assembly in Part I, 3, C of its Resolution XIV of the 12th February, 1946.

(d) The above conclusions are further confirmed by the fact that none of the "expressed intentions" of Mandatory States referred to in paragraph 4 of the Resolution included an intention to report to the United Nations pending such "other arrangements": they were confined to administration of the territories in accordance with obligations regarding protection and promotion of the well-being and development of the inhabitants, and certain of the statements strongly suggested that there would be no reporting pending the "other arrangements". Thus the statement [1] of the South African representative pointedly referred to "the disappearance of those organs of the League concerned with the *supervision* of mandates, primarily the Mandates Commission and the League Council", as something which would "necessarily preclude complete compliance with the letter of the Mandate"; and immediately before, he had stated an intention of continued administration by the Union in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, "as she has done during the past six years when meetings of the Mandates Commission could not be held" (and when reports were in fact not rendered). The Australian representative also stated, [2] *inter alia*, that

> "After the dissolution of the League of Nations and the consequent *liquidation of the Permanent Mandates Commission*, it will be *impossible to continue the Mandates System in its entirety*". (Italics added.)

And 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". [3] (Italics added.)

(e) In view of the above, the conclusion is clear that the relevant resolutions of the Assembly of the League of Nations at its last session did not embody any agreement, either express or implied, between Respondent and the League and/or its other Members,

[1] *Ibid.*, para. 35 (b) (ii).
[2] *Ibid.*, para. 35 (b) (vi).
[3] *Ibid.*, para. 35 (b) (i).

whereby Respondent was rendered obliged to report or account to, or to submit to the supervision of, any organ of the United Nations relative to performance of its functions under the Mandate. On the contrary, the indications point to a mutual understanding that, pending "other arrangements" which may be "agreed" upon between the United Nations and Respondent, there would be no reporting or accounting or supervisory authority. Such "other arrangements" could potentially, as far as the League Resolution was concerned, cover a variety of possibilities such as,

(i) recognition of a new status for the Territory, such as was being proposed by Respondent, or independence, or partition as in the case of Palestine; or

(ii) a Trusteeship Agreement; or

(iii) the "assumption" by the United Nations, in terms of Part I, 3, C of its Assembly's Resolution XIV of 12th February, 1946, of supervision regarding continued Mandatory administration of the Territory in pursuance of a request to that end.

33. *Negotiations subsequent to dissolution of the League:*

The evidence shows that subsequent events never led to any agreement whereby Respondent was rendered obliged to submit to the supervision of any United Nations organ.

"Other arrangements", as contemplated by the Resolution of the last League Assembly, were never "agreed" upon between the United Nations and Respondent. The United Nations was not prepared to agree to an arrangement whereby recognition would be given to incorporation of South West Africa in the Union, nor to other proposals subsequently made.[1] On the other hand, Respondent, for the reasons explained in Chapter II above,[2] was not prepared to agree to Trusteeship for the Territory. And there never was, in terms of Part I, 3, C of the United Nations General Assembly's Resolution No. XIV of 12th February, 1946, any "request from the parties" or agreement thereto by any United Nations organ as to "assumption" by the United Nations of supervisory functions regarding continued Mandatory administration of the Territory.

In Chapter II, Part B above, the history is dealt with of Respondent's undertaking, later withdrawn, to submit statistical and other information "in accordance with Article 73, paragraph (e), of the Charter". Article 73 (e), where it applies as a matter of law, does not involve an obligation to submit to "supervision". The whole of Article 73 comprises a counterpart in amplified form of Article 23 (b) of the League Covenant, in respect of which, as indicated above in paragraph 20, no obligation concerning supervision applied. The same situation was intended to apply in Article 73

[1] *Vide* Chap. II, Part B, paras. 4, 41 and 68 *supra*.

[2] *Ibid.*, para. 5.

of the Charter; and it is to this end that paragraph (e) thereof emphasises that the transmission is to be "for information purposes". [1]

In the present case there was a purely voluntary undertaking to furnish information "in accordance with" or "on the basis of" [2] Article 73 (e), coupled with an express denial of liability to submit to United Nations supervision, and with an understanding that the information was not to be dealt with as if a trusteeship agreement had, in fact, been concluded. [3] Inasmuch as the United Nations neither accepted nor observed the conditions attached to the undertaking, in which circumstances the undertaking was withdrawn, [4] there was never any *consensus ad idem* or agreement, even as regards the furnishing of information in accordance with Article 73 (e), much less as regards Respondent being obliged to submit to supervision on the part of the United Nations.

34. *Practice of States:*

During the years immediately after establishment of the United Nations and dissolution of the League, the practice of States showed a general understanding that the League supervisory powers in respect of Mandates had not been transferred to, or assumed by, the United Nations.

(a) The Trusteeship Agreement for the Mandated Territory of Nauru was entered into as late as November, 1947, [5] *i.e.* more than two years after the Charter had come into force; and the United Kingdom withdrew from the administration of Palestine only as from the 15th May, 1948. [6] Yet no reports were in the *interim* period submitted to the United Nations in respect of either territory. And, as far as the United Nations records show and Respondent is aware, no State ever suggested that such reports should be submitted—either in respect of these territories or in respect of any other Mandated territories during the period after dissolution of the League and prior to "new arrangements" being "agreed" upon in regard to them.

(b) The case of Palestine is of particular significance inasmuch as it was investigated and reported upon by a United Nations Special Committee, consisting of representatives of eleven Members of the United Nations. [7] In its Report, dated the 3rd September, 1947,

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[1] *Vide* Hall, *op. cit.*, pp. 285-86, 288-89.

[2] *Vide* Chap. II, Part B, paras. 2, 6, 7 and 9.

[3] *Ibid.*

[4] *Ibid.*, para. 11.

[5] *Vide G.A., O.R., Second Sess., Sup.* No. 10 (A/402/Rev. 1).

[6] The Mandate terminated on 15th May, 1948. The last British troops left from Haifa on 30th June, 1948. *Vide Keesing's Contemporary Archives*, Vol. VII (1948-1950), p. 9354.

[7] Australia, Canada, Czechoslovakia, Guatemala, India, Iran, the Netherlands, Peru, Sweden, Uruguay and Yugoslavia.

this Committee clearly expressed its understanding that there was, as from the dissolution of the League, no supervisory authority in respect of the administration of Palestine and no obligation on the part of the Mandatory to submit to any supervision. This appears abundantly from the following extracts from the Report, all from portions *unanimously* agreed to by the Committee:

> "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 regime. 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' ".[1] (Italics added.)

After recommending unanimously that:

> "The Mandate for Palestine shall be terminated at the earliest practicable date",

the Committee commented as follows:

> "It may be seriously questioned whether, in any event, the Mandate would now be possible of execution. The essential feature of the mandates system was that it gave an international status to the mandated territories. This involved a positive element of international responsibility for the mandated territories and an *international accountability to the Council of the League of Nations* on the part of each mandatory for the well-being and development of the peoples of those territories. The Permanent Mandates Commission was created for the specific purpose of assisting the Council of the League in this function. But the League of Nations and the Mandates Commission have been dissolved, *and there is now no means of discharging fully the international obligation with regard to a mandated territory other than by placing the territory under the International Trusteeship System of the United Nations.*
>
> The International Trusteeship System, however, *has not automatically taken over* the functions of the mandates system with regard to mandated territories. Territories can be placed under trusteeship only by means of individual trusteeship agreements approved by a two-thirds majority of the General Assembly.
>
> *The most the mandatory could now do, therefore, in the event of the continuation of the Mandate, would be to carry out its administration, in the spirit of the Mandate, without being able to discharge its international obligations in accordance with the intent of the mandates system.* At the time of the termination of the Permanent Mandates Commission in April, 1946, the mandatory Power did, in fact, declare its intention to carry on the administration of Palestine,

[1] *G.A., O.R., Second Sess., Sup.* No. 11, Vol. I (A/364), pp. 26-27.

pending a new arrangement, in accordance with the general principles of the Mandate. The mandatory Power has itself now referred the matter to the United Nations". [1] (Italics added.)

(c) The above Report on Palestine contained, *inter alia*, also a special note by Sir Abdur Rahman, representative of India. The following passage occurred therein:

> "Moreover, the international machinery in the form of the Permanent Mandates Commission, which had been created for the purpose of scrutinizing the actions of the mandatory Powers, and to which they were bound to submit annual reports, has, along with the League of Nations, ceased to exist. *There are no means by which the international obligations in regard to mandates can be discharged by the United Nations.*
>
> The Mandate has in any case become infructuous, and must, in my opinion, go. Whether it could be superseded by any other system within the present Charter is a different matter, and will be dealt with when I consider the solution of the present problem". [2] (Italics added.)

(d) At an earlier stage, on 22nd November, 1946, the representative of New Zealand had clearly expressed a similar understanding that, in the case of a Mandate not converted into Trusteeship, there was no question of United Nations supervision. The statement was made in a sub-committee of the Fourth Committee, during the Second Part of the First Session of the General Assembly, in a debate concerning a draft Trusteeship Agreement for the Territory of Western Samoa, held under Mandate by New Zealand, and was as follows:

> "New Zealand, although it would be most co-operative, could not be forced to amend its draft agreement. The result of disapproval of the draft agreement by the General Assembly would be that New Zealand would carry on, as in the past, its sacred trust to lead the people of Samoa in their orderly progress towards self-government. *In this eventuality, New Zealand would have to carry on without the privilege of the supervision by the United Nations which it desired*". [3] (Italics added.)

(e) On 2nd April, 1947, during the 124th meeting of the Security Council, a similar understanding emerged from statements made by the representative of the Union of Soviet Socialist Republics. He was participating in discussion of a draft trusteeship agreement for the former Japanese Mandated Islands, more particularly with reference to a Polish amendment to insert in the preamble the words:

> "Whereas Japan has violated the terms of the above mandate of the League of Nations and has thus forfeited her mandate".

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[1] *Ibid.*, p. 43.

[2] *Ibid.*, Vol. II (A/364/Add. 1), p. 38.

[3] *G.A., O. R., First Sess., Second Part, Fourth Comm.*, Part II, Fifth Meeting, 22nd November, 1946, p. 28.

Mr. Gromyko's statement, on behalf of the Soviet Union, contained the following:

"It seems to me that there is no need for such an amendment. *There is no continuity, either legal or otherwise, between the mandatory system of the League of Nations and the Trusteeship System laid down in the United Nations Charter.* There is therefore nothing which might entitle the Security Council to discuss this question, let alone take any decisions on it. The mandatory system of the League of Nations is distinct from the Trusteeship System which the United Nations is now trying to establish". (Italics added.)

After referring to "a difference in the fundamental principles" of the two systems, he proceeded:

"It seems to me, moreover, that in this connexion we should not lose sight of the fact that, since there is no continuity such as would permit and justify the discussion of this question by the Security Council, the latter cannot investigate the substance of the matter. For the reasons which I have just stated, *the Security Council is not competent to decide to what extent Japan may have violated the conditions of the mandate system and the duties involved in the administration of mandated territories*". [1] (Italics added.)

(f) On 19th March, 1948, during the 271st meeting of the Security Council, in a debate regarding Palestine, the same understanding emerged once again from a statement by the representative of the United States of America, as follows:

"The United Nations does not automatically fall heir to the responsibilities either of the League of Nations or of the Mandatory Power in respect of the Palestine Mandate. The record seems to us entirely clear that *the United Nations did not take over the League of Nations Mandate system*". [2] (Italics added.)

(g) The understanding which emerges from the above written and oral statements made on behalf of a large number of States, Members of the United Nations, in a variety of circumstances and situations, and within a relatively short time after the establishment of the United Nations and the dissolution of the League, when the events were still reasonably fresh in memory, in Respondent's submission effectively refutes any suggestion of tacit agreement as between Members of the United Nations or other interested parties to the effect that Mandatories would be subject to United Nations supervision in respect of Mandates not converted into Trusteeship.

35. *The Advisory Opinion of 1950*:

(a) The Majority of the Members of the Court came to the conclusion:

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[1] *S.C., O.R., Second Year*, No. 31, 124th Meeting, 2nd April, 1947, p. 648.

[2] *Ibid., Third Year*, Nos. 36-51, 271st Meeting, 19th March, 1948, p. 164.

"that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it". [1]

At the next page followed a consequential conclusion regarding petitions, *viz:*

"In view of the result at which the Court has arrived with respect to the exercise of the supervisory functions by the United Nations and the obligation of the Union Government to submit to such supervision, and having regard to the fact that the dispatch and examination of petitions form a part of that supervision, the Court is of the opinion that petitions are to be transmitted by that Government to the General Assembly of the United Nations, which is legally qualified to deal with them".

The Court's reasoning in support of its above main conclusion, is set out at pages 136 to 137 of the Report. It commences with a recognition of

"the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United Nations nor expressly assumed by that organisation".

Then follow what in the Court's words "nevertheless ... seem to be decisive reasons" for its conclusion. These can briefly be summarised as follows:

(i) The obligation to accept "international supervision" and to submit reports is an *important part* of the Mandate System—considered by the authors of the Covenant to be *required for effective performance* of the sacred trust; and similarly regarded by the authors of the Charter relative to the International Trusteeship System. The *"necessity for supervision"* continues despite disappearance of the League. The *"obligation to submit to supervision"* cannot be admitted to have 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.

(ii) "These general considerations" are confirmed by Article 80 (1) of the Charter, which cannot "effectively safeguard" the rights of the peoples of Mandated territories without international supervision and a duty to render reports to a supervisory organ.

(iii) In its Resolution of 18th April, 1946, concerning Mandates, the Assembly of the League of Nations gave expression to a *"corresponding view"*. In the Court's view *"this resolution presupposes that*

[1] *"International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950"*, p. 137.

the supervisory functions exercised by the League would be taken over by the United Nations".

(iv) The General Assembly of the United Nations is rendered competent to exercise such supervision and to receive and examine such reports by Article 10 of the Charter.

(b) It seems evident that the Court could not have meant that each of the above four "reasons" was to be regarded as in itself affording full justification for the conclusion arrived at.

So, for instance, Reason No. (iv) is concerned merely with the determination *within the United Nations* of an *organ* which *would be competent* to undertake the supervision. But this "reason" has no relevance in the enquiry unless there should be an obligation to submit to United Nations supervision. The General Assembly is said to be such a competent organ by reason of Article 10 of the Charter, which is a general provision as follows:

> "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

Clearly the relevance of Article 10 depends on the prior question whether a supervisory *power* in respect of the Mandate for South West Africa is a "question or matter within the scope of the ... Charter" or a "power" or "function" of any "organ provided for in the ... Charter". And that, in turn, is just another way of putting the question whether the Mandatory is under an *obligation* to submit to United Nations supervision in respect of the administration of South West Africa. Reason No. (iv) above, obviously does not purport to touch upon this question, but, on the contrary, assumes that it has already been affirmatively answered by Reasons Nos. (i), (ii) and (iii).

(c) Similarly Reason No. (i) does not appear to have been intended as justification, by itself, for the conclusion that Respondent is under an obligation to submit to United Nations supervision. On analysis this Reason in the first place emphasises the *importance* of the element of international supervision in the Mandate System. Although the phrase "*necessity for supervision*" is used, the word "necessity" is clearly employed in the *relative* sense of *necessary for effective performance* of the sacred trust, and *not* in the absolute sense of necessity for the *existence* of the sacred trust or of the Mandate. This is rendered clear, not only by the wording of Reason No. (i) in the Opinion, but also by the earlier finding in the same Opinion, that the Mandate was still in existence because of the fact that the substantive obligations of the Mandatory, contained in Articles 2 to 5 of the Mandate, and representing the "very essence of the sacred trust", "*did not depend*" for their fulfilment "*on the*

existence of the League," and "*could not be brought to an end merely because this supervisory organ ceased to exist*".[1] Thereby the Court itself indicated the severability of the Mandate or "sacred trust" itself from supervision over the performance thereof—and it would have been inconsistent had it later suggested that supervision was an absolute necessity in the sense that the Mandate or "sacred trust" could not exist without it. In effect then, "necessity", in the context of Reason No. (i), was intended to mean no more than *desirability with a view to effective performance.* Reason No. (i) proceeds to point out that this desirability continues to exist despite the disappearance of the League. And it further, in effect, signifies that the mere fact of dissolution of the League did not bring about a situation in which there could not possibly be an obligation to submit to supervision, inasmuch as there was now in existence an organ of a new international organisation, the United Nations, performing similar supervisory functions.

On a fair interpretation Reason No. (i) signifies no more than the above. What is said in the course of Reason No. (i) is immediately afterwards described as "these general considerations". Apparently the purpose thereof was to demonstrate *firstly* a general likelihood (because of the importance and desirability of international supervision) that the interested parties would have intended to keep alive, after dissolution of the League, the obligation to submit to international supervision in respect of Mandatory administration; and *secondly*, that there was an appropriate organ of a new organisation which the parties may well have intended to be the successor to the supervisory function. Read in this way, Reason No. (i) would not, in itself, lead to the conclusion that Respondent is under an obligation to submit to supervision by the General Assembly of the United Nations; it would merely consist of general considerations tending to support a possible inference of a tacit agreement between the interested parties, whereby such an obligation was imposed upon Respondent; in other words, it would be mere supporting material for the reasons following upon it.

If Reason No. (i) is read as purporting to be full justification, in itself, for the Court's conclusion in question, it would have to be interpreted as meaning in effect that because international supervision is desirable, therefore the Court holds that it must exist; and, that because the United Nations has an organ performing supervisory functions under a Trusteeship System, which are similar to, though not identical with, the supervision previously exercised by the League organs in respect of Mandates, therefore the Court holds that a Mandatory previously obliged to submit to League supervision must now be obliged to submit, in respect of its Mandate, to supervision of the United Nations organ (and that so, despite the fact that the Mandatory is not obliged and may not be willing to

[1] "*International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*", p. 133.

submit to the Trusteeship System). If this were what the Court meant, it would involve violation of the most fundamental and elementary principles of law which the Court was under a duty to apply in terms of Article 38 of its Statute: for the Court would then have forsaken its function of deciding in accordance with law and would have assumed the role of a legislator; and it would further have ignored the universal principle of law and logic that a party which by agreement accepts an obligation of a certain content, cannot, merely by that reason and without fresh consent or agreement on its part, be held liable to an obligation of a substantially different content.[1] It is not reasonable to suppose that the Court would thus have failed in its functions.

Nor does it seem that the Court could have intended to apply the principle that an obligation is not extinguished by impossibility of performance when the impossibility affects only one of two or more equivalent methods of compliance therewith. The said principle cannot find application in the present case, for the reasons stated in paragraphs 24 and 27 above. The obligation was not one to submit to "international supervision", but to the specific supervision of the League organs. Submission to United Nations supervision would be a different obligation in substance as well as in form, and not a mere equivalent method of complying with the same obligation.

That there were certain inherent and unavoidable differences, appears to have been acknowledged by the Majority of the Court in the 1955 Advisory Opinion, particularly 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]

In the result it seems evident that the interpretation of Reason No. (i) is to be preferred whereby it was intended merely to provide supporting material for the reasons following upon it.

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[1] *Vide* paras. 23 and 27 *supra* as to the material difference in form and substance between an obligation to submit to League supervision in respect of Mandates and one to submit to United Nations supervision.

[2] "*South-West Africa—Voting Procedure, Advisory Opinion of June 7th, 1955: I.C.J. Reports 1955*", p. 75.

(d) Reason No. (ii), by its wording, is intended as confirmation of the "general considerations" contained in Reason No. (i). Article 80, paragraph 1, of the Charter reads as follows:

> "1. 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 gist of the Article is that existing rights and instruments would not be affected by anything "*in this Chapter . . . in or of itself*". In other words, the Article does not purport to "maintain" or "safeguard" existing rights and instruments against anything *not* contained "in this Chapter". If, for instance, an existing right or instrument should be extinguished, say by common consent of the interested parties or by impossibility of performance or the like, the provisions of Article 80 (1) would not, nevertheless, keep them alive.

The matter is very aptly put by Joseph Nisot:

> "This expression *(maintains)* is likely to lead to a misconception as to what Article 80, interpreted in accordance with its wording and spirit, really means. The only purpose of the Article is to prevent Chapter XII of the Charter from being construed as in any manner affecting or altering the rights whatsoever of States and peoples, as they stand pending the conclusion of trusteeship agreements. Such rights draw their judicial life from the instruments which created them; they remain valid in so far as the latter are themselves still valid. If they are maintained, it is by virtue of those instruments, not by virtue of Article 80, which confines itself to providing that the rights of States and peoples—whatever they may be and to whatever extent they may subsist—are left untouched by Chapter XII";

and,

> "But, even supposing it did maintain anything, Article 80 could only maintain whatever existed. It could neither resurrect extinct rights nor create new ones". [1]

That the Court in 1950 was itself fully aware of the true meaning and effect of Article 80 (1), appears from what was stated about this provision earlier in the Majority Opinion:

> "It is true that this provision only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments". [2]

[1] Nisot, J. "The Advisory Opinion of the International Court of Justice on the International Status of South-West Africa", *S.A.L.J.*, Vol. 68, Part 3 (August, 1951), pp. 278-79.

[2] "*International status of South-West Africa: Advisory Opinion: I.C.J. Reports 1950*", pp. 133-34.

It cannot, therefore, be assumed that the Court, in referring to Article 80 (1) in its Reason No. (ii), intended to apply the provisions thereof to a purpose and effect for which, as the Court was aware, they were not intended: this would again be tantamount to legislation instead of interpretation and application of the law.

How, then, is the reference to Article 80 (1) in Reason No. (ii) to be understood? The answer seems to be, again, that the Court was concerned merely with a "general consideration" of probability, concerning a possible underlying, tacit intent or contemplation on the part of the authors of the Charter, rather than with the effect of the express provision as inserted in the Charter by them. In its earlier reference to Article 80 (1), at page 134, the Court had said that

> "as far as mandated territories are concerned ... this provision *presupposes* that the rights of States and peoples shall not lapse automatically on the dissolution of the League of Nations. It *obviously* was the intention to *safeguard* the rights of States and peoples *under all circumstances* and *in all respects*, until each territory should be placed under the Trusteeship System". (Italics added.)

