INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

SOUTH WEST AFRICA CASES

(ETHIOPIA *v.* SOUTH AFRICA;
LIBERIA *v.* SOUTH AFRICA)

SECOND PHASE

JUDGMENT OF 18 JULY 1966

1966

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRES DU SUD-OUEST AFRICAIN

(ÉTHIOPIE c. AFRIQUE DU SUD;
LIBÉRIA c. AFRIQUE DU SUD)

DEUXIÈME PHASE

ARRÊT DU 18 JUILLET 1966

DISSENTING OPINION OF JUDGE JESSUP

SECTION I. INTRODUCTORY

Having very great respect for the Court, it is for me a matter of profound regret to find it necessary to record the fact that I consider the Judgment which the Court has just rendered by the casting vote of the President in the *South West Africa* case, completely unfounded in law [1]. In my opinion, the Court is not legally justified in stopping at the threshold of the case, avoiding a decision on the fundamental question whether the policy and practice of apartheid in the mandated territory of South West Africa is compatible with the discharge of the "sacred trust" confided to the Republic of South Africa as Mandatory.

Since it is my finding that the Court has jurisdiction, that the Applicants, Ethiopia and Liberia, have standing to press their claims in this Court and to recover judgment, I consider it my judicial duty to examine the legal issues in this case which has been before the Court for six years and on the preliminary phases of which the Court passed judgment in 1962. This full examination is the more necessary because I dissent not only from the legal reasoning and factual interpretations in the Court's Judgment but also from its entire disposition of the case. In regard to the nature and value of dissenting opinions, I am in complete agreement with the views of a great judge, a former member of this Court—the late Sir Hersch Lauterpacht—who so often and so brilliantly contributed to the cause of international law and justice his own concurring or dissenting opinions; I refer to section 23 of his book, *The Development of International Law by the International Court*, 1958. He quotes, with evident approval (in note 10 on p. 66), the "clear expression" of Charles Evans Hughes who was a member of the Permanent Court of International Justice and later Chief Justice of the United States: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to

[1] In my view, whenever the Court renders judgment in accordance with its Statute, the judgment is the judgment *of the Court* and not merely a bundle of opinions of individual judges. This is equally true when, in accordance with Article 55 of the Statute, the judgment results from the casting vote of the President. I do not consider it justifiable or proper to disparage opinions or judgments of the Court by stressing the size of the majority. If the Court followed the prevailing European system, the size of the majority would not be known. Throughout this opinion I shall refer to the judgment *of the Court*, and not to the opinion of seven of its members. Of course this is not to say that there is any impropriety in comments by a member of the Court on views expressed in the separate concurring or dissenting opinions of present or past members of the Court.

have been betrayed." It is not out of disrespect for the Court, but out of respect for one of its great and important traditions, that, when necessary, I express my disagreement with its conclusions. It is the first time since I have been a member of the Court that I have found it necessary to dissent.

The Court's Judgment rests, as it must, on an interpretation of historical facts involved in the origin and in the operation of the mandates system of the League of Nations, in the setting of their period. Since my own study of the historical record, both of the time of the Paris Peace Conference and subsequently through the years up to 1939, leads me to believe that the Judgment misconceives the nature of the peace settlements at the close of World War I, the nature and functioning of the League of Nations, and the nature and functioning of the mandates system, I must expound my conclusions on these matters.

The Court's Judgment says that it "must decline to give effect" to the claims of the Applicants; this conclusion naturally rests on the Court's analysis of what those claims are. Since I interpret differently the nature of Applicants' claims and submissions, I must show wherein my interpretation differs, having regard to their character and context. Only when those matters are properly understood, is it possible for me to reach a judicial conclusion whether Applicants have the legal right or interest to entitle them to receive from the Court what they request, or any part of what they request.

The Judgment bases itself on a reason not advanced in the final submissions of the Respondent—namely on Applicants' lack of "any legal right or interest appertaining to them in the subject-matter of the present claims". This is said to be a question of the "merits" of the claim and it is therefore in connection with the "merits" that the nature of the requisite legal right or interest must be analysed.

The Judgment states that the—

> "... same instruments are relevant to the existence and character of the Respondent's obligations concerning the Mandate as are also relevant to the existence and character of the Applicants' legal right or interest in that regard. Certain humanitarian principles alleged to affect the character of the Mandatory's obligations in respect of the inhabitants of the mandated territory were also pleaded as a foundation for the right of the Applicants to claim in their own individual capacities the performance of those same obligations. The implications of Article 7, paragraph 1, of the Mandate ... require to be considered not only in connection with paragraph 9 and certain aspects of paragraph 2 of the Applicants' final submissions, but also, as will be seen in due course, in connection with that of the Applicants' standing relative to the merits of the case. The question of the position following upon the dissolution of

the League of Nations in 1946 has the same kind of double aspect, and so do other matters."