This "*presupposition*" and "*obvious* intention" clearly refer not to the contents of Article 80 (1), but to something *tacit* which in the Court's view must probably have been in the minds of the authors of the Charter. In dealing with Article 80 (1) in its Reason No. (ii), the Court referred back to what it had said earlier and added that "the *purpose must have been* to provide a *real protection* for those rights" (italics added), i.e. including "international supervision" and a duty to render reports to a "supervisory organ". Clearly this "*purpose*" also refers not to the contents of Article 80 (1), but to the tacit presupposition or intent considered by the Court to have probably existed in the minds of the authors of the Charter.

In other words, the Court was arguing from what it considered to be probabilities inherent in objective features referred to by it in its Reasons Nos. (i) and (ii), and seeking to draw from those probabilities an inference of tacit agreement between the parties to the Charter of the United Nations to the effect that Mandatories would be obliged to submit to the United Nations supervision, pending Trusteeship or other agreements with the United Nations. And, in Reason No. (iii), it sought to draw a similar inference of a corresponding tacit agreement on the part of the Members of the League of Nations at the time of its dissolution. Respondent contends that neither of these inferences could have been justified or would have been drawn, had the Court been fully informed of all the relevant facts.

(e) In his judgment in the case of *Rex* v. *Blom*, Judge Watermeyer, a South African Judge of Appeal and later Chief Justice of the Union, stated as follows:

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct". [1]

These rules of logic are clearly of general application. In particular they are applied by Courts of civilized States to the question whether a tacit agreement, or a tacit term in an express agreement, can justifiably be inferred or implied in a given case. The English Courts are in this regard generally guided by the "leading case" of *Hamlyn* v. *Wood*, in which Lord Justice Kay said as follows:

"The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied". [2]

To a similar statement in his judgment, Lord Esher had added:

"It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned". [3]

A fresh exposition was given by Lord Wright in his judgment in the House of Lords in *Luxor, Ltd.* v. *Cooper*, as follows:

"It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. It is well recognised, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that 'it goes without saying', some term not expressed, but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles; or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties. These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts". [4]

(f) When regard is had to the considerations set out in the above quotations, it is self-evident that in the absence of knowledge of certain relevant facts, a conclusion arrived at in reasoning by

[1] *Rex* v. *Blom*, 1939 A.D. 188, at pp. 202-03.
[2] *Hamlyn & Co.* v. *Wood & Co.*, (1891) 2 Q.B. 488, p. 494.
[3] *Ibid.*, at p. 491.
[4] *Luxor, Ltd.* v. *Cooper* (1941 (1) A.E.R. 33), at pp. 52-53.

inference may be vitally different from what it would be if all the facts were known and considered.

In what appears to have been its crucial Reason, No. (iii), for arriving at its conclusion under consideration, the Court inferred that the League Assembly Resolution concerning Mandates, adopted on 18th April, 1946, "presupposes that the supervisory functions exercised by the League would be taken over by the United Nations". Thereby the Court presumably meant that there must have been a tacit agreement to that effect between the parties to the Resolution. Similarly, as observed above, the factors involved in the Court's Reasons Nos. (i) and (ii) were apparently relied upon towards inferring a corresponding tacit agreement on the part of United Nations Members, to the effect that Mandatories would be obliged to submit to United Nations supervision pending or failing Trusteeship or other agreement. It seems quite evident that, with knowledge of certain crucially important facts that were not placed before the Court in 1950, the Court could not possibly have arrived at these conclusions by inference. Of particular importance amongst the facts and material not presented to the Court in 1950, were the following (in time sequence):

(i) Respondent's express reservation of 11th May, 1945, at the San Francisco Conference [1] during the drafting of the Charter, which, by itself and together with the reservations in the Preparatory Commission and later at the First Part of the First Session of the General Assembly in London during January, 1946, [2] rendered quite clear that there was on Respondent's part no tacit agreement to, or acquiescence in, *trusteeship under or supervision by the United Nations.*

(ii) The rejection by the Preparatory Commission of its Executive Committee's proposal for a Temporary Trusteeship Committee, without substitution of anything regarding possible transfer to, or assumption by, the United Nations of any "functions under the Mandates System", [3] which factor, together with the other aspects of the history of Resolutions XI and XIV, as dealt with in paragraph 31 above, negatives a tacit intention on the part of the United Nations that such functions would be transferred or assumed. [4]

(iii) The facts concerning the original proposal by China at the final session of the Assembly of the League of Nations, and the subsequent withdrawal thereof and substitution therefor of the Resolution actually adopted. [5] *The original Chinese proposal sought to achieve by express resolution what the Court considered to be the*

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[1] *Vide* para. 30 *supra* and Chap. II, Part A, paras. 25-26 *supra*. The text of the memorandum set out in Chap. II, Part A, para. 25 *supra* was before the Court in 1950, but the Court was not informed of the further paragraph set out in footnote 1 at p. 26 *supra*.

[2] *Vide* para. 31 (e) *supra* and Chap. II, Part A, para. 29 (d) and (e) *supra*.

[3] *Vide* para. 31 (d) *supra*.

[4] *Vide* particularly para. 31 (f) *supra*.

[5] *Vide* para. 32 (b) and (c) *supra*.

tacit intention of the parties. But it had to be withdrawn because it became plain that certain of the parties would not agree thereto. Hence this history by itself renders plain that there was no room for a tacit intention as inferred by the Court; and together with the other factors dealt with in paragraph 32 (d) and (e) above, it shows that the tacit understanding was the reverse, *viz.* that pending "other arrangements" there would be no obligation to report and account.

(iv) The unanimous comments of the United Nations Special Committee on Palestine, composed of eleven Members of the United Nations, and the statements by representatives of various States during various debates at the United Nations, as set forth in paragraph 34 (b) to (f) above. These comments and statements show most unmistakably a general (or at least very widespread) understanding amongst Members of the United Nations that no supervisory functions regarding Mandates (not converted into Trusteeship) had been taken over, and thus refute any suggestion of a general tacit intention to the contrary.

Had the above facts been known to the Court in 1950, it seems inconceivable that the Court could have arrived at its conclusion regarding an obligation on Respondent's part to submit to United Nations supervision.

36. *Dissent from* 1950 *Opinion concerning Supervision:*

(a) *Minority Opinions:*

Even on the basis of the facts before the Court in 1950, two of its Members, Sir Arnold McNair and Judge Read, were not prepared to subscribe to the finding that Respondent is obliged to submit to a supervisory power on the part of the United Nations, and gave full reasons for their dissent. [1] As far as Respondent is aware, these reasons and the conclusions drawn from them have invited no adverse criticism from writers on International Law. On the contrary, they find considerable support in the critical comments of such writers—as will appear from sub-paragraph (b) below. Furthermore, the additional factual information now brought into consideration, [2] confirms the correctness of the result arrived at in these Minority Opinions.

(b) *Opinions of Writers:*

(i) Even before the 1950 Advisory Opinion, Hall, in dealing with the effect of the dissolution of the League upon Mandates, stated, *inter alia:*

> "... the supervisory functions of the League had come to an end before the supervisory functions of the United Nations could begin to operate, especially since the plan for a temporary trusteeship

[1] "*International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*", pp. 159-62, 166-73.

[2] *Vide* para. 35 (f) *supra* and earlier paras. there referred to.

committee had been rejected in the Preparatory Commission of the United Nations".[1]

In referring to the original proposal of the Chinese delegate at the last session of the League Assembly, which was not adopted, he quotes the Chinese delegate as saying that the Charter "made no provision for assumption by the United Nations of the League's functions" under the Mandate System.[2]

And he commented finally in regard to the League Assembly Resolution of 18th April, 1946:

> "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 the 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 the agreements that were made. But in the case of mandates, the League died without a testament".[3]

(ii) In January, 1951, very shortly after the 1950 Advisory Opinion, Manley O. Hudson wrote as follows:

> "To support its additional conclusion that the Union of South Africa is obliged to submit to the supervision of, and to render annual reports to, the United Nations, the Court relied upon a resolution adopted by the final Assembly of the League of Nations on April 18, 1946, which was said to presuppose 'that the supervisory functions exercised by the League would be taken over by the United Nations'. This is hardly borne out by the text of the resolution, however. Nor is the succession of the General Assembly a necessary consequence of its competence under Article 10 of the Charter to which the Court refers".[4]

and,

> "The Court seems to have placed emphasis on the competence of the General Assembly to exercise supervision and to receive and examine reports. Such competence can hardly be doubted. Yet it does not follow from the conclusion that the General Assembly 'is legally qualified to exercise the supervisory functions previously exercised by the League of Nations', that the Union of South Africa is under an obligation to submit to supervision and control by the General Assembly, or that it is obligated to render annual reports to the General Assembly".[5]

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[1] Hall, *op. cit.*, p. 272.
[2] *Ibid.*, pp. 272-73.
[3] *Ibid.*, p. 273.
[4] Hudson, M. O. "The Twenty-ninth year of the World Court", *A.J.I.L.*, Vol. 45 (1951), p. 13.
[5] *Ibid.*, p. 14.

And regarding the applicability and effect of Article 80 (1) of the Charter he remarked:

"Article 80 (1) of the Charter seems to be the principal basis of the Court's conclusion that the Union of South Africa must report to the General Assembly. This Article provided that, until the conclusion of Trusteeship Agreements, nothing in Chapter XII of the Charter should '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' (italics supplied). The text clearly shows an intention that Chapter XII should not effect any alteration of rights or terms. This intention was 'entirely negative in character'. The provision served an obvious purpose when Chapter XII of the Charter was drawn up: the Mandate was still in force at that time: as the League of Nations had not then been dissolved, any alteration of the existing situation was a matter for its consideration. Article 80 (1) was a precautionary provision designed to negative the accomplishment of any change in the existing situation by reason of Chapter XII 'in or of itself'. It is not surprising that Judge McNair found it 'difficult to see the relevance of this article'.

Yet the Court gave an affirmative effect to Article 80 (1), turning it into a positive 'safeguard' for maintaining the rights of states and the rights of the peoples of the mandated territory. This is the more notable because at a later stage the Court stressed the 'entirely negative' character of Article 80 (2), declining to say that the latter imposed a positive obligation on the Mandatory even to negotiate with a view to the conclusion of a Trusteeship Agreement.

No attention was paid by the Court to the fact that certain states, which as Members of the former League of Nations may have 'rights' under Article 22 of the Covenant and under the Mandate itself, had no responsibility for the Charter and have never become Members of the United Nations. For example, Finland, Ireland and Portugal, which were represented at the final session of the Assembly of the League of Nations in 1946, are in this category. If their rights are 'maintained' by Article 80 (1) of the Charter, they have no voice in the supervision to be exercised by the General Assembly". [1]

(iii) In August, 1951, followed the article by Joseph Nisot already referred to in paragraph 35 (d) above. Apart from the comment already cited there concerning Article 80 of the Charter, the learned author stated:

"Now, what, in actuality, were the rights derived by peoples from the Mandate and from Article 22 of the Covenant? They were not rights to the benefit of abstract supervision and control. They consisted of the right to have the administration supervised and controlled by the *Council of the League of Nations*, and, in particular, the right to ensure that annual reports were rendered by the mandatory Power to the *Council of the League of Nations*, as it was, and the right to send petitions to the *Secretariat of the League of Nations*.

[1] *Ibid.*

What has become of these rights? They have necessarily disappeared as a result of the disappearance of the organs of the League (Council, Permanent Mandates Commission, Secretariat).

The Court could not correctly conclude that such rights had been maintained by Article 80, except by contending at the same time that for the purposes of the Mandate for South West Africa, the said organs had survived the dissolution of the League.

... Being unable, and for good reasons, so to contend, the Court creates *new* rights. To the Court, the right of peoples 'maintained' by Article 80 is linked to the *United Nations Organisation*...

According to its thesis, it is because Article 80 'maintains' the rights of peoples that these, though linked to the League, must now be deemed linked to the United Nations! To infer this from a text worded as is Article 80 amounts to assuming that, with respect to the mandates system, the United Nations stands as the legal successor of the League, an assumption inconsistent with the discussions of San Francisco and with the very fact that the Charter provides for the conclusion of trusteeship agreements". [1]

Regarding the resolution of the 18th April, 1946, of the League Assembly, he continued:

"... one fails to see how this statement can provide any support for a suggestion that it was the Assembly's opinion that a mandatory Power, though not bound by a trusteeship agreement, was under an obligation to submit to supervision and control by the United Nations. This was no more the opinion of the Assembly of the League of Nations than that of the General Assembly of the United Nations, which, by its resolution of 9th February, 1946, urged the conclusion of trusteeship agreements, implying that no implementation of the principles of the trusteeship system—therefore, no supervision or control—was possible in the absence of such agreements". [2]

In the final portion of this part of the article, Nisot referred to the failure of the authors of the Charter

"to provide for international supervision with respect to the obligations incumbent on a mandatory State, should it elect not to conclude such an agreement" (i.e. Trusteeship Agreement).

He concluded:

"This lack of foresight has resulted in the present situation, which the Court attempts itself to redress, stepping out of its role as interpreter of the law to assume that of legislator". [3]

(iv) Georg Schwarzenberger commented, *inter alia*, as follows:

"... the World Court was faced with the issue of whether the United Nations had become responsible for the discharge of the supervisory function which the League had formerly exercised in relation to the

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[1] Nisot, *S.A.L.J.*, Vol. 68 (1951), p. 279.
[2] *Ibid.*, p. 280.
[3] *Ibid.*, p. 281.

> only still surviving mandate. In support of a positive answer, the Court could neither rely on any general principle of succession between international persons nor any relevant transaction between the two collective systems... The still missing link with the United Nations was provided by the Court's interpretation of Article 80 of the Charter of the United Nations. It was admitted in the majority Opinion that 'this provision only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments'. Still, with the assistance of a somewhat debatable presupposition and 'obvious' intentions, the last gap was bridged. It is not surprising that Judge McNair should have found it 'difficult to see the relevance of this Article'.
>
> Having filled the legal void which separated the supervisory functions of the League of Nations from those of the United Nations, the Court proceeded with its self-imposed task of 'judicial legislation' ". [1]

Again the criticism of the Majority Opinion of 1950 was possibly in a large measure derived from the feature that the Court did not have all the relevant facts before it in 1950.

37. Respondent submits that the Court will in this case, for the reasons advanced above, conclude that Respondent's obligation, derived from the Mandate agreement, to report and account to, and submit to the supervision of, the Council of the League of Nations, lapsed upon dissolution of the League and has not been replaced by any similar obligation to submit to the supervision of any organ of the United Nations or any other organisation or body.

D. Effect of Dissolution of the League on the Mandatory's Substantive Obligations

38. In Part B of this Chapter Respondent stated the submission that the only International Persons with whom the Mandate agreement could have been contracted as parties to a treaty or convention, and who could have derived rights or legal interests therefrom *vis-à-vis* the Mandatory, were the League of Nations and/or its Members.

39. The League itself could have been a party to the agreement, deriving rights therefrom against the Mandatory, only on the basis of the League being regarded as a legal *persona*, and, naturally, only for such time as it existed as such. It must follow, then, that upon dissolution of the League it could no longer be a party to a treaty or convention, and no obligations could any longer be owed to it. It follows further that, on the premise stated in paragraph 38 above, only the situation as regards League Members requires further consideration with a view to determining whether the Mandate could possibly, as a treaty or convention, have survived the League.

[1] Schwarzenberger, *op. cit.* (3rd ed.), Vol. I, pp. 101-02.

If, on the premise of the League being a legal *persona*, League Members were not co-parties to the respective Mandate agreements, those agreements would have been ordinary bilateral treaties which, on the demise of one party thereto (i.e. the League) would have terminated or become void. [1]

If it be assumed, however, that League Members did become parties or co-parties to the Mandate agreements, this could only have been on one or other of the bases discussed in paragraph 16 above. On this assumption Respondent will proceed to deal firstly with the premise stated in paragraph 38 above, *viz.* that apart from the League, no International Persons, other than League Members, could have acquired contractual rights or obligations against the Mandatory, and will thereupon develop the submission that the League Members could have obtained their contractual rights or legal interests *vis-à-vis* the Mandatory only in their capacity as, and for the duration of their being, Members of the League.

40. The history of the Mandate agreement itself shows that no States other than League Members could have been *parties* thereto—save for the limited participation of the Principal Allied and Associated Powers, which did not, however, result in any rights or legal interests for them as Principal Powers.[2] The Council of the League, in agreeing with the respective Mandatories, acted in pursuance of Article 22 (8) of the Covenant, which was a Convention as between League Members. [3] Insofar as Article 22 (8) could be regarded as being an authorization to the Council to act on behalf of States as distinct from the League itself, [4] it remained an authorization to represent League Members and League Members alone. The only manner, therefore, in which non-Member States could in any possible sense become *parties* to the Mandate agreements, would be by joining the League as Members thereof. As was stated by Sir Arnold McNair,

> "As regards States which are not members of the League, the basic fact is that the Covenant and the mandates are *pacta quae tertiis nec nocent nec prosunt*, and it is not open to a group of States to create a new international institution and then to demand that other States should recognize it". [5]

41. On analysis it will be found that the Covenant of the League and the Mandate instruments made in pursuance thereof, bear out

[1] *Vide* Oppenheim, *op. cit.* (8th ed.), Vol. I, p. 944; Schwarzenberger, *op. cit.* (3rd ed.), Vol. I, p. 176; McNair, A. D. *The Law of Treaties*—British Practice and Opinions (1938), pp. 389, 390, 405 and 433; Starke, *op. cit.* (3rd ed.), p. 324; François, J. P. A. *Grondlijnen van het Volkenrecht* (2nd ed.), p. 349.

[2] *Vide* para. 14 *supra*.

[3] *Ibid.*, para. 10.

[4] *Ibid.*, para. 16 (a) and (b) (ii).

[5] McNair, A. D. "Mandates", *C.L.J.*, Vol. III, No. 2 (1928), p. 157. *Vide* also Wright, Q. "Treaties Conferring Rights in Mandated Territories", *A.J.I.L.*, Vol. 18 (October, 1924), pp. 786-87.

fully that States other than League Members were not intended to derive contractual rights or legal interests from their provisions.

The Covenant provided, *inter alia*, as follows with regard to Membership in the League:

(a) "The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant". (Article 1(1).)

(b) "Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided ..." (Article 1 (2).)

(c) "Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided ..." (Article 1 (3).)

(d) "Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon". (Article 16 (4).)

(e) "No such amendment [to the Covenant] shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League". (Article 26 (2).)

The Covenant did not mention, in so many words, the possibility of dissolution of the League, but Article 3 in general terms empowered the Assembly to deal with any matter within the sphere of action of the League.

42. In all except four of the Articles of the Covenant (the exceptions being Articles 2, 9, 21 and 24) the expression "Member(s) of the League" is employed; and that so in dealing both with rights and benefits conferred on Member States and with obligations and duties imposed on them. As examples the following are mentioned:

Article 3: Assembly consists of Representatives of "the Members of the League". "Each Member of the League" has one vote.

Article 4: Representation in the Council for the Principal Powers and "four other Members of the League" to be elected by the Assembly.

Article 6: Obligation imposed upon "the Members of the League" to contribute to expenses of Secretariat in accordance with apportionment.

Article 7: Diplomatic privileges and immunities of Representatives of "Members of the League".

Arricle 8: Obligation upon "the Members of the League" to interchange information as to armaments, etc.

Article 12: Obligation upon "the Members of the League" to submit disputes between themselves to arbitration.

Article 15: Obligation upon "Members of the League" to submit disputes between themselves to the Council of the League.

Article 22: Equal opportunities for trade and commerce of "other Members of the League".

43. Certain provisions of the Covenant were such that non-Members of the League could benefit from them, in an indirect manner or by the grace of the League or its Members. Thus promotion of the League's general object "to achieve international peace and security" [1] would certainly benefit all nations, whether Members of the League or not. But this factor would not, by itself, enable such non-Member States to claim that they were parties to the Covenant or that its provisions conferred any rights or legal interests upon them, as little as they would have been prepared to accept a suggestion that the provisions of the Covenant imposed any legal obligations upon them.

Throughout the Covenant the intention was clear that insofar as its provisions conferred rights or legal interests or imposed legal obligations upon States, they did so with reference only to Members of the League. There were no provisions capable of being interpreted as stipulations for the benefit of non-Member States, resulting in "legal interests" being vested in such States, and capable of being turned into rights by acceptance or exercise on their part. The *basic purpose* of the authors of the Covenant in that regard was obvious, *viz.* to *reserve rights and legal interests for such States as were*, inter alia, *willing to accept also the obligations of Membership.*

Significant illustration was afforded by the provisions of Articles 16 and 17 of the Covenant. Article 16 provided that a Member resorting to war "in disregard of its covenants under Article 12, 13 or 15", would be deemed, *ipso facto*, to have committed an act of war against all other Members of the League: the latter would then be obliged to take certain action against the "covenant-breaking State" and to support one another in that regard. Articles 12, 13 and 15 related to methods of peaceful settlement of disputes, but only disputes *between Members of the League:* hence Article 16 applied only where a Member had failed to resort to those methods relative to such disputes. Article 17 proceeded to deal with disputes between a Member and a non-Member State, or between non-Member States *inter se*, in order to make, for such cases, provision corresponding to that contained in Article 16. But as a prerequisite it prescribed that non-Members involved in such a dispute should be "invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just". Upon acceptance of the invitation the provisions of Articles 12 to 16 would apply, with such modifications as the Council might deem necessary: in other words, the non-Member

[1] Preamble of the Covenant.

State(s) would *then* have the *benefit* of those provisions, on the same basis as League Members, *but only after acceptance of corresponding Members' obligations*. In the event of a non-Member's refusal to accept the obligations of membership for the purposes of a dispute, and resorting to war against a League Member, the provisions of Article 16 would apply "*as against*" it: in other words the non-Member could *then* experience the *detriment* envisaged by Article 16 (for protection of a League Member), but could *not* invoke the *benefit* thereof upon being attacked by another State.

44. In terms of Article 22 of the Covenant the "tutelage" entrusted to Mandatories over Mandated territories would be exercised "*on behalf of the League*".

The Mandatories were, therefore, in terms of Article 22, to be responsible to the League—in other words, either to a distinct international entity existing apart from its Members, or to a collection of States which together formed an association. On either supposition non-Members would again be excluded from the circle of international persons intended to acquire rights against the Mandatory.

45. The distinction between the position of Members and non-Members, as above observed, in the provisions of the Covenant, was maintained in the *Mandate agreements* made in pursuance of the Covenant. In the preambles the Mandatories undertook to exercise their Mandates "*on behalf of the League*". Although non-Members could here also benefit indirectly or by grace of the Mandatories, they would not be able to point to any provision intended to operate in their favour and conferring upon them a legal interest or right against the Mandatories. There could on their part be no claim, as of right, for substantive benefits such as "open door" facilities or acceptance of missionaries that were their nationals. It was in keeping with this lack of substantive right or legal interests on the part of non-Members that procedural facilities with a view to enforcement of substantive rights and interests were also confined to League Members (i.e. participation in League supervisory activities and the bringing of contentious proceedings in the Permanent Court of International Justice under the clauses in the various Mandates corresponding to Article 7 in the Mandate for South West Africa).

46. The practice of States and of the League itself bears out that non-Members were not intended to acquire rights or legal interests from the Covenant or the Mandate agreements. Thus,

(a) The United States of America, which did not join the League, entered into separate treaties with certain Mandatories in order to secure the same rights in the territories as Members of the League.[1]

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[1] *Vide* McNair, *C.L.J.*, Vol. III (1928), p. 157; Wright, *op. cit.*, p. 55.

(b) When Germany, in 1925, prior to becoming a Member of the League, raised a complaint about Mandatory administration by Belgium in Ruanda-Urundi, the Council of the League declined to reply thereto, and the Belgian Government rejected the complaint, *inter alia*, on the express grounds that the Covenant "confers rights only upon States which are Members of the League of Nations", and that "until Germany is a Member of the League of Nations, she has no title to intervene". [1]

(c) Wright [2] refers also to an Allied exchange of notes with Germany before the signature of the Covenant as clearly suggesting that Members only would be entitled to the benefits of the Covenant. One of the notes stated, *inter alia*, that "as soon as Germany is admitted to the League she would enjoy the benefit of these provisions" (i.e. of Article 23).

47. Just as League membership was a necessary qualification for a State to *obtain* any right or legal interest under the Mandate agreement *vis-à-vis* the Mandatory, the intention of the parties to the Covenant and to the Mandate instruments was equally clear that membership was a necessary qualification for a State to *retain* such right or legal interest.

As far as the Covenant is concerned, reference may again be made to the provisions referred to in paragraph 42 above. The clear, grammatical and natural construction of those provisions is that the expression "Member of the League", wherever it appeared in the Covenant, contained within itself a qualification, namely membership, which had to be satisfied *at the time when the provisions of the Covenant were sought to be invoked*, either for the exercise of a right or for the enforcement of an obligation due by another.

Any of the provisions referred to as examples in paragraph 42 can be used to demonstrate the absurd results that would follow if this construction were not adhered to, *e.g.* if the construction were to be that States which were at any time Members, would retain the covenanted rights or obligations despite and after loss of membership. The following illustrations should suffice:

The ex-Member would retain a seat and vote in the Assembly (Article 3), and could be elected a Member of the Council (Article 4); it could continue to be held liable for a contribution to the expenses of the Secretariat (Article 6); and despite the fact that it may have been expelled (in pursuance of Article 16) for an act of war, Members would still be obliged to submit information to it in regard to their armaments, military, naval and air programmes (Article 8).

It is, therefore, abundantly clear from the Covenant that the rights and benefits conferred on Member States would continue to be held by a State only while it continued to be a Member; and that,

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[1] *Vide L. of N., O.J.*, 1927, pp. 316-17. *Vide* also Wright, *op. cit.*, pp. 493-94; Hall, *op. cit.*, p. 140.

[2] Wright, *op. cit.*, pp. 494-95.

likewise, obligations and duties imposed would be binding on a State as long as its membership continued and no longer—hence the proviso in the last paragraph of Article 1 of the Covenant to the effect that a Member is allowed to withdraw voluntarily, on the two years' notice there prescribed, *only if* "all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal".

48. Again the same intention as in the Covenant is manifest from the provisions of the Mandate agreements entered into in pursuance of the Covenant.

(a) The very concept of a "Mandatory on behalf of the League", [1] tends to negative any contemplation of rights or legal interests being retained by a State after loss of its membership in the League.

(b) Attention should be drawn again to the different bases upon which it might be possible at all for rights or legal interests to be vested in League Members, as distinct from the League itself.

The *first* of these would be that the League is not regarded as a legal *persona*. On this basis the concept of a "Mandatory on behalf of the League" would have to be interpreted as meaning really a Mandatory on behalf of *the States associated in the League as Members thereof*; [2] this would logically confine Members' rights to the duration of their membership, otherwise the description would become inapt as soon as certain members left the League: for then the Mandatory would be a Mandatory "on behalf of League Members *and* certain other States". In the late 1930's this would have meant that the Mandates would have been held also "on behalf of" some fifteen States other than League Members. [3] Moreover, inasmuch as League Members would *in their very covenant of association* have authorised the Council to act as an agent on their behalf in entering into the Mandate agreements, the only natural construction would be that the authority was confined to rendering them parties to the agreements *for the purposes of their association in the League*—in other words, for as long as they should be Members of the League.

The *second* basis upon which the matter is to be considered is that the League is regarded as a legal *persona* and therefore as the party primarily represented by the Council in the contracting of the Mandate agreements. It would be surprising if, on this basis, Members could have obtained rights more durable than on the basis of the League *not* being a legal *persona* and they themselves being the principal parties represented by the Council. And, indeed, this cannot be so. For, on this basis, an intention to confer a right or legal interest upon Members themselves can only be arrived at by *inference* from the fact that certain of the provisions of the Mandate agreements would appear to have been intended for their

[1] Art. 22 of the Covenant and the Preambles to the Mandate agreements.
[2] *Vide* para. 16 (a) *supra*.
[3] *Vide* Walters, *op. cit.*, Vol. I, pp. 64-65.

benefit.[1] They would not, however, be able to point to any provision justifying an inference that they were intended to continue to enjoy the interests independently of their membership in the League.

(c) Strange anomalies, similar to those discussed in paragraph 47 above, would be involved in a suggestion that a State would continue to hold rights or legal interests by virtue of the Mandate agreements after loss of membership in the League. Such a State may have been expelled because of belligerency, and would then nevertheless be entitled to call the Mandatory to task concerning fortification of the Territory or military training of the natives. Or the cause of expulsion may have been a flagrant breach of the obligation undertaken in Article 23 (e) "to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League": and yet such State could then still insist on freedom of entry, residence and movement in the Mandated territory for its nationals as missionaries, and in the case of A and B Mandates, on "open door" privileges for all its nationals.

49. For the above reasons the conclusion follows that insofar as Members of the League were parties to and/or the holders of rights or legal interests conferred upon them by the Mandate agreements, they, in pursuance of the manifest intention of the agreements themselves, ceased to be such parties and lost such contractual rights or legal interests when they ceased to be Members of the League upon dissolution thereof.

E. FINAL OBSERVATIONS ON EFFECT OF CONCLUSIONS ARRIVED AT IN PARTS C AND D

50. The effect of the conclusions stated in Parts C and D above is that, upon the dissolution of the League, the Mandate for South West Africa lapsed in so far as its previous existence as an operative treaty or convention was concerned. Part C demonstrated that the procedural obligations, pertaining to supervision by the Council of the League, were dependent for performance on the existence of the League and lapsed for that reason upon its dissolution. Part D demonstrated that the substantive obligations lapsed insofar as they were contractual obligations owed to other international persons: they could not be owed to a non-existent League; and insofar as they may have been intended to be owed to States, they were not covenanted to be owed to any States not Members of the League. If the League had been a legal *persona* which could have been a party to a treaty or convention, it ceased to be so on its dissolution and its Members ceased to have the qualification in consequence whereof they might have been parties.

Consequently there ceased to be "in force" a "treaty or conven-

[1] *Vide* para. 16 (b) (ii) and (iii) *supra*.

tion": the party or parties with whom the agreement had been contracted, fell away, [1] as well as the contractual obligations undertaken *vis-à-vis* them; and there were no longer "provisions" to the "interpretation or application" of which a compulsory jurisdiction clause could have reference.

It follows further that insofar as any powers, rights and obligations may have survived the dissolution of the League, this would have to be in an objective or "real" sense independent of the operation of a treaty or convention.

51. The fact that upon the dissolution of the League the inhabitants of the Mandated territories continued to exist as communities for whose benefit administration in accordance with the "sacred trust" was intended, does not affect the above conclusion. Whatever might have been the position of the peoples inhabiting A Mandated areas, [2] the inhabitants of a C Mandated area could not on ordinary principles of international customary law be regarded collectively as an international person or separately as international persons.

The possibility exists that individuals, though not ordinary or full subjects of International Law, can by agreement between States be the bearers of rights in International Law in a sense and to an extent intended by the parties to such agreement. Whether such intent exists in a particular case, is always a matter for interpretation of the agreement in question. [3] The general trend of opinion appears to be that rights in International Law cannot be considered to have been conferred upon individuals unless there is covenanted for them procedural capacity to pursue their interests in an international political and/or judicial *forum*. [4]

In the case of the C Mandate agreements, although obligations imposed upon the Mandatories were undoubtedly intended for the benefit of the inhabitants of the territories, there is nothing to indicate that rights in International Law *vis-à-vis* the Mandatories were intended to be conferred upon them. Certain writers suggest that the inhabitants were, in a sense, accorded such rights in that they were permitted the facility of petitioning the League. [5] It is to be recalled, however, that there was no provision for such petitions either in the Mandate agreements or in the Covenant of the League. The Mandatories did not by international agreement undertake any obligations relative to petitions by inhabitants. Insofar as the rules of procedure regarding petitions, as laid down by the Council, required petitions from inhabitants to be forwarded through the respective Mandatories, this was in reality directed towards affording the Mandatories an opportunity of commenting on the contents of

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[1] *Vide* Part D, paragraph 39 *supra*, and the authorities quoted in footnote 1 on p. 139 *supra*.

[2] As to which *vide* Wright, *op. cit.*, p. 460.

[3] *Vide* François, *op. cit.* (2nd ed.), p. 233. Korowicz, M. St. "The Problem of the International Personality of Individuals", *A.J.I.L.*, Vol. 50, (1956), pp. 536, 561.

[4] *Ibid.*

[5] *Vide e.g.* Wright, *op. cit.*, p. 457.

the petitions.[1] If there could be said to have been an obligation upon the Mandatories to forward the petitions to the League, the obligation was of a procedural nature only, concerning the Mandatories' relationship with the League; and it was not of the nature of an obligation towards the inhabitants undertaken by treaty or convention. Moreover, although inhabitants could *submit* petitions, they had no capacity of *pursuing* such petitions in the proceedings of the League itself; even consideration of the petitions depended entirely upon the will of the Members and Organs of the League. In all these circumstances it seems erroneous to suggest that the facility for submitting petitions was to be regarded as a right in International Law, vested in the inhabitants *vis-à-vis* the Mandatories.

However, even if such a suggestion could be countenanced, the "right" involved therein would have been dependent entirely on the existence of the supervisory body. Upon the dissolution of the League and the consequent lapse of the Mandatories' obligation to report and account to the Council as supervisory organ, the very basis of the suggested "right" on the part of the inhabitants also fell away.

In the result no possibility exists of the inhabitants having rights which involve any procedural capacity for them in an international *forum*, whether political or legal. If they could possibly be said to have rights in International Law in any other sense, such a proposition would have to be founded on some basis other than international treaty or convention.

52. Although there could be controversy on the question whether the "sacred trust" and "tutelage" intended for the benefit of the inhabitants are now to be regarded as falling within the realm of International Law at all, or whether they are matters of domestic law or of morality only,[2] a decision thereon is not necessary for the purposes of Respondent's objection to jurisdiction in the present case. For that question concerns the nature and scope of aspects of the Mandate institution which could only exist, if at all, independently of the continued operation of the Mandate as a treaty or convention—also referred to in the Advisory Opinion of 1950 as corresponding to "real" rights and obligations.[3] Whatever nature and extent may be assumed for such aspects of the Mandate institution, the contention that the Mandate has ceased to operate as a treaty or convention is not affected.

53. As has been referred to in paragraph 2 above, Applicants rest their claim to jurisdiction on Article 7 of the Mandate for South West Africa, read with Article 37 of the Statute of the Court. Respondent has also pointed out that inasmuch as Article 7 provided for reference to the Permanent Court of International Justice,

[1] *Vide* Chap. II, Part A, para. 14 *supra*.
[2] *Vide e.g.* uncertainty expressed by the United Nations Special Committee on Palestine, para. 34 (b) *supra*.
[3] *Vide* para. 3 *supra*.

Article 37 of the Statute is a necessary link in the chain of Applicants' claim,[1] and that Applicants must therefore perforce base such claim on the contention that the obligation to submit to compulsory jurisdiction, as originally covenanted in Article 7 of the Mandate agreement, still exists as a *provision* of a "*treaty or convention in force*".

A contention that the obligation in question survived the dissolution of the League as an aspect of the Mandate institution which was independent of the continued operation of the Mandate as a treaty or convention, would in Respondent's submission be untenable. An obligation of a State to submit to the jurisdiction of an international Court at the instance of specified other States, must rest on operative *agreement* or *consent* to that effect—in other words it must necessarily be "contractual" in nature and cannot possibly be said to be something "real" pertaining to title to or the status of a territory. So, also, Article 7 of the Mandate for South West Africa bound Respondent as long as it was part of an operative convention or treaty, and no longer. But even if such a contention could be tenable, it would not avail the Applicants, inasmuch as it would not bring their claim within the provisions of Article 37 of the Statute.

54. For the reasons that have been advanced in this Chapter, Respondent submits that the basic premise of the Applicants' claim to jurisdiction does not apply. The Mandate could have survived the League of Nations, if at all, only as an institution existing independently of treaty or convention. In the sense that the Mandate was, in the time of the League of Nations, a treaty or convention with "provisions" operating between international persons, which "provisions" could give rise to disputes between the parties thereto or between the Mandatory and States having legal interests therein, and which provisions included in their number an Article 7, providing for reference of such disputes to the Permanent Court of International Justice—it is in the sense of being such a treaty or convention that the Mandate has lapsed and is no longer "in force" within the meaning of Article 37 of the Statute of the Court.

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[1] *Ibid.*, para. 2.

CHAPTER IV

SECOND OBJECTION

THE ALLEGED DISPUTE IS NOT BETWEEN RESPONDENT AND "ANOTHER MEMBER OF THE LEAGUE OF NATIONS" IN TERMS OF ARTICLE 7 OF THE MANDATE.

1. In this Chapter Respondent deals with its Second Objection, namely, that even if there could be said to exist a "treaty or convention in force", in terms of Article 37 of the Statute of the Court, to the provisions of which Article 7 of the Mandate could have application, the Applicants have no *locus standi* inasmuch as they both ceased to be Members of the League of Nations at its dissolution in April, 1946. [1]

2. Each of the Mandate instruments contained identical provisions (save for an addition in the case of the Mandate for Tanganyika) for compulsory jurisdiction of the Court, in the following terms:

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

For the Court to have jurisdiction by virtue of the aforesaid provisions there must be concurrence of all the following essential conditions, namely:

(a) there must be a "dispute";

(b) the dispute must exist "between the Mandatory and another Member of the League of Nations";

(c) the dispute must relate to "the interpretation or application of the provisions of the Mandate";

(d) it must be established that the dispute "cannot be settled by negotiation".

This particular Objection involves only the one essential requirement mentioned in (b) above, namely, that because Applicants are not Members of the League of Nations the alleged dispute is not with "another Member of the League of Nations".

[1] *Vide* Applicants' *Memorials*, p. 90.

3. In construing the expression "another Member of the League of Nations" in Article 7 of the Mandate agreement, the following accepted rules of interpretation are applicable:

(a) The Mandate instrument records the terms of the Mandate as "defined" by the Council of the League of Nations, acting for the League and/or its Members on the one hand, and accepted by the Mandatory on the other hand. [1]

In the interpretation thereof effect must accordingly be given to the common intention of the parties, which must be ascertained from the language used by them, read in the light of the circumstances prevailing at the time when the instrument was drafted and the Mandate accepted upon the terms therein defined. [2] Circumstances arising thereafter, unless and except insofar as they result in an alteration of the terms of the Mandate *by agreement of the parties concerned*, cannot be relied upon to give any article in the Mandate instrument a meaning other than that which it was originally intended to have. [3]

(b) The doctrine of *in pari materia* permits of reference to contemporaneous instruments covering the same field as, and intimately linked with, the Mandate instrument in question as an aid towards ascertaining the intention involved in a particular provision in the Mandate.

Thus in the *Mavrommatis Case* where the Court was concerned with the interpretation of an article in the Mandate for Palestine, reference was made to the Mandate for Tanganyika. [4]

(c) There must be observance of the rule that international engagements purporting to confer jurisdiction on the Court ought to be strictly interpreted, and unless it is clear that the parties agreed to confer jurisdiction over the concrete case, jurisdiction should be declined. [5]

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[1] *Vide* Preamble to the Mandate.

[2] *Vide Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, P.C.I.J., Ser. A/B, Fasc. No. 50, 15th November, 1932, p. 383—"the words have no value except as an expression of the intention of the parties"; McNair, *op. cit.*, p. 185. On contemporaneity, *vide* Fitzmaurice, G. "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty points", *B.Y.B.I.L.*, (1957), pp. 203-04, 212.

[3] Sir Gerald Fitzmaurice stresses in this respect what he terms "the principle of Contemporaneity" as "a major principle" of treaty interpretation, *inter alia*, for the reason that "Unlike private contracts, the average duration of which is relatively short, treaties may endure for considerable periods and even for centuries". (*B.Y.B.I.L.* (1957), pp. 203-04).

[4] *The Mavrommatis Palestine Concessions*, P.C.I.J., Ser. A, No. 2, 30th August, 1924. *Vide* dissenting opinions of Judges Moore and de Bustamante at pp. 61 and 82 respectively. *Vide* also *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, P.C.I.J., Ser. A/B, Fasc. No. 50, 15th November, 1932, pp. 380-81.

[5] *Case concerning the Factory at Chorzów*, P.C.I.J., Ser. A, No. 9, 26th July, 1927, p. 32; *Phosphates in Morocco*, P.C.I.J., Ser. A/B, Fasc. No. 74, 14th June, 1938, pp. 23-24; Rosenne, S. *The International Court of Justice* (1957), pp. 260, 318-20. *Vide* also *The Mavrommatis Palestine Concessions*, P.C.I.J., Ser. A, No. 2, 30th August, 1924, pp. 16-19.

As Lauterpacht states:

> "The Court ... has emphasised repeatedly the necessity for extreme caution in assuming jurisdiction, which must be proved up to the hilt. Numerous Judgments show the Court as 'bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given'. [1] Nothing should be done which creates the impression that the Court, in an excess of zeal, has assumed jurisdiction where none has been conferred upon it". [2]

4. The provisions of Article 7 of the Mandate could be invoked by other Members of the League of Nations for the enforcement of the Mandatory's obligations in which they had a legal interest, insofar as such interest was intended to be justiciable.

In Chapter III above the legal interest of Members in the obligations imposed on the Mandatory were stated to have been as follows, depending on whether the League of Nations was a legal *persona* or not, *viz:*

(a) On the basis that the League was *not* a legal *persona*, all the contractual obligations would have been owed to the Members of the League, who would then as Members have had a legal interest in the observance by the Mandatory of all such obligations. [3]

(b) On the basis, however, that the League *was* a legal *persona*, the said obligations would have been owed to the League itself; and Members of the League would have had a legal interest in such obligations *vis-à-vis* the Mandatory only insofar as the latter's obligations were intended to operate for the benefit of Members and their nationals (in addition to operating for the benefit of the inhabitants of the Mandated territory). [4]

It is not necessary for the purposes of this Objection to deal with the nature and compass of the disputes intended to be justiciable under the compulsory jurisdiction clause, a matter which will be dealt with fully in Chapter V below. It is, therefore, unnecessary in considering this Objection, to decide whether the legal interests of Members were as stated in paragraph (a) above or as stated in paragraph (b) above and to what extent such interests were intended to be justiciable.

Although Respondent denies, for the reasons stated in Chapter V below, that the alleged dispute raised by Applicants is justiciable under the compulsory jurisdiction clause, Respondent will for the purposes of the argument in this Chapter assume the widest possible ambit (during the lifetime of the League) of Members' legal interests and of the compulsory jurisdiction clause. In other words, Respondent will for the said purposes assume that Members of the League

[1] As quoted from the *Mavrommatis Case.*

[2] Lauterpacht. *The Development of International Law by the International Court* (1958), p. 91.

[3] *Vide* Chap. III, para. 17 (a) read with para. 16 (a) *supra.*

[4] *Ibid.*, para. 17 (b) read with para. 16 (b).

had a legal interest in all the substantive obligations imposed by the Mandate, even where these obligations were intended solely for the benefit of the inhabitants, and will also assume that the compulsory jurisdiction clause was intended to apply in respect of all such obligations.

Respondent's submission is that, on the wide assumption stated, and *a fortiori* on the basis of any narrower ambit of Members' legal interests and of the compulsory jurisdiction clause, the Applicants are not qualified to invoke the said clause in that neither of them is "another Member of the League of Nations".

5. The Mandate agreements were entered into in pursuance of Article 22 of the Covenant of the League of Nations. In Chapter III above it has been shown that upon a proper and detailed analysis of the Covenant the expression "Member of the League" wherever it appears in that document contains within itself a qualification, namely, membership, which must be satisfied at the time when the provisions of the Covenant are sought to be invoked both for the exercise of a right and for the enforcement of an obligation due by another. [1]

Likewise it has been shown that, insofar as the Mandate instruments incorporated obligations for the benefit of Members of the League, such benefits were intended to be enjoyed by a State only while it continued to be a Member. [2]

Upon termination of its membership a State ceased to be qualified for the enjoyment of such benefits and therefore lost its legal interest in the observance of the said obligations. In respect of obligations imposed solely for the benefit of the inhabitants of Mandated territories the position was exactly the same insofar as other Members of the League had any legal interest in the observance thereof by the Mandatories. Upon termination of membership such legal interest would also have disappeared. [3]

It is precisely for the reasons aforestated that the compulsory jurisdiction clauses in the Mandate instruments were so worded as to make the provisions thereof available to Members of the League only. Once a State ceased to be a Member of the League it lost its legal interest in the administration of the Mandates [4] and the very reason for affording it a voice in the affairs of Mandated territories would have disappeared. Such a State would then have no right to participate in League debates or resolutions concerning Mandates and would not be entitled to implead the Mandatory before the Court in terms of the compulsory jurisdiction clause.

That State would stand in exactly the same position as a State which, never having been a Member of the League and therefore

[1] *Vide* Chap. III, paras. 41-44, 46-47 *supra*.
[2] *Ibid.*, paras. 45, 46, 48.
[3] *Ibid.*, para. 49.
[4] Except for a Mandatory in respect of its own Mandate.

never having had a legal interest in the administration of Mandated territories, was not intended to exercise any rights *vis-à-vis* the Mandatory either in the Organs of the League or by judicial process.

6. In looking at the matter from the viewpoint of the parties to the Mandate instruments, it could never have been the intention of the Council of the League that a State which had ceased to be a Member of the League, should be entitled to implead before the Court a Mandatory of the League with regard to the administration of a Mandated territory—a matter in which such State, by reason of termination of its membership, had no further legal interest. Any contrary view must permit of the strange result that such a State, though having no longer a seat in the League of Nations and being unable to raise in the League for its consideration a matter concerning the interpretation or application of the provisions of the Mandate, could nevertheless raise the very same matter in contentious proceedings before the Court, possibly even in conflict with an attitude unanimously resolved upon by the Council.

Nor can it be conceived that the respective Mandatories, in agreeing to the terms of the compulsory jurisdiction clause, intended to accept compulsory jurisdiction at the instance of a State which, though at one time a Member of the League, had ceased to be such.

The above observations would be all the more forcible if it should be held (contrary to the submission in Chapter V below) that the compulsory jurisdiction clause entitled a State to refer to the Court also matters which did not affect itself or its subjects, but solely concerned the interests of the inhabitants of the Mandated territory.

The Mandatory, even though it may have been exercising its Mandate in complete accordance with the views of the League, may nevertheless then still have been obliged to entertain negotiations with, and be subject to judicial proceedings instituted by, a State which was no longer a League Member and which held a view with regard to aspects of Mandate administration in conflict with that of the Mandatory and the League itself.

This could not have been the intention of the parties to the Mandate instruments.

That the League itself regarded membership as a qualification for the questioning by another State of the administration of Mandated territories is evidenced by the League's refusal to answer the complaints of Germany, made when the latter was not a Member of the League, with regard to the administration by Belgium of the Mandated territory of Ruanda-Urundi. [1]

It is submitted that the League would have adopted the same attitude if this question had arisen after termination of Germany's

[1] A matter dealt with in Chap. III, para. 46 *supra*.

membership of the League, and that Germany would not then, upon the League's refusal to entertain its complaint, have been entitled to raise the same complaint in contentious proceedings before the Court.

7. It is submitted that by application of the doctrine of *in pari materia* support for the contention advanced by Respondent is found in the use of the expression "Member of the League of Nations" in the provisions of all the Mandate instruments.

This expression was used in all the B and C Mandates where provision was made for rights of entry, movement and residence to be enjoyed by missionaries who were nationals of "*any State Member of the League of Nations*".[1]

Pursuant to paragraph 5 of Article 22 of the Covenant, all the B Mandates provided for equal opportunities for the trade and commerce of other "*Members of the League of Nations*" in the said Mandated territories. [2]

Somewhat similar provisions in favour of "*Members of the League of Nations*" were contained in some of the A Mandates. [3]

In all the aforesaid provisions the expression "*Member of the League of Nations*" could have been used in one sense only, namely Members at the time when the intended privilege was sought to be enjoyed, and not as including States which had ceased to be Members of the League.

There is not one instance in which the said expression was used in another sense in any other provision of the Mandate instruments.

When, therefore, the compulsory jurisdiction clause in each of the Mandate instruments contained an identical expression, it seems evident that, in the absence of a clear indication to the contrary, it was intended to bear in that clause the same meaning as in the other provisions of the Mandate instruments.

8. If, despite the considerations mentioned in paragraphs 6 and 7 above there should still be uncertainty as to whether it was intended that a State which had ceased to be a Member of the League should be entitled to invoke the compulsory jurisdiction provision in the Mandate instruments, then it is contended that, in conformity with the rule of strict interpretation as mentioned in paragraph 3 (c) above, a conclusion that the Court has jurisdiction would not be justified.

A contention to the effect that a State which is in fact no longer a Member of the League, could nevertheless claim still to be "another Member of the League of Nations" within the meaning of

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[1] *Vide e.g.* British Mandate for Tanganyika (Art. 8); Belgian Mandate for Ruanda-Urundi (Art. 8); Mandate for German Samoa (Art. 5); Mandate for South West Africa (Art. 5). (*U.N. Doc.* A/70.)

[2] *Vide e.g.* British Mandate for Togoland (Art. 6); British Mandate for Tanganyika (Art. 7); Belgian Mandate for Ruanda-Urundi (Art. 7). (*U.N. Doc.* A/70.)

[3] *Vide e.g.* Mandate for Syria and the Lebanon (Art. 11); Mandate for Palestine (Art. 18). (*U.N. Doc* A/70.)

Article 7 of the Mandate Agreement, must, to say the least, rest on a strained and unnatural interpretation of that Article. Such an interpretation is in general to be avoided, but more particularly so in the case of a compulsory jurisdiction clause, which requires strict interpretation.

9. For the reasons aforestated, it is submitted that on a proper construction of Article 7 of the Mandate for South West Africa it follows not only from the clear and unambiguous language of the Article, but also by application of the accepted rules of interpretation that a State is entitled to refer to the Court a dispute such as mentioned in the said Article only if at the time when the provisions of the Article are invoked that State is a Member of the League of Nations.

10. In their treatment of this aspect of jurisdiction the Applicants:

(a) make the submission that as Members of the League, they had a legal interest in the proper exercise of the Mandate;

(b) state that the question before the Court is whether their legal interests have survived the dissolution of the League;

(c) submit that the phrase "'another Member of the League of Nations' as used in Article 7 of the Mandate should be construed as *referring to former members of the League, as well as to members of the United Nations*".[1] (Italics added.)

For the purposes of this Objection, Respondent does not dispute that during the lifetime of the League, the Applicants, as Members thereof, had certain legal interests in the proper exercise of the Mandate.[2]

For the reasons previously herein stated, Respondent submits that the said interests did not survive the dissolution of the League: once the Applicants' membership of the League terminated, they lost their legal interests; and having lost their legal interests they stood in the same position as States that had never been Members of the League.

But in any event the decisive question relative to jurisdiction is not whether Applicants' interests have survived the dissolution of the League, but whether Applicants have the qualification (membership of the League) which the parties to the Mandate instrument (*i.e.* the Council of the League and the Mandatory) intended, according to the express provisions of Article 7, that prospective applicants should have in order to invoke the said Article. Clearly the answer to the question is in the negative.

Applicants' submission as to the construction of the expression "another Member of the League of Nations" as used in Article 7 is untenable in law because:

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[1] Applicants' *Memorials*, p. 90.

[2] *Vide* para. 4 *supra*.

(i) it requires the insertion in the Article of words not meant to be there (*i.e.* the words "*former*" as well as "*and members of the United Nations*"); and thereby, in effect, attributes to the Council of the League and to the Mandatory in the year 1920 when the Mandate terms were agreed upon, knowledge of the dissolution of the League and the establishment of the United Nations which came about some twenty-five years thereafter;

(ii) by such insertion of words the scope of the Article is altered in order to make provision for something contrary to the clear intention of the Council of the League and the Mandatory—*i.e.* interference with Mandate administration by States not being Members of the League;

(iii) it would result in the subjection of the Mandatory to jurisdiction which the Mandatory had never consented to.

On the Applicants' approach to this matter, Article 7 must be construed *not* as a provision in an instrument framed at the inception of the League of Nations, when dissolution of the League and creation of the United Nations were not in contemplation, *but* as an instrument framed at the time of, and in contemplation of, the dissolution of the League—which in fact it is not.

11. The Applicants' submissions on this aspect of jurisdiction include a reference to the 1950 Advisory Opinion of the Court. In the proceedings in Court in connection with the said Opinion, Dr. Steyn, who appeared on behalf of Respondent, advanced the contention that by reason of the dissolution of the League there were no longer any States which could invoke Article 7 of the Mandate. He appears to have regarded this contention as a legal proposition which did not require further argument. The opinion of the majority of the Judges with regard to the application of Article 7 of the Mandate was expressed in the following passage of the Opinion, *viz*:

> "According to Article 7 of the Mandate, disputes between the mandatory States and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, if not settled by negotiation, should be submitted to the Permanent Court of International Justice. Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that *this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions*". [1] (Italics added.)

It is not clear what conclusion was intended to be conveyed by the words italicized above. [2]

[1] "*International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*", p. 138.
[2] As was also pointed out by Rosenne, *op. cit.*, p. 282.

As has been stated in paragraph 1 above, Respondent assumes for the purposes of the argument in this Chapter that, contrary to the contention advanced in Chapter III above, the Mandate, including Article 7, still exists as a treaty or convention in force.

If the words in the Court's Opinion, as italicized above, were intended to mean that Article 7 still stands as part of the Mandate instrument and that the Mandatory would be obliged to accept the jurisdiction of the Court according to the provisions of Article 7, then, upon the assumption aforestated, the literal correctness of what the Court stated cannot be denied. But in the application of the provisions of Article 7 it must then follow that the Mandatory is obliged to accept the jurisdiction of the Court only at the instance of Members of the League of Nations—and since the dissolution of the League there are no longer States of that capacity.

If, on the other hand, the words in question were intended to convey an opinion that the Mandatory is obliged to accept the jurisdiction of the Court at the instance of a State which is no longer a Member of the League, then it is submitted, with respect, that no reason in law is advanced, or can be advanced, to arrive at that conclusion.

Article 37 of the Statute of the Court reads as follows:

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

This Article goes no further than to substitute the International Court of Justice for the Permanent Court of International Justice in treaties and conventions containing a reference to the latter.

Its effect could merely be to read Article 7 of the Mandate as if it provided as follows:

> "The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the International Court of Justice".

When Article 37 of the Statute of the Court was accepted by the Signatories to the Charter of the United Nations in the year 1945, the League of Nations was still in existence and it continued in existence until April, 1946. Article 37 of the Statute does not in terms, and was not intended to, amend treaties or conventions by altering qualifications upon which the right to refer a dispute to a tribunal or the Court was dependent—it merely substituted a new forum for the adjudication of disputes. [1]

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[1] "*Ambatielos case (jurisdistion), Judgment of July 1st, 1952 : I.C.J. Reports 1952*", p. 39. *Vide* also Hudson, *A.J.I.L.*, Vol. 45 (1951), p. 15; Rosenne, *op. cit.*, p. 282.

Article 80, paragraph 1, of the Charter, also accepted by the Signatories to the Charter when the League of Nations was still in existence, merely provides that nothing in Chapter XII of the Charter (dealing with the International Trusteeship System) "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".

This Article deals therefore with the construction and application of Chapter XII of the Charter and does not, and was not intended to, serve in the interpretation of other instruments, nor to effect alterations in other instruments. [1]

To suggest that Article 80, paragraph 1, of the Charter has any bearing on the question whether States, not being Members of the League of Nations, can exercise rights under Article 7 of the Mandate, would be to apply Article 80, paragraph 1, for a purpose for which it was not intended; and to conclude that by virtue of the said paragraph, Article 7 of the Mandate is still in force (in the sense that its provisions can be invoked by States not being Members of the League of Nations) would run counter to the very object embodied in Article 80, paragraph 1, of the Charter.

12. The Applicants further quote in support of their submissions, certain statements extracted from the Separate Opinion of Judge McNair. [2]

Respondent cannot, with respect, accept the said statements as being correct legal conclusions, and with regard thereto the following submissions are made:

(a) Judge McNair's statement:

> "*Every State which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate*". [3] (Italics added).

Judge McNair does not appear to have taken into account the very basis upon which States were accorded a legal interest in the administration of the Mandate, namely membership of the League. From this basis, as indicated in paragraph 5 above, it followed that membership was a qualification for the continued existence of that legal interest and in the result also a qualification for enforcement of that interest through the compulsory jurisdiction provision in the Mandate instrument.

All States who were Members of the League at its dissolution, like all States that had ceased to be Members *prior* to dissolution, lost the qualification for having a legal interest in the adminis-

[1] *Vide* Hudson, *A.J.I.L.*, Vol. 45 (1951), pp. 14-15; Nisot, *S.A.L.J.*, Vol. 68 (1951), pp. 278-79; Schwarzenberger, *op. cit.* (3rd ed.), Vol. I, p. 105.

[2] Applicants' *Memorials*, p. 90.

[3] "*International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*", p. 158.

tration of the Mandate, and therewith their right to invoke Article 7 of the Mandate automatically disappeared.

The learned Judge did not state upon what reasoning a distinction could in law be drawn, as he apparently did, between League Members which ceased to be such *prior to* the dissolution of the League and States which, though Members at the time of dissolution, ceased to be such *by reason of* dissolution.

There can in law be no distinction, because in whatever way membership terminated the result was the same, namely a loss of the erstwhile legal interest and of the qualification provided for in Article 7 of the Mandate.

(The comment in this paragraph applies also to the view expressed by Judge Read in his Separate Opinion namely:

> "... the legal rights and interests of the Members of the League in respect of the Mandate survived with one important exception—in the case of Members that did not become parties to the Statute of this Court, their right to implead the Union before the Permanent Court lapsed".) [1]

(b) Judge McNair's statement:

> "... *I have endeavoured to show that the agreement between the Mandatory and other Members of the League embodied in the Mandate is still 'in force'. The expression 'Member of the League of Nations' is descriptive, in my opinion, not conditional, and does not mean 'so long as the League exists and they are Members of it'* ".[2] (Italics added).

Even if the view expressed in the first part of the above passage is correct, namely, that the agreement between the Mandatory and other Members of the League is still in force, it can only be in force in accordance with its provisions, and its provisions accord the benefit of Article 7 only to Members of the League of Nations.

As already shown, the Mandate instrument provided for the exercise and enjoyment of rights by Members of the League, but, only as long as they continued to be Members.

To say that Article 7 of the Mandate must be so interpreted that the expression "Member of the League of Nations" is descriptive and not conditional, is in direct conflict with the intended meaning of that expression not only in each and every one of the Mandate instruments, but also in the whole Covenant. The absurd consequences which would follow from such an interpretation have been demonstrated in paragraphs 47 and 48 (c) of Chapter III above.

Moreover, as a description, the expression, in the context of Article 7, would be meaningless unless qualified with reference to a point of time, and the following comment by Manley O. Hudson seems justified:

> "Judge McNair expressed the view that this expression is 'descriptive, not conditional', and that it does not mean *so long as*

[1] *Ibid.*, p. 169.
[2] *Ibid.*, pp. 158-59.

the League exists and they are Members of it. Yet what States does it describe? Does the phrase mean another State which was a Member of the League of Nations on December 17, 1920? If so, Brazil would be included, though it withdrew from the League of Nations in 1923, and Egypt and Mexico would be excluded because they were admitted to the League of Nations at later dates. Does the phrase now mean another State which was a Member of the League just prior to its dissolution? Judge McNair seems to have been willing to give it this import. Yet some States in this category—for example, Portugal, whose territory borders on South West Africa—may not now be 'States entitled to appear before the Court'. In any event, the meaning is so imprecise that perhaps the Court might have shown more hesitance in declaring the replacement to be made in the second paragraph of Article 7 of the Mandate". [1]

To this criticism can be added the comment, that if the description applies, as Judge McNair appears to have applied it, at the date of dissolution of the League, there must be attributed to the framers of the Mandate instrument a contemplation of dissolution of the League and some special arrangement for the maintenance of the Permanent Court of International Justice after the dissolution of the League or for the establishment of some other tribunal in the place thereof. Alternatively, the description would have had to apply to all States that at some time or another were Members of the League—and then it is not clear on what basis Judge McNair excluded States that had ceased to be Members *prior* to dissolution, as he apparently did.

The Applicants' submission that "the basic principles of the Mandate System and the means devised by the League of Nations for their enforcement affirm the soundness of this [Judge McNair's] reasoning", [2] can only be based on a misconception. The basic principle of the Mandate System was the administration of Mandated territories by Mandatories who consented to administer the said territories subject to explicit conditions and to *certain agreed and accepted forms of supervision.*

Even if the functions of the Court under Article 7 of the Mandate can be regarded as of a supervisory nature (contrary to Respondent's contention in Chapter V hereafter), then in neither of the forms of supervision devised by the League of Nations and agreed to by the respective Mandatories was it intended that States which were not Members of the League should have any participation: they were denied any say in the supervision exercised by the League itself and in terms of the respective Mandate instruments they were not included as States entitled to invoke the so-called supervision of the Court.

13. In the premises aforestated Respondent respectfully submits that, although certain views were expressed in the 1950 Advisory

[1] Hudson, *A.J.I.L.*, Vol. 45 (1951), p. 16.
[2] Applicants' *Memorials*, p. 90.

Opinion with regard to the aspect of jurisdiction dealt with in this Chapter, the matter requires reconsideration in full, inasmuch as:

(a) it was not formulated as a specific question for the Court's consideration and was not fully dealt with in the argument presented to the Court for the purposes of the said Opinion;

(b) the considerations dealt with in paragraphs 3 to 9 above may, in the absence of a full argument, not have been present in the mind of the Court;

(c) the view expressed in the Opinion of the Majority of the Court is not clear, and it is not apparent from the Opinion what relevance Article 80, paragraph 1, of the Charter had in the mind of the Court;

(d) the views expressed by certain of the Judges in their Separate Opinions are open to the criticism advanced in paragraph 12 above; and

(e) on this aspect also the 1950 Opinion was critically received by writers on International Law (as referred to in paragraphs 11 and 12 above).

14. The remainder of the Applicants' submissions on this aspect of jurisdiction can be summarised as follows:

(a) each Member of the League of Nations had a legal interest in the administration of the Mandate;

(b) such interest was to be exercised ultimately through invoking the compulsory jurisdiction of the Court;

(c) judicial supervision is an indispensable feature of the Mandate System since, if administrative supervision should fail, there is no other method of enforcing the "sacred trust";

(d) if the Mandate is in force, judicial supervision must likewise be in force, since the former is empty without the latter;

(e) unless the Applicants are entitled to institute a contentious proceeding there is no method of obtaining an enforceable decision. If that were so, judicial supervision over the Mandate would be a nullity.

It is not disputed that each Member of the League of Nations had certain legal interests (as dealt with in paragraph 4 above) in the administration of the Mandate, and that in terms of Article 7 of the Mandate each such Member could invoke the compulsory jurisdiction of the Court for the enforcement of such legal interests.

The Applicants' further reasoning is, however, based on the premise that "judicial supervision is an indispensable feature of the Mandate System". Whether the function of the Court under the compulsory jurisdiction clauses in the Mandates can be regarded as of a supervisory nature will be dealt with in Chapter V hereafter. But, even assuming for the purposes of the argument in this Chapter

that it could be so regarded, Respondent denies that it was an indispensable feature of the Mandate System.

Article 22 of the Covenant made specific provision only for supervision by the League of Nations, and even that form of supervision was regarded by the Court in the 1950 Advisory Opinion as an "important part", [1] and therefore, by deduction from that Opinion, not an indispensable feature of the Mandate System.

If judicial supervision had been considered by the framers of the Covenant to have been a very important, let alone indispensable, feature of the Mandate System, one would have expected mention thereof to have been made in the Covenant.

In any event there is no reason why the Mandate, as an institution, cannot continue in existence without a form of judicial supervision. In this respect Respondent respectfully draws attention to the fact that the Applicants seek to identify, in essence, the Trusteeship System under the United Nations with the Mandate System under the League of Nations; [2] and it is interesting to note that in some Trusteeship Agreements there is no provision for compulsory jurisdiction of the Court.

So, for instance, despite the fact than an article on compulsory jurisdiction similar to Article 7 of the South West Africa Mandate, appeared in the former Japanese Mandate (Article 7), the United States did not include an analogous article in the draft Trusteeship Agreement for that territory proposed by it to the Security Council. [3] Nor was this omission ever commented on during the relevant debates in the Security Council, let alone rectified. [4]

Similarly, articles relating to the compulsory jurisdiction of the Permanent Court of International Justice *did* appear in the Mandate instruments for Nauru and New Guinea—but analogous articles did *not* appear in the draft Trusteeship Agreements for these territories submitted to the General Assembly by Australia. Here also the lengthy debates in the General Assembly do not reveal that there were any proposals by Members of the United Nations—including both Applicants—that this omission be rectified on the ground that judicial supervision is indispensable. In this instance the omission was more pertinently brought to the General Assembly's attention by the fact that the other draft Trusteeship Agreements which were simultaneously considered and approved, did contain such articles.

In the light of these events it does not seem that "judicial supervision" was regarded by the Members of the United Nations as an "indispensable feature" of the Trusteeship System.

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[1] "*International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*", p. 136.

[2] Applicants' *Memorials*, pp. 104-105.

[3] *S.C., O.R., Second Year, Sup.* No. 8.

[4] *S.C., O.R., Second Year,* Nos. 20, 23, 25, 30 and 31.

If, contrary to the Applicants' contention, judicial supervision is not an indispensable feature of the Mandate System, then, whatever its importance may be, the Applicants' premise would be wrong and the whole argument formulated thereon would collapse.

If, however, the Applicants should be correct in their premise, the further reasoning that, because judicial supervision is an indispensable feature of the Mandate System, then, if the Mandate is still in force, judicial supervision must likewise be in force, shows an illogical approach to the whole enquiry before the Court. The very fact that an indispensable feature of the System is no longer operative may well provide support for Respondent's argument as contained in Chapter III above, that the Mandate has lapsed in the sense there stated.

In any event, it does not follow, because judicial supervision may be desirable, or even indispensable, that that consideration confers jurisdiction on the Court.

Compulsory jurisdiction of the Court can only arise by consent of the Mandatory and that consent was given only to the extent and upon the terms stated in Article 7 of the Mandate.

To ask the Court to hold that compulsory jurisdiction exists, not by virtue of the consent of the party impleaded before the Court, but by virtue of a so-called necessity for such jurisdiction, is to demand the performance of a function beyond the competency of the Court. [1]

15. In the premises it is submitted that the Court has no jurisdiction to hear, or adjudicate on, any of the matters raised by the Applicants, in their Applications and *Memorials* inasmuch as the Applicants, not being Members of the League of Nations, are not entitled in law to invoke the provisions of Article 7 of the Mandate and have, accordingly, no *locus standi* before the Court.

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[1] *Vide* Art. 36 of the Statute of the Court in terms whereof the jurisdiction of the Court, save in so far as it is founded on declarations in accordance with Art. 36(2), comprises only cases which the parties refer to it and all matters specially provided for in the Charter or in treaties or conventions in force.

CHAPTER V

THIRD OBJECTION

The Alleged Conflict or Disagreement Is not a "Dispute" as Is envisaged in Article 7 of the Mandate.

1. Respondent's Third Objection, dealt with in this Chapter, is that the alleged conflict or disagreement between Applicants and Respondent is not a "dispute" as envisaged in Article 7 of the Mandate.

Before proceedings could be instituted by a Member of the League of Nations under the provisions of Article 7 of the Mandate, there had to be, in terms of the said Article, a "dispute" between that Member and the Mandatory relating to the interpretation or application of the provisions of the Mandate.

With regard to the subject-matter of the alleged dispute, the Applicants' *Memorials* contain the following statement:

> "The Applicant alleges, and the Union has denied, that the Union has violated and is violating Articles 2, 4, 6 and 7 of the Mandate. There is therefore a dispute concerning both the interpretation and the application of these Articles of the Mandate". [1]

For the reasons hereinafter set forth, Respondent contends that, because of its subject-matter, the alleged conflict or disagreement is not a "dispute" envisaged for adjudication by the Court in terms of Article 7 of the Mandate—more particularly in that the said conflict or disagreement does not affect any material interests of the Applicant States or their nationals.

It will be assumed for the purposes of this Objection that, despite the dissolution of the League, Applicants would still be entitled to invoke the provisions of Article 7 in an appropriate case.

2. As a matter of logic, conflicts between parties are generally justiciable only when their rights or legal interests are involved.

Courts of law are not concerned with conflicts, differences of opinion or opposite views unconnected with the rights or legal interests of the litigants. It is submitted that the position is the same in International Law. International Courts exist for the adjudication and settlement of claims arising from legal rights or legal interests and are not there for judicial expression on differences of opinion or on conflicts of views between States, unrelated to their legal rights or interests.

The Court, of course, has a discretion to respond to a request for an advisory opinion on any legal question, even though the question may not involve legal rights of the organisation or body which asks for the opinion; but that is so by virtue of specific provisions in the

[1] Applicants' *Memorials*, p. 91.

Charter of the United Nations (Article 96) and the Statute of the Court (Article 65). Advisory opinions are an exceptional form of process and the right to request such an opinion is limited to the General Assembly, the Security Council and other Organs of United Nations and Specialised Agencies which may be authorised by the General Assembly to make such a request. States have no such right. The position with regard to advisory opinions was the same in the Permanent Court of International Justice, also by virtue of express provision in the Covenant of the League of Nations (Article 14) and the relevant Rules of Court. [1]

3. There is no indication in Article 7 of the Mandate instrument, or in any other part thereof, that the word "dispute" was intended to convey a notion other than the generally accepted legal meaning; namely, a disagreement or conflict between the Mandatory and another Member of the League concerning the legal rights or legal interests of the latter in the provisions of the Mandate.

The words "any" and "whatever" flanking the word "dispute" in the Article, cannot give to the latter word a meaning wider than its ordinary connotation in law.

In the *Mavrommatis Case* the Permanent Court of International Justice, in dealing with Article 26 of the Mandate for Palestine (which clause is identical to Article 7 of the Mandate for South West Africa), defined the word "dispute" as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". [2]

The Court was, however, careful in demonstrating that the Applicant had itself a right or legal interest in the subject-matter of the dispute then before the Court.

Thus said the Majority of the Court:

> "It is an elementary principle of international law that a State is entitled to protect its subjects, *when injured* by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, *a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law*". [3] (Italics added.)

In each of the five dissenting judgments in the said case, although there is no direct statement to that effect, the reasoning of the individual Judges indicate a contemplation of a legal right or interest as a requirement for *locus standi* of the applicant, and consequently for jurisdiction of the Court.

[1] As referred to by Rosenne, *op. cit.*, pp. 441-43.

[2] *The Mavrommatis Palestine Concessions*, P.C.I.J., Ser. A, No. 2, 30th August, 1924, p. 11.

[3] *Ibid.*, p. 12.

Thus Lord Finlay stated:

"There can be no doubt as to the class of case which primarily, at all events, this article was intended to meet. There are a number of provisions of the Mandate under which it is highly probable that questions may arise between different Members of the League of Nations. Article 5 forbids placing any Palestine territory under the control of any foreign Power. Some Member of the League might allege that this provision had been violated *to its prejudice*. Article 9 provides that the judicial system of Palestine shall assure to foreigners as well as to natives a complete guarantee of their rights. Questions might arise at any time with another Member of the League as to whether the judicial system is so constituted as to afford this guarantee *to its subjects*. Article 18 forbids all discrimination against the nationals of any State, Member of the League of Nations, or against the goods originating in or destined for any such State, and provides for freedom of transit across the mandated area. Questions may arise between the Mandatory and another Member of the League as to the observance of this article . . .
. . . Under all these heads there are endless possibilities of dispute between the Mandatory and other Members of the League of Nations, and it was highly necessary that a Tribunal should be provided for the settlement of such disputes. Article 26 provides the Tribunal for this purpose". [1] (Italics added.)

Judge Moore:

"The first condition—the existence of a dispute between the Mandatory and another Member of the League—is not merely by the filing of a suit by the one government against the other in this Court. There must be a pre-existent difference certainly in the sense and to the extent that the government which *professes to have been aggrieved should have stated its claims* and the grounds on which they rest, and that the other government should have had an opportunity to reply, and if it rejects the demands, to give its reasons for so doing". [2] (Italics added.)

Judge de Bustamante:

"It should also be noted that the Greek Government *asks for nothing for itself* and that in the case reference is always made to an indemnity to be paid, not to the Greek Government, but to the beneficiary under the concessions". [3] (Italics added.)

and:

"Whenever Great Britain as Mandatory performs in Palestine under the Mandate acts of a general nature affecting the public interest, the Members of the League—from which she holds the Mandate—are entitled, provided that all other conditions are fulfilled, to have recourse to the Permanent Court. On the other hand, when Great Britain takes action affecting private interests and in respect of individuals and private companies in her capacity

[1] *Ibid.*, pp. 42-43.
[2] *Ibid.*, p. 61.
[3] *Ibid.*, p. 77.

as the Administration of Palestine, *there is no question of a juridical relation between the Mandatory and the Members of the League* from which she holds the Mandate, but of legal relations between third Parties who have nothing to do with the Mandate itself from the standpoint of public law". [1] (Italics added.)

Judge Oda:

"Since the Mandate *establishes a special legal relationship*, it is natural that the League of Nations, which issued the Mandate, should have rights of supervision as regards the Mandatory. Under the Mandate, in addition to the direct supervision of the Council of the League of Nations (Articles 24 and 25) provision is made for indirect supervision by the Court; but the latter may only be exercised at the request of a Member of the League of Nations (Article 26). It is therefore to be supposed that an application by such a Member must be made exclusively with a view to the protection of general interests and that it is not admissible for a State simply to substitute itself for a private person in order to assert his private claims". [2] (Italics added.)

Judge Pessôa:

"The Parties which may appear before the Court being States, it cannot be called upon to *protect the rights of individuals, but only those of States*". [3] (Italics added.)

The fact that Judges de Bustamante and Oda in their reasoning made the *obiter* statement that Members of the League stand in a special legal relationship to the Mandatory and can, therefore, implead the Mandatory before the Court in matters of general interest or with regard to acts of a general nature affecting the public interest (a question to be dealt with in paragraph 5 hereafter), does not detract from the present argument. For they also recognised the necessity of a legal right or interest (flowing, as they considered, from the aforesaid special legal relationship) for *locus standi* on the part of the applicant and, therefore, as a requirement for jurisdiction.

4. Neither of the Applicants in the present case contend, nor can they in the circumstances validly contend, that they as States are, directly or through their subjects, affected by any of the acts alleged to have been committed by Respondent in violation of the provisions of the Mandate.

They both, however, found their cases as to *locus standi* on a contention that they (as former Members of the League of Nations) have a legal interest in the matters submitted for adjudication; namely, "a legal interest in seeing to it through judicial process that the sacred trust of civilization created by the Mandate is not violated". [4]

[1] *Ibid.*, p. 81.
[2] *Ibid.*, p. 86.
[3] *Ibid.*, p. 88.
[4] Applicants' *Memorials*, pp. 91-92.

This contention can be sound only if, upon a proper construction of Article 22 of the Covenant and the Mandate instrument, it must be concluded:

(a) that the individual Members of the League were intended to have a legal interest in the observance by the Mandatory of the conditions imposed in the Mandate for the benefit of the inhabitants of the Territory, even in cases where the breach of these obligations by the Mandatory did not affect the material interests of individual League Members, either directly or through their nationals;

and,

(b) that, in view of the said legal interest each Member of the League, if it considered that the Mandatory was not observing its obligations towards the inhabitants, was entitled not only to raise the matter in the League for its consideration and attention, but also to institute with regard thereto contentious proceedings against the Mandatory in terms of Article 7 of the Mandate.

Both these propositions require careful consideration.

The proposition under (a) above depends for its correctness to a certain extent, though not entirely, on the question whether the League of Nations was a legal *persona*. If it was not a legal *persona*, then the proposition in (a) above would appear to be correct, inasmuch as the obligations mentioned in the said paragraph could then have been owed only to the Members of the League. [1]

There is, however, strong authority for the view that the League of Nations was a legal *persona* having, apart from its Members, a legal capacity. [2]

If this view is correct, then the obligations imposed for the benefit of inhabitants would primarily, in any event, have been owed to the League, on whose behalf the Mandatory undertook to exercise the Mandate. Although the League Members would then be entitled, by virtue of their membership, to participate in the League's supervision of the observance by the Mandatory of the aforesaid obligations, they would individually *vis-à-vis* the Mandatory have had no legal interest therein. Theoretically it is possible to conceive that the League, in contracting with the Mandatory, acted not only on its own behalf, but also on behalf of its Members and members-to-be, in obtaining for them, by way of agency or by way of a contract for the benefit of the Members as third parties, a legal interest in the aforesaid obligations in addition to its own interest therein. The following indications in Article 22 of the Covenant and in the Mandate, however, seem to exclude that theory, *viz*:

(i) that the Mandate was to be exercised on behalf of the League only; and not on behalf of the League *and* its Members; [3]

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[1] *Vide* Chap. III, para. 17 (a), r.w. para. 16 (b) *supra*.

[2] *Ibid.*, para. 15.

[3] Para. 2 of Art. 22 of the Covenant and the Preamble to the Mandate.

(ii) that the consent of the Council of the League was required for modification of the terms of the Mandate; and not also the consent of the Members of the League. [1]

Moreover, the whole conception of legal rights with regard to the same obligations being vested both in the League as a legal *persona*, as well as in the individual Members of the League, seems unreal—especially in view of the possible conflicts and anomalies which could arise in the exercise of such rights by the League as well as by its individual Members, as indicated in paragraph 5 below.

The better view would seem to be that it was only the League, as a legal *persona*, that acquired a legal interest in the obligations imposed in the Mandate for the benefit of the inhabitants of the territory, save insofar as the said obligations were intended to operate for the benefit also of League Members or their nationals, in which case they, too, would have had an interest in the observance of those obligations. [2]

If this view is correct then Applicants cannot be said to have a legal interest in the alleged acts of violation of the Mandate complained of by them, as such acts concern only the inhabitants and do not affect the Applicants or their nationals.

But even if it is concluded that they have such a legal interest, the further question raised in sub-paragraph (b) above remains to be dealt with, namely, whether *that* legal right or interest was intended to be enforceable by judicial process in terms of Article 7 of the Mandate.

5. In construing Article 7 of the Mandate with regard to jurisdiction *ratione materiae*, the rules of interpretation mentioned in Chapter IV, paragraph 3 *supra* with regard to jurisdiction *ratione personae* are equally applicable. An interpretation of Article 7 in accordance with the said rules leads to the conclusion that the said Article was not intended to have the meaning and effect assigned thereto by the Applicants, namely, that the Article entitles the Applicants to institute contentious proceedings with regard to matters which concern only the inhabitants of the Mandated Territory and do not affect the material interests of the Applicants, either directly or through their nationals. The reasons for this contention are the following:

(a) According to paragraph 1 of Article 22 of the Covenant "securities for the performance of" the "sacred trust of civilization" were embodied in the Covenant.

Paragraph 2 of Article 22 stated the mandate conception. Paragraphs 4, 5 and 6 thereof then dealt with the Mandated territories in three categories, indicating in general terms the powers and functions of the Mandatories in each of the three categories, thus:

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[1] Art. 7 of the Mandate.

[2] *Vide* Chap. III, para. 17 (b) *supra*.

(i) *the so-called A Mandates in respect of territories formerly belonging to the Turkish Empire* (Paragraph 4):
"the rendering of administrative advice and assistance by a Mandatory";

(ii) *the so-called B Mandates in respect of Central African territories,* (Paragraph 5):
The Mandatory to be "responsible for the administration of the territory" under certain conditions;

(iii) *the so-called C Mandates in respect of South West Africa and certain South Pacific Islands* (Paragraph 6):
to be "administered under the laws of the Mandatory as integral portions of its territory" subject to the conditions mentioned in respect of the B Mandates in the interests of the indigenous population.

Paragraph 8 of Article 22 provided that "The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be *explicitly defined in each case* by the Council of the League". (Italics added.)

With regard to supervision of the Mandatories in the exercise of their Mandates the only provisions contained in the Covenant were the following:

> "In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge";
>
> (Paragraph 7 of Article 22.)

and

> "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."
>
> (Paragraph 9 of Article 22.)

There was no mention, either in Article 22 or in any other part of the Covenant, of a form of "judicial supervision", or of any form of supervision other than that to be exercised by the League itself.

(b) Pursuant to Article 22 of the Covenant, the Council of the League, by the express provisions of the respective Mandate instruments, explicitly defined the degree of authority, control or administration to be exercised by each Mandatory.

Except in the case of the A Mandates, where the legislative and administrative powers of the Mandatories differed from case to case, all the Mandate instruments vested plenary powers of legislation and administration in the respective Mandatories subject only to certain particular obligations stipulated in the said instruments.

Thus in the case of all B Mandates the Mandatories' powers of legislation and administration were recorded in the following terms:

> "*The Mandatory shall be responsible for the peace, order and good government of the territory*, and for the promotion to the utmost of the material and moral well-being and the social progress of its inhabitants". [1] (Italics added.)

In the Mandate for Tanganyika the following sentence was added:

> "The Mandatory shall have full powers of legislation and administration". [2]

The powers conferred in all the C Mandates were recorded as follows (the Mandate for South West Africa being quoted as an example): [3]

> "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." (Article 2.)

In the express terms of the Mandate instrument the Mandatory for South West Africa was therefore vested with complete powers of government, i.e. both legislative and administrative, over the Mandated Territory.

The only limitations or restrictions on, or directions in respect of, such powers could lie in the particular obligations mentioned in the Mandate instrument. These were:

(i) Promotion to the utmost of the material and moral well-being and the social progress of the inhabitants. (Article 2.)

(ii) Prohibition of the slave trade and forced labour. Control of traffic in arms. Prohibition of the supply of intoxicating spirits and beverages to natives. (Article 3.)

(iii) Restriction upon military training of natives and the establishment of military and naval fortifications. (Article 4.)

(iv) Freedom of conscience and free exercise of all forms of worship, and rights of certain missionaries in the territories. (Article 5.)

Other than the aforementioned obligations, the only duty imposed on the Mandatory was the rendering of annual reports to the Council of the League. (Article 6.)

The aforesaid obligations and the duty to report were provided for in the Mandate instrument pursuant to the provisions of the Covenant.

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[1] *Vide* Art. 2 of the British Mandate for the Cameroons. (*U.N. Doc.* A/70.)

[2] *Vide* Art. 3 of the British Mandate for Tanganyika. (*U.N. Doc.* A/70.)

[3] *Vide* Annex B *infra*.

When, therefore, the Covenant of the League, in pursuance whereof the Mandate instruments were entered into, did not provide for a form of judicial supervision, it seems highly unlikely that the provisions of Article 7 of the Mandate were intended to introduce such a form of supervision, especially in view of the implications which, as indicated hereinafter, would necessarily flow from such a form of supervision.

(c) Furthermore, there appears to have been no need for a form of judicial supervision in addition to the supervision by the League envisaged in the Covenant, and given effect to in the Mandate instruments.

The League itself was fully empowered to deal with all matters pertaining to the administration of Mandated territories and, when any legal question was involved concerning the interpretation or application of the provisions of the Mandate, could itself request an advisory opinion from the Court.

It seems most unlikely that the Council could have considered that, in addition, there would be a need for judicial supervision of the nature contended for by the Applicants. Such a view on the Council's part would have been tantamount to an acknowledgement, in advance, of probable failure by it to perform adequately the supervisory functions entrusted to it; and the Council must have been alive to the danger of conflict or interference with its own supervision, as dealt with below.

(d) It could hardly have been the intention that, in addition to the supervisory functions of the League, each and every Member State would individually stand in the position of a custodian of the rights of the inhabitants of the Mandated territories.

One cannot conceive of the Council of the League intending, and the respective Mandatories agreeing to, interference by individual Member States through a form of judicial process with the policies adopted by the Mandatories in the application of the provisions of their Mandates—interference which could touch on all aspects of government policy and political situations involving the inhabitants of Mandated territories.

The position of a Mandatory would surely have been an extremely individious one, if, having accounted to the League for its administration of the Mandated territory and having satisfied the League on matters affecting the inhabitants, it could then still be subject to the attack of individual Members of the League which might choose to disagree with the Mandatory (and perhaps even with all other League Members) as regards legislative acts and administrative measures affecting the inhabitants, and then raise disputes for judicial decision thereon.

An analysis of the functions entrusted to the various Organs of the League in its supervision of Mandate administration, and the implications resulting therefrom, support a denial of the contention

that the Court was intended to act as an independent supervisory authority at the instance of individual Member States.

The role played by the respective Organs of the League with regard to supervision of Mandates is described as follows in a League of Nations publication:

> "During the discussion upon the Secretary-General's annual report on the work of the League, it is permissible for any delegation to draw the attention of the Assembly to some point in the chapter concerning mandates and even to move that this chapter be referred to one of the Assembly Committees where an exhaustive discussion may ensue . . . The discussion in the *Assembly* usually leads to the adoption of a resolution laying stress on some particular aspect of the discharge of the mandates, formulating *some wish* addressed to the Council, the Mandates Commission or the mandatory Powers, etc.
>
> Thus the role of the Assembly consists in the exercise of a certain moral and very general influence in this domain. Its function may be said to be to maintain touch between public opinion and the Council.
>
> *The right to take decisions in regard to mandate questions belong, however, to the Council.* It exercises its supervision with the aid of the Permanent Mandates Commission, instituted by the Covenant itself.
>
> The Covenant provides that this *Commission* is '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'. It is therefore essentially an advisory body—a body whose duty it is to examine and report—designed to assist the Council in carrying out its task. Its work is preliminary in character. Constitutionally, it *has no power to take decisions binding on the mandatory Powers or to address direct recommendations to them.* Its conclusions are not final until they have been approved by the Council". [1] (Italics added.)

If, then, Article 7 were given such a wide construction as to entitle any Member State, at its own instance, to call in the aid of the Court for the purpose of functioning as a supervisory authority, the effect would have been to accord to such State individual powers exceeding those of both the Mandates Commission and the Assembly of the League.

Whereas the Mandates Commission, a competent body of experts, was not even entitled to address recommendations to a Mandatory, any Member of the League would, under this construction, have been entitled to *demand* from the Mandatory the adoption of a suggested course of action, bound with the threat of judicial proceedings if the Mandatory should refuse.

And similarly whereas the Assembly, composed of all the Member States, could take no decisions in regard to Mandate questions, any Member of the League would have been entitled to *decide*, by itself, upon measures to be adopted or not to be adopted by a Mandatory and seek to enforce its own decision by judicial process.

[1] *The Mandates System—Origin—Principles—Application*, p. 35.

But even more: if a question should have arisen as to the desirability or otherwise of adopting a particular policy in Mandate administration, it would have mattered little if such a policy were considered unwise by the Mandates Commission, or discussed and outvoted in the Assembly, or rejected by the Council—for a single Member holding isolated views could then still have ignored the weighty body of opinion in the League and the resolutions resulting therefrom, and have forced a Mandatory to adopt that particular policy or account to the Court as the final supervisory body.

Furthermore, if the Mandatory, placed in the position aforestated by a particular Member of the League which was not satisfied with the League's views, should have ventured to negotiate with that Member in order to avoid litigation, a result could have followed with which the League as the supervisory body entirely disagreed. And if there should have been more than one Member State deflecting from the body of opinion in the League; but which, *inter se*, held different views as to various policies of administration or as to the manner of application of a particular policy, how would the Mandatory have negotiated with such States? Concessions made to one Member could then still be rejected by the other, and the Mandatory's willingness to effect changes and to negotiate for a settlement would have been of no avail, resulting in its having to defend judicial proceedings instituted by one or the other or perhaps both.

The very idea of such negotiation sounds unreal—and this would apply not only in such complicated circumstances as just discussed but in any case involving negotiation with another State regarding matters of internal policy as applied in legislative acts and administrative measures.

(e) Insofar as the Mandatory's acts in the Mandated territory could at all be questioned in the interest of the inhabitants, the League of Nations would have been the only appropriate body to consider and deal with matters of policy and political doctrines applied in legislative acts and/or administrative measures.

The Applicants' contention necessarily means that Article 7 of the Mandate subjected the Mandatory to judicial enquiry concerning its application of each and every one of the provisions of the Mandate, including Article 2 thereof—which provided that the Mandatory "shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory". This would then mean that the Court could have been required to pronounce on all matters of policy affecting the material and moral well-being and the social progress of the inhabitants, which would often have involved decisions of a purely political nature.

The functions of Courts of Law do not normally extend to the realm of politics; and where a legislature or an administrative body

acts within the scope of powers conferred upon it, it is not the function of Courts of Law to enquire into the policy or soundness of its acts.

This general principle was recognised in the case of *Jerusalem-Jaffa District Governor and another v. Murra and others*, as being applicable also in regard to the administration of the Mandated Territory of Palestine under that Mandate. In regard to certain measures of expropriation applied by the Mandatory, the Privy Council stated:

> "Their Lordships agree that in such a case, and in the absence of exceptional circumstances, justice requires that fair provision shall be made for compensation. But this depends not upon any civil right, but (as the Chief Justice said) upon principles of sound legislation; and it cannot be the duty of the Court to examine (at the instance of any litigant) the legislative and administrative acts of the Administration, and to consider in every case whether they are in accordance with the view held by the Court as to the requirements of natural justice". [1]

With regard to the functions of International Courts, Rosenne states, with reference to decisions both of the Permanent Court of International Justice and of the present Court:

> "In the first place, it cannot too often be emphasized that the Court is a Court of Justice and not of ethics or morals or of political expediency. Its function is to 'declare the law'. Its pronouncements are solely concerned with the law as it is, and 'it is not for the Court to pronounce on the political or moral duties' which its conclusions on the law may involve". [2]

Respondent is mindful of the fact that legal questions are often encompassed or intertwined with political issues, and that the jurisdiction of the Court, if otherwise established, would not for that reason be ousted. It is, however, foreign to the essential nature and purpose of the Court to entertain matters of a purely political character.

In the premises it would indeed be strange to find that the Council of the League, which defined the terms of the Mandates, and the respective Mandatories which accepted the Mandates, had intended that the Court should be vested with powers to act at the instance of any Member of the League, as an umpire in pronouncing upon the soundness of the Mandatories' legislative acts and administrative measures involving the material and moral well-being and the social progress of the inhabitants of the Mandated Territories. It is submitted that it could not so have been intended.

Upon any contrary view it must follow that the Court would have had to act as a tribunal for adjudication of conflicts, formulated

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[1] *Jerusalem-Jaffa District Governor and another* v. *Suleiman Murra and others*, 1926 A.C. 321, p. 328.

[2] Rosenne, *op. cit.*, pp. 62-63.

upon differences in current political views, concerning the administration of a particular Mandated Territory.

Moreover, the decision of the Court relating to policy at a particular moment would have been binding on the Mandatory, which thereafter might have been unable to adapt its administration to meet changed circumstances, or to adopt new policies advantageous to the inhabitants; or the Mandatory might, at least, have been unwilling to do so for fear of being again impleaded for an alleged violation of the provisions of the Mandate.

6. Each of the Mandate instruments contained provisions apparently intended to operate also for the benefit of Member States, for example, the "open door" provisions in the A and B Mandates, and the provisions in all Mandates for the freedom of movement of missionaries, nationals of Members of the League. Each of the said instruments also contained other provisions, primarily intended for the benefit of the inhabitants of the Mandated Territory, the non-observance of which could, however, also have affected Member States or their nationals, such as the provision with regard to slave trade. For example, if a Mandatory, in breach of the last-mentioned provision, permitted slavery to be practised and, in so doing, allowed the subjects of a neighbouring Member State to be subjected thereto in the Mandated Territory, its breach could have affected that Member State.

It would be natural and in accordance with the recognised functions of the Court, for a compulsory jurisdiction provision to be inserted in the Mandate instruments for the protection of Member States, insofar as they would be affected directly or through their subjects by a breach of the aforesaid provisions. And it is contended that the compulsory jurisdiction clauses were inserted in the Mandates for that very purpose.[1] There is, however, no justification for giving Article 7 of the Mandate the wide and peculiar construction contended for by the Applicants. Bearing in mind the recognised functions of the Court, the language used in Article 7 does not justify such a construction. If it had been the intention that each and every Member should be appointed an individual custodian of the interests of the inhabitants of Mandated territories, and that the Court should function as a supervisory body in respect of Mandate administration, the Mandate instruments would surely have provided so in clear terms.

Nor, in view of the implications discussed above, could such a wide construction be justified with reference to the likely intention of the Council of the League and the respective Mandatories.

In any event, inasmuch as the considerations mentioned above must at least leave a grave doubt as to whether a conflict of the

[1] *Vide* in this respect the statement by Lord Finlay quoted in para. 3 *supra* with regard to the class of case which, in his opinion, the compulsory jurisdiction clause was intended to meet.

nature now raised by the Applicants was intended to be included in the provisions of Article 7 of the Mandate, it is respectfully submitted that, in observance of the rule which calls for a strict interpretation of consents to jurisdiction, the Court should decline jurisdiction in the present case.

7. In support of their contention as to the construction of Article 7 of the Mandate, the Applicants rely, in the first place, on a statement by Quincy Wright. [1]

The learned author first raises the question as follows, giving neither an affirmative nor a negative answer thereto:

> "Whether every member of the League can be considered to have a legal interest in the observance of the mandate, entitling it to raise a dispute and eventually to invoke the Court's jurisdiction even where no citizen and no material interest of its own is involved, has not been decided. It might be argued that the interest of every member of the League in maintaining the complete integrity of the Covenant and the mandate is sufficient. Undoubtedly the Council could ask the Court for an advisory opinion on the interpretation of any clause in the mandates but the Court might, according to its jurisprudence refuse to respond to the request". [2]

Later there appears the statement quoted by the Applicants:

> "Every member of the League can regard its rights as infringed by every violation of the mandatory of its duties under the mandate, even those primarily for the benefit of natives, and can make representations which if not effective will precipitate a dispute referable to the Permanent Court of International Justice if negotiation fails to settle it". [3]

This statement is, however, immediately followed by a qualification in the following terms:

> "The additional paragraph in the submission article of the Tanganyika mandate may seem to cast doubt on this conclusion". [3]

The author then deals with the particular provision in the Tanganyika Mandate, and ends the whole enquiry as follows:

> "But League members have a right that natives of the areas be treated as prescribed by the mandates, thus the article would seem broad enough to cover claims presented by League members in behalf of such natives". [4]

From the above it is clear that the author does not state his views with conviction, nor in any event, does he appear to have given careful consideration, as has been done in paragraph 5 above, to the serious implications resulting from such a view, not

[1] Applicants' *Memorials*, p. 92.
[2] Wright, *op. cit.*, p. 158.
[3] *Ibid.*, p. 475.
[4] *Ibid.*, p. 476.

only insofar as the Mandatory was concerned, but also with regard to the functions of the Court and those of the League of Nations.

Other scholars who have written on the subject either hold the view that the provision in question does not confer jurisdiction in a matter in which the particular Member State has neither personally nor through its subjects a material interest, or raise doubts thereanent. [1]

8. In further support of their contention the Applicants refer to the *Mavrommatis Case* and make the following statement:

> "In the *Mavrommatis Case*, the Court took it for granted that Article 26 of the Palestine Mandate (as stated above such Article is identical to Article 7 of the Mandate herein) embraced disputes pertaining to the welfare of the inhabitants of the mandated territory. The issue discussed by the Court was whether 'disputes relating to the interpretation or application of the Mandate' included claims made on behalf of a national *not* an inhabitant of the territory".[2]

They then proceed to quote two passages in the dissenting Opinions of Judges Oda and de Bustamante. It is submitted that the Applicants' statement in this respect is wrong.

In the *Mavrommatis Case* the only point in issue was whether the Applicant, the Government of the Greek Republic, could, by virtue of Article 26 of the Mandate for Palestine, implead before the Court the Mandatory in connection with claims made against the latter by one Mavrommatis, a national of the Applicant State. The majority of the Court held that the Applicant was so entitled. A minority of five judges dissented.

Nowhere in the written Judgment of the Majority of the Court is there the least indication of support for the Applicants' statement that the Court took it for granted that the compulsory jurisdiction clause embraced disputes pertaining to the welfare of the inhabitants of the Mandated territory.

Indeed the contrary is suggested by the following passage from the Judgment of the Majority of the Court:

> "Although the provisions of the Mandate possess a special character by reason of the fact that they have been drawn up by the Council of the League of Nations, neither of the Parties has attempted to argue that a Member of the League of Nations cannot renounce rights which he possesses under the terms of the Mandate". [3]

Having so stated, the Court proceeded to deal with the matter before it as if Members of the League could renounce the rights conferred upon them.

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[1] *Vide* Feinberg, N. *La juridiction de la Cour Permanente de Justice Internationale dans le Système des Mandats* (1930), pp. 203-04; McNair, *C.L.J.*, Vol. III (1928), p. 157; Wessels, L.H. *Die Mandaat vir Suidwes-Afrika*, (1938), pp. 111-12; Schwarzenberger, *op. cit.* (3rd ed.), Vol. I, pp. 104, 107-08.

[2] Applicants' *Memorials*, p. 92.

[3] *The Mavrommatis Palestine Concessions*, P.C.I.J., Ser. A, No. 2, 30th August, 1924, p. 30.

With regard to the aforementioned view of the Court, Schwarzenberger states as follows:

> "This statement would also appear to cover the right to submit disputes on the interpretation and application of such provisions to the World Court. Thus, the World Court interpreted such rights as strictly individualistic rights which had been granted to members in their own interest and which, therefore, they were free to renounce. By implication, the Court rejected the view that these rights were part of any international quasi-order, that is to say, *jus cogens* in accordance with the intentions of the parties to the governing treaty instruments in the interest, for instance, of the execution of an international trust". [1]

In the premises it is submitted that the Applicants have no cause for saying, and, in fact are wrong in saying, that the Court in the *Mavrommatis Case* "took it for granted that Article 26 of the Palestine Mandate ... embraced disputes pertaining to the welfare of the inhabitants of the mandated territory". [2]

Of the five dissenting Judges in the *Mavrommatis Case* only two, namely Judge de Bustamante and Judge Oda expressed views in those portions of their Separate Opinions, quoted in paragraph 3 above, which can be regarded as supporting the contention of the Applicants. These views were, however, entirely *obiter dicta*, stated without motivation and apparently without consideration of the matters mentioned in paragraph 4 above and the implications dealt with in paragraph 5 above.

Of the other three dissenting Judges, Lord Finlay indicated the class of case which, in his opinion, the Article was, primarily at all events, intended to meet, and did not include therein actions brought in the interests of the inhabitants; Judge Moore did not touch upon the question, and Judge Pessôa's view that the Court could not in terms of Article 26 of the Palestine Mandate be called upon to protect the rights of individuals, but only those of States, [3] does not support the Applicants' contention in the present case.

9. On this aspect of jurisdiction reference is also made by the Applicants to the following passages extracted from the oral argument addressed to the Court by Dr. Steyn, representative of Respondent, in connection with the Advisory Opinion of 1950 on the International status of South West Africa, namely,

> "It was only in their capacity as Members of the League that third States were competent to uphold the rights of the inhabitants of mandated territories or to claim rights for themselves in those territories",

and

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[1] Schwarzenberger, *op. cit.* (3rd ed.), Vol. I, p. 104.

[2] Applicants' *Memorials*, p. 92.

[3] *Vide* extract from his Separate Opinion quoted in para. 3 *supra*.

"Nor have individual Members of the United Nations any *locus standi* in respect of the administration of South West Africa. They could have had such a *locus standi* only as Members of the League".

It is upon the strength of these extracts that the Applicants state "the Union has nonetheless conceded that Article 7, if in force, entitled League members to institute proceedings to uphold the rights of inhabitants of the Territory". [1]

Upon a proper reading of the above passages in the context of the whole of Dr. Steyn's argument, it is clear that the Applicants are wrong in stating that Respondent thereby conceded that League Members could institute proceedings in the Court to uphold the rights of inhabitants of the Territory. Dr. Steyn propounded the argument that as the "Mandate was not an agreement between the Union Government and every individual Member of the League, but between the Union Government and the League as a distinct international entity", League Members were not separate parties to the Mandate. [2]

He then stated:

"As Members of the League they all had, of course, a certain *locus standi* in regard to the Mandate, but when they ceased to be members, as all of them eventually did, upon dissolution of the League, they lost also that *locus standi*". [2]

There are also other passages to the same effect [3] and a reference to the League and the Members of the League as "the only parties with any *locus standi* in regard to mandates". [4]

In using the words "*locus standi*", insofar as Member States were concerned, he was referring to the right of Members to participate in the proceedings of the League as the supervisory body in respect of Mandates, and not to their right to institute judicial proceedings under Article 7; this latter aspect he dealt with as follows:

"The League having expired, there are no Members of the League who can claim rights in respect of the administration of the Territory. And finally, there is no State legally competent to refer disputes relating to the interpretation or the application of the provisions of the Mandate to the International Court of Justice, the competence to do so having been limited by Article 7 of the Mandate to Members of the League". [5]

With regard to the rights of the peoples of South West Africa, Dr. Steyn again mentioned the rights of Member States to participate as Members in the League's supervision of the Mandates and he referred to Articles 11 (2) and 19 of the Covenant, under which

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[1] *Vide* Applicants' *Memorials*, p. 93.

[2] "*International status of South-West Africa, Pleadings, Oral Arguments, Documents*", p. 275.

[3] *Ibid.*, pp. 278 and 280.

[4] *Ibid.*, p. 280.

[5] *Ibid.*, p. 288.

matters could be raised by Members for the consideration of the Assembly and the Council. [1] Thereafter, he again referred to the rights of Members under the compulsory jurisdiction clause. [2]

It is against the above background that the passages quoted by the Applicants should be read. When Dr. Steyn stated:

> "The League itself was no longer there to exercise its supervisory functions, and third States who were Members of the League had lost their *locus standi* when the League dissolved itself. It was only in their capacity as Members of the League that third States were competent to uphold the rights of the inhabitants of mandated territories or to claim rights for themselves in those territories", [3]

he was *not* referring to *judicial* process but to the participation in the exercise of supervisory functions in the League itself. The very example mentioned by him in support of his argument, namely, the refusal of the League to entertain the complaints of Germany made, *not* to the Court, but to the League, makes this clear. And, when he stated:

> "Nor have individual Members of the United Nations any *locus standi* in respect of the administration of South West Africa. They could have had such a *locus standi* only as Members of the League", [3]

he again meant by "*locus standi*" as he had throughout his argument, the right of participation as Members of the League in the League's supervisory functions, and not "*locus standi*" in judicial proceedings before the Court. [4]

10. The kind of disputes justiciable under Article 7 of the Mandate was not a matter specifically raised in the questions submitted to the Court for its Advisory Opinion in 1950. The matter was not canvassed in argument and the Court did not express any opinion thereon; save that certain of the Judges in their Separate Opinions used language conveying a notion of judicial supervision under Article 7 of the Mandate [5] thereby implying the exercise of rights under Article 7 by Members of the League in the protection of inhabitants of the Territory.

For the reasons advanced above, it is submitted that Member States had no such right. Although the Court's function under

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[1] *Ibid.*, p. 289.

[2] *Ibid.*, p. 290.

[3] *Ibid.*

[4] Applicants' reference, in a footnote to p. 93 of their *Memorials*, to an extract from a statement by the Union's representative in the Fourth Committee on 7th December, 1950, is not relevant to this aspect of jurisdiction. In any event it is to be read in the context of the statement as a whole, from which will appear that the representative was not stating an attitude of his Government—which, as he stressed, was still to be determined—but was referring to one aspect of the effect of the 1950 Advisory Opinion of the Court.

[5] *Vide e.g.* Sir Arnold McNair in "*International status of South-West Africa, Advisory Opinion : I.C.J. Reports 1950*", p. 158.

Article 7 of the Mandate has colloquially been referred to as "judicial supervision", it is not an exact legal description of that function.

In this respect Respondent refers to the following comment by Schwarzenberger who, in comparing the approach of the Court in the 1950 Advisory Opinion with that which the Permanent Court adopted in the *Mavrommatis Case* (as dealt with in paragraph 8 above), states:

> "While the International Court of Justice did not deal expressly with this aspect of the matter, it is significant that it should have chosen the right of members to submit such disputes to the World Court as one of the two illustrations which were meant to prove the essentially international character of the functions entrusted to the mandatory. This change in emphasis becomes still more apparent in Judge McNair's Separate Opinion, which attributes to this right, as distinct from the administrative supervision of mandatories by the League Council, the character of judicial supervision of the mandatories by the World Court. If this right was granted to members in a functional capacity rather than in their own interests, could they renounce it? If so, does this not suggest that the term 'judicial supervision' in juxtaposition with 'administrative supervision' is a euphemism? If not, how can the two *dicta* be reconciled unless on the assumption of a difference in approach to the nature of this international trust and on a basis of a more profound insight gained into this phenomenon since 1924?" [1]

11. In the premises aforestated it is submitted that, inasmuch as the Applicants do not allege, and indeed, cannot validly allege, that they as States, are affected either directly or indirectly through their subjects by the alleged violation of Articles 2, 4, 6, and 7 of the Mandate by Respondent, they have no *locus standi* and the Court has accordingly no jurisdiction to enquire into, and adjudicate upon, the alleged acts of violation.

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[1] Schwarzenberger, *op. cit.* (3rd ed.), Vol. I, p. 104.

CHAPTER VI

FOURTH OBJECTION

THE ALLEGED CONFLICT OR DISAGREEMENT IS NOT A "DISPUTE" WHICH "CANNOT BE SETTLED BY NEGOTIATION" WITHIN THE MEANING OF ARTICLE 7 OF THE MANDATE.

1. Respondent deals in this Chapter with its Fourth Objection, namely, that the alleged conflict or disagreement is not a "dispute" which "cannot be settled by negotiation" in the sense of Article 7 of the Mandate.

For the purposes of this Objection it will be assumed that, despite the dissolution of the League of Nations, the Applicants, as former Members of the League, have retained the rights which by Article 7 of the Mandate were conferred on them as Members; and it will further be assumed that the subject-matter of the alleged conflict or disagreement concerns the interpretation or application of the provisions of the Mandate.

In order to invoke Article 7 the Applicants must then still establish affirmatively that there is a "dispute" between them and Respondent, and that that dispute "cannot be settled by negotiation".

2. In their *Memorials* Applicants formulate the alleged dispute as "a disagreement on points of law and fact, as well as a conflict of legal views and interests", particularised as follows:

(a) Applicants have maintained at all times that the Mandate is in force; Respondent that the Mandate has lapsed.

(b) Applicants have insisted that Respondent has violated the Mandate; Respondent has denied doing so.

(c) Applicants have contended that the United Nations has supervisory powers over Respondent as Mandatory; Respondent has repeatedly rejected this contention.

(d) Applicants have asserted a legal interest in, and the right to object to, the manner in which Respondent administers the Territory; Respondent insists that it alone has a legal interest in what occurs in the Territory. [1]

In support of their contention that a dispute exists between them and Respondent concerning these matters, Applicants do not allege, nor indeed can they allege, that there has at any time been an exchange of views or statements of attitude directly between them and Respondent through the ordinary and recognised diplomatic

[1] *Memorials*, p. 89.

channels. Instead, the Applicants rely on correspondence between Respondent and the United Nations, and on debates in, and resolutions and reports of, various Organs and Agencies of the United Nations, concerning South West Africa and the administration thereof, in which said correspondence and debates Respondent expressed views in conflict with those held by other Members of the United Nations, including the Applicants. [1]

Likewise, in support of their contention that the alleged dispute cannot be settled by negotiation, Applicants do not rely, nor in fact can they rely, on negotiations conducted directly between them and Respondent through diplomatic channels; because no such negotiations were conducted. Instead, the Applicants refer in this respect to certain abortive negotiations and attempts at negotiation between, on the one hand the *Ad Hoc* Committee, the Good Offices Committee, the Fourth Committee of the General Assembly and the Committee on South West Africa, and, on the other hand, Respondent. [2]

The question arises whether from the events in the United Nations and its Organs and Agencies, as narrated in Part B of Chapter II of the Applicants' *Memorials*, and as amplified and/or qualified by Respondent in Chapter II Part B above, an affirmative conclusion can be drawn that there exists between the Applicants and Respondent a "dispute", and that that dispute "cannot be settled by negotiation".

3. In the *Mavrommatis Palestine Concessions Case* the Permanent Court of International Justice considered the essential requirements for jurisdiction under Article 26 of the Mandate for Palestine, the provisions of which Article were identical to those of Article 7 of the Mandate for South West Africa. The Majority of the Court in that case defined a dispute as a "disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". [3] In applying that definition to the circumstances of the case, the Majority held that a dispute between Mavrommatis and the Mandatory, the subject-matter and particulars whereof had been stated and dealt with in negotiations between the said parties, became a dispute between a Member of the League and the Mandatory in terms of the compulsory jurisdiction clause in the Mandate when the Greek Government took up the case on behalf of Mavrommatis, who was a Greek subject.

This conclusion was based on the principle of International Law that a State is entitled to protect its subjects when injured by acts contrary to International Law committed by another State, and the view that, by taking up the case of its subject, the State is in reality asserting its own rights.

[1] *Ibid.*, Part B (1) of Chap. III read with Part B of Chap. II.
[2] *Ibid.*, para. B, p. 93.
[3] *The Mavrommatis Palestine Concessions*, P.C.I.J., Ser. A, No. 2, 30th August, 1924, p. 11.

In their Judgment the Majority of the Court expressed the following views:

> "The Court realises to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it. It recognises, in fact, that before a dispute can be made the subject of an action at law, *its subject-matter should have been clearly defined by means of diplomatic negotiations*. Nevertheless, in applying this rule, the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation. When negotiations between the private person and the authorities have already—as in the present case—*defined all the points at issue between the two Governments*, it would be incompatible with the flexibility which should characterise international relations to require the two Governments to reopen a discussion which has in fact already taken place and on which they rely". [1] (Italics added.)

The Judges who dissented from the conclusion that in that particular case there was a dispute which could not be settled by negotiation, expressed their own views as to the essential requirements before a conflict could be regarded as a dispute and one which could not be settled by negotiation in the sense of the compulsory jurisdiction clause. Thus said Lord Finlay:

> "Article 26 does not make it a condition to the jurisdiction of the Court that there should have been negotiations with a view to settling the dispute between the two Powers, but it does make it a condition that the dispute is one which cannot be settled by negotiation. *There may be some exceptional cases in which it can be predicated that from special circumstances it is obvious that negotiations would be a mere waste of time, but the present is not such a case.* If the Government of Greece had really taken up the Mavrommatis matter and made it a subject of negotiation with Great Britain, who can say that a settlement would not have been arrived at?...
>
> A State which has undertaken a Mandate under the League of Nations had gratuitously taken upon itself a very arduous task and full effect must be given to the provisions of the Mandate for the protection of the Mandatory from litigation on any lines other than those laid down in the Mandate". [2] (Italics added.)

And Judge Moore:

> "There must be a pre-existent difference, certainly in the sense and to the extent that the government which professes to have been aggrieved should have *stated its claims and the grounds on which they rest, and that the other government should have had an opportunity to reply, and if it rejects the demands, to give its reasons for so doing. Moreover, if it rejects some of the demands, but admits others, it is entitled to know why the compromise thus offered is not acceptable.* These propositions, tested by the ordinary conceptions of fair dealing as between

[1] *Ibid.*, p. 15.
[2] *Ibid.*, pp. 41-42.

man and man, should seem to be self-evident; nor would it be difficult to cite cases in which governments have abandoned their claims on considering the arguments adduced on the other side.

. . . .

The condition in question ['which cannot be settled by negotiation'] does not mean that the difference must be of such a nature that it is not susceptible of settlement by negotiation; nor does it mean that resort to the Court is precluded so long as the alleged wrong-doer may profess a willingness to negotiate. The clause must receive a reasonable interpretation; but an interpretation cannot be reasonable which in effect nullifies the condition.

. . . .

Moreover, in deciding whether such negotiation has taken place, the Court is not at liberty to interpret the word 'negotiation' as a process by which governments are enabled to evade their obligations. Although this superficial view may to some extent popularly prevail, yet, in the international sphere and in the sense of international law, *negotiation is the legal and orderly administrative process by which governments, in the exercise of their unquestionable powers, conduct their relations one with another and discuss, adjust and settle, their differences*". [1] (Italics added.)

Judge Pessôa:

"Negotiation consists of debate or discussion between the representatives of rival interests, discussion during which each puts forward his arguments and contests those of his opponent.

. . . .

It must further be remarked that under Article 26 of the Mandate, the mere fact that negotiations have taken place between the two Governments does not suffice to bring a question within the jurisdiction of the Court; it is further indispensable that *either the conflict from its very nature cannot be settled by negotiation or else that negotiations shall have failed.* The fact of requiring such negotiations is, as I have already stated, a tribute to the sovereignty of nations; the principle is that all disputes shall be settled between the nations concerned themselves. The Court can only interpose its authority when such solution is recognized as impossible". [2] (Italics added.)

From the views expressed both by the Majority of the Court and those Judges in the Minority referred to above, the following general propositions with regard to the application of the compulsory jurisdiction clause in the Mandate for Palestine, and for that matter in all the Mandates, would appear to be clear (the Judges merely

[1] *Ibid.*, pp. 61-63.

[2] *Ibid.*, p. 91. *Vide* also "*Interpretation of Peace Treaties, Advisory Opinion : I.C.J. Reports 1950*", p. 74 and "*Interpretation of Peace Treaties (second phase), Advisory Opinion : I.C.J. Reports 1950*", p. 221 *et seq.*; Green, L. C. *International Law Through the Cases* (2nd ed.), pp. 329 *et seq.*, 790 *et seq.*; "*Interhandel Case, Judgment of March 21st, 1959: I.C.J. Reports 1959*", pp. 21, 22, 35, 60-61.

disagreeing as to application thereof to the circumstances of that case), namely:

Before a dispute can be justiciable;

(a) its subject-matter must have been clearly defined;[1] and

(b) the Mandatory must have been afforded an opportunity to negotiate with the object of settling the dispute. And, except in the rare type of case where from the very circumstances or the nature of the dispute it is clear that the dispute cannot in fact be settled by negotiation, either the Mandatory must have failed to avail itself of an afforded opportunity to negotiate, or, the Mandatory having so availed itself, the negotiations must have resulted in a deadlock, before it can be said that the dispute is one which cannot be settled by negotiation.

It is necessary to apply these propositions to the facts in the present case. In so doing, it will be both logical and convenient to deal separately with that part of the Applicants' case which comprises disagreements purely on points of law, as distinct from that part which also involves a disagreement on facts.

4. The disagreements purely on points of law included in Applicants' alleged dispute are those set forth in paragraph 2, sub-paragraphs (a), (c) and (d), above. Respondent does not dispute that Applicants, in participating in debates in and resolutions of Organs and Agencies of the United Nations, have contended that the Mandate is in force, that the United Nations has supervisory powers over Respondent as Mandatory and that they have a legal interest in, and right to object to, the manner in which Respondent administers the Territory. Neither does Respondent dispute that it has, in debates in the Organs and Agencies of the United Nations and in correspondence with the United Nations, made clear its stand in rejecting the aforesaid contentions. Respondent, however, denies that the dispute concerning the aforesaid points of law is one which cannot be settled by negotiation.

Applicants do not make the case, as indeed they cannot, that the aforesaid matters of conflict are, either in their very nature or by reason of special circumstances, impossible of settlement by negotiation; on the contrary they base their case on alleged frustration of efforts at negotiation on the part of Organs of the United Nations and Agencies of the United Nations appointed for the very purpose of, *inter alia*, negotiating with Respondent in regard thereto. Respondent, however, contends that it has not been afforded a real opportunity of negotiating, as is contemplated in Article

[1] A similar view is expressed by Goodrich and Hambro who state—"A dispute can properly be considered as a disagreement or matter at issue between two or more States which has reached a stage at which the parties have formulated claims and counter-claims sufficiently definite to be passed upon by a court or other body set up for purposes of pacific settlement". (Goodrich and Hambro, *op. cit.* (2nd ed.), p. 249).

7 of the Mandate, with the object of settling the said dispute; and, in that regard, Respondent makes the following submissions:

(a) Instead of raising the aforesaid matters directly with Respondent, Applicants thought fit to join with other Members of the United Nations in discussing the said matters in the United Nations Organs and in appointing United Nations Agencies vested with certain powers to negotiate with Respondent thereanent. The terms of reference of these Agencies were, however, of a restrictive nature or were restrictively interpreted. Thus:

(i) The *Ad Hoc* Committee was appointed, *inter alia*, to confer with Respondent on the "procedural measures necessary for the implementation of the Advisory Opinion" of the Court. [1] This was modified in 1952, to conferring with Respondent "concerning means of implementing the Advisory Opinion". [2]

(ii) The terms of reference of the Committee on South West Africa were similarly limited to the continuation of negotiations "in order to implement fully the Advisory Opinion". [3]

(iii) The terms of reference of the Good Offices Committee were originally of a less restrictive nature, [4] which resulted in at least one proposal acceptable to Respondent being formulated for consideration by the General Assembly. [5] But this proposal was rejected by the Assembly and the terms of reference of the Committee were then amended to finding a basis for an agreement which would "continue to accord to South West Africa as a whole an international status and which would be in conformity with the purposes and principles of the United Nations", bearing in mind "the discussions at the thirteenth session of the General Assembly". [6] Eventually the Good Offices Committee had to report that it "has not succeeded in finding a basis for an Agreement *under its terms of reference*". [7] (Italics added.)

By limiting the powers of these Agencies in the manner aforestated, the compass of their respective fields of negotiation was restricted, and, correspondingly, the opportunity for negotiation afforded to Respondent was limited to that extent. Thus, despite Respondent's repeated objections the possibility of a settlement of the dispute by negotiation was substantially reduced by the regular process of restricting in advance the scope of the proffered "opportunity for negotiation".

Furthermore, the *Ad Hoc* Committee, while insisting that Respondent should in principle accept United Nations supervision

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[1] *Vide* Chap. II, Part B, para. 18 *supra*.
[2] *Ibid.*, para. 31.
[3] *Ibid.*, para. 41.
[4] *Ibid.*, para. 60.
[5] *Ibid.*, para. 66.
[6] *Ibid.*, para. 68.
[7] *Ibid.*, para. 72.

as a basis for negotiation, declined, despite repeated requests on the part of Respondent, to show how machinery for such supervision could be devised without subjecting Respondent to obligations more onerous than those assumed under the Mandate. [1] Nor did the General Assembly suggest any solution to this difficulty.

In that very respect the Court in its 1950 Opinion had also stated that:

> "The degree of supervision to be exercised by the General Assembly should not ... exceed that which aplied 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". [2]

In the negotiations which did take place Respondent repeatedly drew attention to the broader membership and the fundamentally different structure of the United Nations as compared with the League of Nations, with special emphasis on the non-application of the unanimity rule. (*Vide* paras. 27 and 44 of Chapter II, Part B, above.) Respondent's view that United Nations supervision would extend its obligations, was reinforced by the form of supervision actually devised which, if Respondent had acquiesced therein, would have made its task more onerous. (*Vide* e.g. those mentioned in paragraph 44 of Chapter II, Part B, above.)

In effect, therefore, the insistence upon prior acceptance by Respondent of United Nations supervision meant insistence upon the acceptance of more onerous obligations as a prerequisite for negotiations.

(b) The *Ad Hoc* Committee and the Committee on South West Africa, in addition to being entrusted with the function of negotiation, were vested with powers, the exercise of which was in direct conflict with their office of negotiation.

Thus: (i) Part of the functions of the *Ad Hoc* Committee was to examine reports and petitions with regard to South West Africa and report thereon to the General Assembly. [3]

(ii) A similar task was entrusted to the Committee on South West Africa. [4] In 1957 this Committee's functions were extended to embrace also the study of legal action against Respondent. [5]

Respondent had protested against the conferment on, and exercise of, these powers and functions by Agencies constituted to negotiate for a settlement of a dispute, the very nature of which involved a manifest denial by Respondent of the right of supervision which the United Nations sought to exercise through these Agencies. [6]

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[1] *Ibid.*, para. 40.
[2] "*International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*", p. 138.
[3] *Vide* Chap. II, Part B, paras. 18 and 31 *supra*.
[4] *Ibid.*, para. 41.
[5] *Ibid.*, para. 59.
[6] *Ibid.*, paras. 19, 41 and 74(b).

Despite Respondent's protestations, these Agencies, while inviting Respondent to negotiate, were at the same time acting, in the exercise of those conferred powers, as if Respondent was obliged to submit to United Nations supervision. It is submitted that thereby a circumstance was created which contributed to the frustration of the very object of the negotiations, namely, a settlement of the dispute.

Moreover, these Agencies were created and controlled by the Fourth Committee of the General Assembly, which established their terms of reference and passed judgment on the results of the negotiations. But it was also to the Fourth Committee that these Agencies had to render an account of their divergent functions, the ensuing debates on which were invariably marred by the intrusion of disturbing features (*e.g.* oral hearings of petitioners) and procedures which gave rise to an atmosphere which was not conducive to fruitful results in negotiation. Respondent on many occasions drew attention to this unsatisfactory situation. [1]

(c) Throughout the whole period of so-called negotiations there was, furthermore, the repeated request of the General Assembly that Respondent should submit South West Africa to United Nations Trusteeship. Indeed, the annually repeated resolutions urging Respondent to conclude a trusteeship agreement, [2] and even censuring Respondent for not yet having done so, [3] suggested that the majority of Members of the United Nations would not be satisfied with any settlement of the dispute which would not result in the Territory being brought within the United Nations Trusteeship System—and that so despite the Court's Opinion that Respondent was not obliged to do so.

In fact the most recent General Assembly resolution offering negotiations implied United Nations Trusteeship as the only arrangement which the majority of the General Assembly would accept. [4]

The Applicants in particular have shown by their actions, in sponsoring and supporting relevant resolutions of the General Assembly, that they were insistent on having South West Africa placed under United Nations Trusteeship. Liberia's attitude is further confirmed by the statement of the Liberian representative referred to at page 82 of Applicants' *Memorials*.[5]

The insistence on the extreme of a trusteeship agreement must have had the effect of conditioning the Organs and Agencies of the United Nations and its individual Members in a direction of thought which militated against the settlement of the dispute on any other basis.

[1] *Ibid.*, paras. 30, 32(b) and 67.
[2] *Ibid. Vide, inter alia*, paras. 2, 8, 10, 20, 31, 53 and 70.
[3] *Ibid.*, para. 10.
[4] *Ibid.*, para. 74.
[5] *Ibid.*, para. 79.

(d) Respondent for its part had, as the record of events in Chapter II, Part B, above shows, repeatedly expressed its desire to find a solution to the disagreement which would be acceptable to all parties concerned.

With the object of finding such a solution Respondent had over the years made concrete proposals involving concessions from its side and expressed its willingness to examine others. [1] The majority in the United Nations had, however, acted in a manner calculated to frustrate negotiations by—restricting the terms of reference of the Agencies appointed to negotiate; conferring supervisory and other extraneous functions on the negotiating agencies; allowing negotiations to be disturbed by accusatory debates and procedures; requiring prior acceptance of United Nations supervision by Respondent; and persistently urging the extreme end result namely United Nations Trusteeship.

Respondent nevertheless recorded, and as recently as July, 1960, reiterated its readiness to enter into discussions with an appropriate United Nations *ad hoc* body with terms of reference which would allow *full discussion* on, and exploration of, *all possibilities*. [2]

This offer by Respondent elicited no reaction on the part of the United Nations or the Applicants, and has therefore never been probed.

5. Respondent, therefore, denies the implication conveyed in the Applicants' *Memorials* [3] that it was responsible for frustration of negotiations attempted on the part of the Organs and Agencies of the United Nations. On the contrary, Respondent respectfully submits that, in the premises aforestated, it was not afforded a real and genuine opportunity to negotiate with the object of settling the dispute in question. Respondent accordingly denies that the alleged dispute in respect of the matters stated in paragraph 2 (a), (c) and (d) above is one which cannot be settled by negotiation, or that any conclusion to that effect can be drawn from the narrative of events contained in the *Memorials* of the Applicants [4] as qualified and amplified in Chapter II, Part B above.

6. With regard to the disagreement or conflict on the one point which is not purely a question of law, namely, the alleged violation by Respondent of the Mandate, the position is somewhat different.

Again, in this respect, Applicants did not avail themselves of the ordinary diplomatic channels to bring complaints and raise disputes concerning Respondent's administration of South West Africa, but participated with other Members of the United Nations in debates and resolutions concerning such administration. Participation therein was not confined to States which as Members of the

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[1] *Ibid.*, paras. 24 *et seq.*, 36 and 73.
[2] *Ibid.*, paras. 77 and 78.
[3] *Memorials*, p. 93.
[4] *Ibid.*, pp. 43-87.

League of Nations had, prior to its dissolution, a legal interest in the administration of the Territory, but was shared in also by States which had never been Members of the League, and had at no time had any such interest.

Respondent, on the other hand, had from the inception of the United Nations and throughout, adopted and maintained the attitude that the United Nations had no supervisory functions or powers in relation to the administration of the Territory and that Respondent was not obliged to account to the United Nations for its administration. In strict conformity with its attitude, Respondent throughout refused to submit reports on the basis of accountability to the United Nations. It had undertaken in 1946 to submit reports for information purposes only, but this undertaking was withdrawn when the conditions under which it had been given were not observed by the United Nations in dealing with the report for the year 1946. [1]

Also in conformity with its stated attitude Respondent throughout refused to deal in the United Nations with complaints regarding, and criticism of, its administration of the Territory. On a number of occasions Respondent, without prejudice to the legal position adopted by it, participated in debates concerning its administration, but only for the stated purpose of demonstrating that the complaints and criticism were based on unreliable information and without a proper conception of conditions prevailing in the Territory. [2] Respondent, however, throughout denied that it had violated the provisions of the Mandate and repeatedly stated that, in conformity with its expressed intention, the Territory was being administered in the spirit of the Mandate.

In view of Respondent's attitude as to non-accountability to the United Nations, and as no arrangement had been come to in terms whereof Respondent was obliged to recognise supervisory authority as being vested in any Organ or Agency of the United Nations, Respondent did not state its case in opposition to the allegations concerning the administration of the Territory; nor have there been any negotiations whatsoever concerning the complaints involved in such allegations. In the premises, it is submitted that whatever differences may, from debates in the United Nations, appear to exist between Respondent and the Members of the United Nations, including Applicants, as to certain aspects of the administration of the Territory, those differences are not so defined as to constitute a dispute cognisable by the Court in terms of Article 7 of the Mandate.

In any event, even if the said differences can at all be regarded as constituting a dispute in terms of Article 7, it cannot be said that that dispute is one which cannot be settled by negotiation. The

[1] *Vide* Chap. II, Part B, para. 11 *supra*.
[2] *Ibid.*, paras. 10, 46 and 76.

recommendations of the United Nations urging Respondent to submit reports and to account for its administration of the Territory, and statements made in debates by individual Members concerning such administration, did not constitute opportunity for negotiation as envisaged in Article 7 of the Mandate agreement.

7. For the reasons aforestated Respondent submits that the Court has no jurisdiction to adjudicate upon the alleged dispute as particularised at page 89 of the Applicants' *Memorials*.

8. In conclusion of this aspect of jurisdiction Respondent raises its strongest objection to the reliance placed by the Applicants on Resolution No. 1565 (XV) of the General Assembly adopted on the 18th December, 1960, insofar as the said resolution contains a conclusion that "the dispute which has arisen between Ethiopia, Liberia and other Member States on the one hand and the Union of South Africa on the other, relating to the interpretation and application of the Mandate has not been and cannot be settled by negotiation". [1]

This resolution was adopted after the Applicants had filed with the Court their respective Applications in which it was alleged that a dispute existed which could not be settled by negotiation.

Whatever importance the Applicants may attach to this conclusion, it is merely an expression of opinion on the part of a majority of the Members in the General Assembly, and the reference thereto by the Applicants presumably for the purpose of influencing the Court is submitted to be improper. In the decision of the Court as to whether jurisdiction under Article 7 of the Mandate agreement has been established or not it should bear no weight, and Respondent respectfully requests that the Court ignore the reference thereto by the Applicants.

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[1] *Memorials*, pp. 85, 89 and 93.

SUBMISSIONS

For all or any of the reasons set out in these Preliminary Objections, the Government of the Republic of South Africa submits that the Governments of Ethiopia and Liberia have no *locus standi* in these contentious proceedings and that the Honourable Court has no jurisdiction to hear, or adjudicate upon, the questions of law and fact raised in the *Applications* and *Memorials*; and prays that the Court may adjudge and determine accordingly.

(Signed) J. P. VERLOREN VAN THEMAAT.
Agent of the Government of the Republic
of South Africa.

Annexes to the Preliminary Objections filed by the Government of the Republic of South Africa

Annex A

ARTICLE 22 OF THE COVENANT OF THE LEAGUE OF NATIONS

[*See Annex A to the Memorial, p. 200,* supra]

Annex B

MANDATE FOR GERMAN SOUTH WEST AFRICA

[*See Annex B to the Memorial, p. 201,* supra]

Annex C

LIST OF THE RELEVANT DOCUMENTATION

I. League of Nations

A. *Minutes of the Council*, sess. VIII, 1920, pp. 183, 185, 187.

B. *Records of the Assembly*, sess. I, 1920, p. 320.

C. *Official Journal*, 1920 (No. 8), p. 87; 1921, pp. 84-94, 1124-25; 1923, p. 300; 1924, p. 1287; 1926, pp. 1407, 1422, 1533; 1927, pp. 316-17, 348, 1120; 1929, p. 1467; 1930, pp. 838-39.

D. *Official Journal, Special Supplement* No. 194, 1946, pp. 28, 32-34, 43, 47, 58-59, 76, 78-79, 250, 278-79, 281.

E. *Minutes of the Permanent Mandates Commission*, sess. I, 1921, pp. 5, 21; II, 1922, pp. 91-92; III, 1923, p. 215; VI, 1925, p. 60; VIII, 1926, p. 200; XXVI, 1934, p. 50; XXVII, 1935, pp. 153, 161, 229; XXIX, 1936, p. 137; XXXI, 1937, p. 192.

F. OTHER.

1. *The Covenant of the League of Nations.*
2. *The Mandates System—Origin—Principles—Application* (Geneva, 1945), pp. 34, 35 *et seq.*
3. *The League Hands Over* (Geneva, 1946,) pp. 61, 63.

II. United Nations

A. *Documents of the United Nations Conference on International Organization, San Francisco*, 1945, (London/New York: United Nations Information Organizations, 1945), Vol. 1, p. 630; Vol. 5, pp. 300, 315-16; Vol. 10, p. 434.

B. UNITED NATIONS PREPARATORY COMMISSION, 1946.

1. *Committee 4, Summary Records*, pp. 39-40.
2. *Committee 7, Summary Records*, pp. 2-3, 10-11.
3. *Journal*, p. 131.
4. *Doc.* PC/EX/113/Rev. 1, 12th November, 1945, pp. 55-56, 108-11, 114.
5. *Doc.* PC/20, 23rd December, 1945, pp. 49, 118.

C. GENERAL ASSEMBLY.

1. *Resolutions.*

XI (1),	9th February, 1946, in *U.N. Doc.* A/64, p. 13.
XIV (1),	12th February, 1946, in *U.N. Doc.* A/64, pp. 35-36.
65 (I),	14th December, 1946, in *U.N. Doc.* A/64/Add. 1, pp. 123-24.
141(II),	1st November, 1947, in *U.N. Doc.* A/519, pp. 47-48.

227 (III), 26th November, 1948, in *U.N. Doc.* A/810, pp. 89-91.

337 (IV), 6th December, 1949, in *U.N. Doc.* A/1251, p. 44.

449 A(V), 13th December, 1950, in *G.A., O.R., Fifth Sess., Sup.* No. 20 (A/1775), pp. 55-56.

570 B(VI), 19th January, 1952, in *G.A., O.R., Sixth Sess., Sup.* No. 20 (A/2119), p. 64.

749 A(VIII), 28th November, 1953, in *G.A., O.R., Eighth Sess., Sup.* No. 17(A/2630), pp. 26-27.

749 B(VIII), 28th November, 1953, in *U.N. Doc.* A/2630, pp. 27-28.

852 (IX), 23rd November, 1954, in *G.A., O.R., Ninth Sess., Sup.* No. 21(A/2890), p. 29.

904 (IX), 23rd November, 1954, in *U.N. Doc.* A/2890, pp. 55-56.

940 (X), 3rd December, 1955, in *G.A., O.R., Tenth Sess., Sup.* No. 19(A/3116), p. 23.

942 (X), 3rd December, 1955, in *U.N. Doc.* A/3116, p. 24.

1055 (XI), 26th February, 1957, in *G.A., O.R., Eleventh Sess., Sup.* No. 17(A/3572), pp. 28-29.

1059 (XI), 26th February, 1957, in *U.N. Doc.* A/3572, p. 30.

1060 (XI), 26th February, 1957, in *U.N. Doc.* A/3572, p. 30.

1141 (XII), 25th October, 1957, in *G.A., O.R., Twelfth Sess., Sup.* No. 18(A/3805), pp. 24-25.

1142 (XII), 25th October, 1957, in *U.N. Doc.* A/3805, p. 25.

1143 (XII), 25th October, 1957, in *U.N. Doc.* A/3805, pp. 25-26.

1243 (XIII), 30th October, 1958, in *G.A., O.R., Thirteenth Sess., Sup.* No. 18(A/4090), p. 30.

1246 (XIII), 30th October, 1958, in *U.N. Doc.* A/4090, p. 31.

1359 (XIV), 17th November, 1959, in *G.A., O.R., Fourteenth Sess., Sup.* No. 16(A/4354), p. 28.

1360 (XIV), 17th November, 1959, in *U.N. Doc.* A/4354, pp. 28-29.

1361 (XIV), 17th November, 1959, in *U.N. Doc.* A/4354, p. 29.

1565 (XV), 18th December, 1960, in *G.A., O.R., Fifteenth Sess., Sup.* No. 16(A/4684), pp. 31-32.

2. *Plenary Meetings.*

G.A., O.R., First Sess., First Part, 11th Plenary Meeting, pp. 161-79; 12th Plenary Meeting, pp. 179-87; 14th Plenary Meet-

ing, pp. 200-28; 15th Plenary Meeting, pp. 228-40; 16th Plenary Meeting, pp. 241-57.

G.A., O.R., Second Sess., Vol. I, 105th Plenary Meeting, pp. 591-651.

G.A., O.R., Third Sess., 164th Plenary Meeting, pp. 577-92.

G.A., O.R., Fourth Sess., 269th Plenary Meeting, pp. 523-37.

G.A., O.R., Fifth Sess., 322nd Plenary Meeting, pp. 627-32.

3. *Fourth Committee Meetings.*

G.A., O.R., First Sess., First Part, Fourth Comm., 3rd Meeting, pp. 7-11.

G.A., O.R., First Sess., Second Part, Fourth Comm., Part I, 19th Meeting, pp. 96-107.

G.A., O.R., First Sess., Second Part, Fourth Comm., Part II, Fifth Meeting, pp. 26-32.

G.A., O.R., Third Sess., Fourth Comm., 76th Meeting, pp. 287-97; 77th Meeting, pp. 297-306; 78th Meeting, pp. 307-20; 81st Meeting, pp. 340-54.

G.A., O.R., Fourth Sess., Fourth Comm., 128th Meeting, pp. 199-208.

G.A., O.R., Fifth Sess., Fourth Comm., 196th Meeting, pp. 359-67

G.A., O.R., Sixth Sess., Fourth Comm., 204th Meeting, pp. 17-19.

G.A., O.R., Eighth Sess., Fourth Comm., 363rd Meeting, pp. 301-08.

G.A., O.R., Ninth Sess., Fourth Comm., 407th Meeting, pp. 61-70.

G.A., O.R., Tenth Sess., Fourth Comm., 491st Meeting, pp. 129-36; 500th Meeting, pp. 179-83.

G.A., O.R., Twelfth Sess., Fourth Comm., 659th Meeting, pp. 35-40.

G.A., O.R., Thirteenth Sess., Fourth Comm., 747th Meeting, pp. 23-25.

G.A., O.R., Fourteenth Sess., Fourth Comm., 883rd Meeting, pp. 5-7; 914th Meeting, pp. 161-66; 915th Meeting, pp. 167-73; 916th Meeting, pp. 175-79; 918th Meeting, pp. 185-90; 924th Meeting, pp. 221-22; 931st Meeting, pp. 249-58; 932nd Meeting, pp. 259-63.

G.A., O.R., Fifteenth Sess., Fourth Comm., 1049th Meeting, pp. 293-99.

4. *Ad Hoc Committee on South West Africa.*

U.N. Doc. A/AC.49/SR. 2, (1951).

U.N. Doc. A/AC. 49/SR. 3, (1951).

U.N. Doc. A/AC. 49/SR. 4, (1951).

U.N. Doc. A/AC. 49/SR. 7, (1951).

U.N. Doc. A/AC. 49/SR. 11, (1951).

U.N. Doc. A/1901, in *G.A., O.R., Sixth Sess., Annexes* (Agenda item 38), pp. 2-11.

U.N. Doc. A/2261, in *G.A., O.R., Eighth Sess., Annexes* (Agenda item 36), pp. 1-29.

U.N. Doc. A/2475, in *G.A., O.R., Eighth Sess., Annexes* (Agenda item 36), pp. 31-48.

5. *Committee on South West Africa.*

G.A., O.R., Ninth Sess., Sup. No. 14(A/2666).

G.A., O.R., Tenth Sess., Sup. No. 12(A/2913).

G.A., O.R., Eleventh Sess., Sup. No. 12(A/3151).

G.A., O.R., Fifteenth Sess., Sup. No. 12(A/4464).

6. *Good Offices Committee on South West Africa.*

U.N. Doc. A/3900, in *G.A., O.R., Thirteenth Sess., Annexes* (Agenda item 39), pp. 2-10.

U.N. Doc. A/4224, in *G.A., O.R., Fourteenth Sess., Annexes* (Agenda item 38), pp. 1-5.

7. *Special Committee on Palestine.*

G.A., O.R., Second Sess., Sup. No. 11, Vol. I(A/364).

G.A., O.R., Second Sess., Sup. No. 11, Vol. II(A/364/Add. 1).

8. *Miscellaneous.*

U.N. Doc. A/123, in *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, pp. 199-235.

U.N. Doc. A/C. 4/41, in *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, pp. 235-44.

U.N. Doc. A/334, in *G.A., O.R., Second Sess., Fourth Comm.*, pp. 134-36.

U.N. Doc. A/334/Add. 1, in *G.A., O.R., Second Sess., Fourth Comm.*, pp. 136-38.

U.N. Doc. A/422, in *G.A., O.R., Second Sess., Plenary Meetings*, Vol. II, pp. 1537-43.

U.N. Doc. A/929, in *G.A., O.R., Fourth Sess., Fourth Comm., Annex*, pp. 7-12.

U.N. Doc. A/C.4/190, in *G.A., O.R., Sixth Sess., Annexes* (Agenda item 38), p. 17.

D. SECURITY COUNCIL.

S.C., O.R., Second Year, No. 20, 113th Meeting, pp. 407-15; No. 23, 116th Meeting, pp. 463-85; No. 25, 118th Meeting, pp. 513-16; No. 30, 123rd Meeting, pp. 615-39; No. 31, 124th Meeting, pp. 641-80.

S.C., O.R., Second Year, Sup. No. 8, pp. 69-74.

S.C., O.R., Third Year, Nos. 36-51, 271st Meeting, pp. 154-72.

E. TRUSTEESHIP COUNCIL.

G.A., O.R., Second Sess., Sup. No. 10 (A/402/Rev. 1).

G.A., O.R., Third Sess., Sup. No. 4 (A/603).

U.N. Doc. T/175, 3rd June, 1948.

F. OTHER.

1. *The Charter of the United Nations.*
2. *The Statute of the International Court of Justice.*
3. *U.N. Doc.* A/70, October, 1946 *(Terms of League of Nations Mandates).*
4. *Everyman's United Nations,* Sixth Edition (New York: United Nations Office of Public Information, 1959), pp. 4-6.

III. Union of South Africa and Republic of South Africa

1. *Union of South Africa, Parliamentary Debates, Senate,* Vol. 15 (1956), Cols. 3631-32.
2. *The Republic of South Africa Constitution Act,* No. 32 of 1961, Sections 1, 3 and 121.

IV. United States of America

Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference, 1919, 13 Vols. (Washington: United States Government Printing Office, 1942-47), Vol. III, pp. 741-42, 769-70, 785-86, 788, 795-96, 799-802; Vol. V, p. 508.

V. Books and Pamphlets

1. Baker, R. S. *Woodrow Wilson and World Settlement,* 3 Vols. (New York: Doubleday, Page and Co., 1922-23), Vol. III, pp. 108-10, 126-29.
2. Beer, G. L. *African Questions at the Paris Peace Conference,* ed. by L. H. Gray (New York: Macmillan, 1923), pp. 431, 443.
3. Bentwich, N. *The Mandates System* (London: Longmans, Green and Co., 1930), pp. 4-5.
4. Chowdhuri, R. N. *International Mandates and Trusteeship Systems* (The Hague: Martinus Nijhoff, 1955), pp. 16-22.
5. Feinberg, N. *La Juridiction de la Cour Permanente de Justice Internationale dans le Système des Mandats* (Paris: Rousseau, 1930), pp. 203-04.
6. François, J. P. A. *Grondlijnen van het Volkenrecht,* Second Edition (Zwolle: N.V. Uitgevers Mij W. E. J. Tjeenk Willink, 1957), pp. 233, 349.
7. Goodrich, L. M. and Hambro, E. *Charter of the United Nations,* Second Edition (London: Stevens and Sons, 1949), pp. 3-18, 249.
8. Green, L. C. *International Law Through the Cases,* Second Edition (London: Stevens and Sons, 1959), pp. 329 *et seq.,* 790 *et seq.*
9. Hall, H. D. *Mandates, Dependencies and Trusteeship* (London: Stevens and Sons, 1948), pp. 17 *et seq.,* 97-100, 102-05, 140, 174, 209, 272-73, 285-86, 288-89.
10. Hobson, J. A. *Towards International Government* (London, 1915).

11. Kennedy, W. P. M. and Schlosberg, H. J. *The Law and Custom of the South African Constitution* (London: Humphrey Milford, 1935), pp. 514-15.

12. Lauterpacht, H. *The Development of International Law by the International Court* (London: Stevens and Sons, 1958), p. 91.

13. Lloyd George, D. *The Truth about the Peace Treaties*, 2 Vols. (London: Victor Gollancz, 1938), Vol. I, pp. 114-23, 530; Vol. II, p. 766.

14. Logan, R. W. *The African Mandates in World Politics* (Washington: The Public Affairs Press, 1948), pp. 1-2.

15. Margalith, A. M. *The International Mandates* (Baltimore: Johns Hopkins Press, 1930), pp. 33-34.

16. McNair, A. D. *The Law of Treaties*—British Practice and Opinions (Oxford: The Clarendon Press, 1938), pp. 185, 389-90, 405, 433.

17. Miller, D. H. *The Drafting of the Covenant*, 2 Vols. (New York: G. P. Putnam's Sons, 1928), Vol. I, pp. 186, 190; Vol. II, pp. 213-28, 273, 283, 285, 306, 313, 323-24, 355.

18. Mohr, E. G. *Die Frage der Souveränität in den Mandatsgebieten* (Borna-Leipzig: Universitätsverlag von Robert Noske, 1928), p. 4.

19. Oppenheim, L. *International Law:* A Treatise, Vol. I, Eighth Edition, ed. by H. Lauterpacht (London: Longmans, Green and Co., 1955), pp. 384, 944.

20. Rosenne, S. *The International Court of Justice*—An Essay in Political and Legal Theory (Leyden: A. W. Sijthoff's Uitgeversmaatschappij, 1957), pp. 62-63, 260, 282, 318-20, 441-43.

21. Schneider, W. *Das Völkerrechtliche Mandat* (Stuttgart: Ausland und Heimat Verlags-Aktiengesellschaft, 1926), p. 14.

22. Schwarzenberger, G. *International Law*, Third Edition (London: Stevens and Sons, 1957), Vol. I, pp. 101-02, 104-05, 107-08, 138, 176.

23. Smuts, J. C. *The League of Nations: A Practical Suggestion* (London: Hodder and Stoughton, 1918), pp. 12, 15.

24. Spiegel, M. *Das Völkerrechtliche Mandat und seine Anwendung auf Palästina* (Vienna: Leuschner and Lubensky, 1928), pp. 8-9.

25. Starke, J. G. *An Introduction to International Law*, Third Edition (London: Butterworth and Co., 1954), pp. 57, 324.

26. Temperley, H. W. V. (ed.) *A History of the Peace Conference of Paris*, 6 Vols. (London: Hodder and Stoughton, 1920-24), Vol. I, p. 195; Vol. II, pp. 233-34; Vol. III, p. 95; Vol. VI, p. 502.

27. Toussaint, C. E. *The Trusteeship System of the United Nations* (London: Stevens and Sons, 1956), pp. 5-9.

28. Townsend, M. E. *The Rise and Fall of Germany's Colonial Empire* (New York: Macmillan, 1930), pp. 363-69, 377-78.

29. Verdross, A. *Die Verfassung der Völkerrechtsgemeinschaft* (Wien und Berlin: Verlag von Julius Springer, 1926), p. 51.

30. Walters, F. P. *A History of the League of Nations*, 2 Vols. (London: Oxford University Press, 1952), Vol. I, pp. 64-65.

31. Wessels, L. H. *Die Mandaat vir Suidwes-Afrika* ('s-Gravenhage: Martinus Nijhoff, 1938), pp. 111-12.

32. Wright, Q. *Mandates Under the League of Nations* (Chicago: University of Chicago Press, 1930), pp. 3, 15-23, 55, 64, 87-89, 114, 128, 158, 196-97, 199-200, 319-39, 366, 457, 460, 475-76, 493-95, 536-37.

VI. Articles

1. Anonymous. "New Guinea—Most Backward Trust Area", *United Nations Review*, Vol. 1, No. 3 (September, 1954), pp. 31-36; at p. 31.

2. Anonymous. "A Formidable Task in New Guinea: Peaceful Penetration Continued in Primitive Trust Territory", *United Nations Review*, Vol. 2, No. 3 (September, 1955), pp. 33-44; at p. 34.

3. Fitzmaurice, G. "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points", *The British Year Book of International Law*, Vol. XXXIII (1957), pp. 203-93; at pp. 203-04 212.

4. Furukaki, P.T. "Nature juridique des mandats internationaux de la Société des Nations", Bibliothèque Universelle et Revue de Genève (July-December, 1926), pp. 381-90; at p. 385.

5. Hall, H. D. "The Trusteeship System", *The British Year Book of International Law*, Vol. XXIV (1947), pp. 33-71; at pp. 44-46.

6. Hudson, M.O. "The Twenty-ninth Year of the World Court", *The American Journal of International Law*, Vol. 45 (January, 1951), pp. 1-36; at pp. 13-16.

7. Jennings, R. Y. "The International Court's Advisory Opinion on the voting procedure on questions concerning South West Africa", *Transactions of the Grotius Society*, Vol. 42 (1956), pp. 85-97; at p. 92.

8. *Keesing's Contemporary Archives*, Vol. VII (1948-1950), at p. 9354.

9. Korowicz, M. St. "The Problem of the International Personality of Individuals", *The American Journal of International Law*, Vol. 50 (1956), pp. 533-62; at pp. 536, 561.

10. McNair, A. D. "Mandates", *The Cambridge Law Journal*, Vol. III, No. 2 (1928), pp. 149-60; at p. 157.

11. Nisot, J. "The Advisory Opinion of the International Court of Justice on the International Status of South West Africa", *The South African Law Journal*, Vol. 68, Part 3 (August, 1951), pp. 274-85; at pp. 278-81.

12. Potter, P. B. "Origin of the System of Mandates under the League of Nations", *The American Political Science Review*, Vol. XVI, No. 4 (November, 1922), pp. 563-83.

13. Rappard, W. E. "The Mandates and the International Trusteeship Systems", *Varia Politica* (Zurich: Editions Poligraphiques S.A., 1953), pp. 181-90; at pp. 182, 184.

14. Rolin, H. "Le Système des Mandats Coloniaux", *Revue de Droit International et de Législation Comparée,* Vol. XLVII (1920), No. 1, pp. 329-63; at pp. 356-57.

15. Van Asbeck, F. M. "International Law and Colonial Administration", *Transactions of the Grotius Society,* Vol. 39 (1953), pp. 5-37; at p. 14.

16. Williams, J. F. "The Status of the League of Nations in International Law", *International Law Association, Report of the 34th Conference* (1926), pp. 675-95; at pp. 688-89.

17. Wright, Q. "Treaties Conferring Rights in Mandated Territories", *The American Journal of International Law,* Vol. 18 (October, 1924), pp. 786-87.

(The Publications enumerated under III above were filed with the Registrar of the Court in accordance with Article 43 of the Rules of Court. The other documentation was available in the Library of the Court. For convenience, photostatic extracts from League of Nations documents, United Nations documents and Articles quoted were also filed.)

TABLE OF CASES CITED

I. Permanent Court of International Justice

1. *Eastern Carelia Case*, P.C.I.J., Ser. B, No. 5, 23rd July, 1923.
2. *The Mavrommatis Palestine Concessions*, P.C.I.J., Ser. A, No. 2, 30th August, 1924, pp. 11-12, 15-19, 30, 41-43, 61-63, 77, 81-82, 86, 88, 91.
3. *Case concerning the Factory at Chorzów*, P.C.I.J., Ser. A, No. 9, 26th July, 1927, p. 32.
4. *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, P.C.I.J., Ser. A/B, Fasc. No. 50, 15th November, 1932, pp. 377, 380-81, 383.
5. *Phosphates in Morocco*, P.C.I.J., Ser. A/B, Fasc. No. 74, 14th June, 1938, pp. 23-24.

II. International Court of Justice

1. "*Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174*", at p. 179.
2. "*Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950, p. 65*", at p. 74.
3. "*International status of South-West Africa, Pleadings, Oral Arguments, Documents*", pp. 122-23, 275, 278, 280, 288-90.
4. "*International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950, p. 128*", at pp. 132-34, 136-38, 140, 145-46, 154-62, 164-73, 186, 191.
5. "*Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950, p. 221*".
6. "*Ambatielos case (jurisdiction), Judgment of July 1st, 1952: I.C.J. Reports 1952, p. 28*", at p. 39.
7. "*South-West Africa—Voting Procedure, Advisory Opinion of June 7th, 1955: I.C.J. Reports 1955, p. 67*", at pp. 75, 95, 100-01.
8. "*Interhandel Case, Judgment of March 21st, 1959: I.C.J. Reports 1959, p. 6*", at pp. 21-22, 35, 60-61.

III. Other

1. *Hamlyn & Co. v. Wood & Co.* (1891) 2 Q.B. 488, at pp. 491, 494.
2. *Jerusalem-Jaffa District Governor and another v. Suleiman Murra and others*, 1926 A.C. 321, at p. 328.
3. *Rex v. Blom*, 1939 A.D. 188, at pp. 202-03.
4. *Luxor, Ltd. v. Cooper* (1941 (1) A.E.R. 33), at pp. 52-53.