If—as is the case—my analysis of these "same instruments", "principles" and "the position following upon the dissolution of the League of Nations", leads me to a conclusion different from that reached by the Court, I must, with all respect, explain my chain of reasoning and why it leads me to the conclusion that the Applicants do have the requisite "legal right or interest".

At the same time it must be stated that there are aspects of the manifold issues, both procedural and substantive, presented in this case, which cannot be disposed of in a dissenting opinion, as, for example, a detailed appraisal of the relevance and materiality of all of the testimony of the 14 witnesses. Since the Court does not reach such issues as these, which were not and could not be definitively resolved during the course of the oral proceedings, the record cannot be taken as having precedental authority.

This is the fifth time the Court has given consideration to legal matters arising out of the administration by the Republic of South Africa of the mandated territory of South West Africa. In the course of three Advisory Opinions rendered in 1950, 1955 and 1956, and in its Judgment of 21 December 1962, the Court never deviated from its conclusion that the Mandate survived the dissolution of the League of Nations and that South West Africa is still a territory subject to the Mandate. By its judgment of today, the Court in effect decides that Applicants have no standing to ask the Court even for a declaration that the territory is still subject to the Mandate.

The case now decided by the Court was brought before the Court by Applications of Ethiopia and Liberia on 4 November 1960. The Court joined the two actions by an Order of 20 May 1961.

On 30 November 1961 the Respondent—the Government of South Africa—filed preliminary objections. The Applicants designated an *ad hoc* Judge and the Respondent did likewise. Oral arguments were heard on 2-5, 8-11, 15-17 and 19 and 22 October 1962.

In its Judgment of 21 December 1962 the Court decided that "it has jurisdiction to adjudicate upon the merits of the dispute".

In reaching that conclusion the Court had to reject the four preliminary objections filed by the Respondent. It did reject the four objections and thereby substantially held:

(1) that the Mandate for South West Africa is a "treaty or convention in force" within the meaning of Article 37 of the Statute of the Court;
(2) that despite the dissolution of the League, Ethiopia and Liberia had *locus standi* under Article 7, paragraph 2, of the Mandate, to invoke the jurisdiction of the Court;
(3) that the dispute between the Applicants and the Respondent was a "dispute" as envisaged in Article 7, paragraph 2, of the Mandate; and

(4) that the prolonged exchanges of differing views in the General Assembly of the United Nations constituted a "negotiation" within the meaning of Article 7, paragraph 2, of the Mandate and revealed that the dispute was one which could not be settled by negotiation within the meaning of that same provision of the Mandate.

Under Article 60 of the Statute of the Court, this Judgment of 1962 is "final and without appeal". Under Article 94, paragraph 1, of the Charter of the United Nations, both parties to the case were under a duty to comply with this decision of the Court.

After the 1962 Judgment, the Respondent filed its Counter-Memorial in ten volumes plus one supplementary volume. The Applicants in turn filed their Reply and the Respondent filed its Rejoinder in two volumes supplemented by other materials, including the so-called Odendaal Report of 557 printed foolscap pages.

Beginning on 15 March 1965, the Court devoted 99 public sessions to oral hearings which included the arguments of Agents and Counsel for both Parties and the testimony of 14 witnesses.

The voluminous record was studied by the Court and its deliberations were held over a period of some six months.

The Court now in effect sweeps away this record of 16 years and, *on a theory not advanced by the Respondent in its final submissions of 5 November 1965*, decides that the claim must be rejected on the ground that the Applicants have no legal right or interest.

The Applicants have not asked for an award of damages or for any other material amend for their own individual benefit. They have in effect, and in part, asked for a declaratory judgment interpreting certain provisions of the Mandate for South West Africa. The Court having decided in 1962 that they had standing *(locus standi)* to bring the action, they are now entitled to a declaratory judgment without any further showing of interest.

Allowing for the factual differences, the following passage from the separate opinion of Judge Sir Gerald Fitzmaurice in *Northern Cameroons* (*I.C.J. Reports 1963*, p. 99) is apt here:

> "By not claiming any compensation, the Applicant State placed itself in a position in which, had the Court proceeded to the merits, the Applicant could have obtained a judgment in its favour merely by establishing that breaches of the Trust Agreement had been committed, without having to establish, as it would otherwise have had to do (i.e., if reparation had been claimed) that these breaches were the actual and proximate cause of the damage alleged to have been suffered—that is the incorporation of the Northern Cameroons in the Federation of Nigeria rather than in the Republic of Cameroon; without, in short, having to establish the international *responsibility* of the United Kingdom for this outcome."

The learned Judge concluded his remarks on this particular point by saying:

> "It is not the task of an international tribunal to apportion blame *in vacuo*, or to find States guilty of illegalities except as a function of, and relative to a decision that these have been the cause of the consequences complained of, for which the State concerned is accordingly internationally responsible; *or except in relation to a still continuing legal situation in which a pronouncement that illegalities have occurred may be legally material and relevant.*" (*Loc. cit.*, p. 100.)

The words which I have emphasized describe the situation in the instant *South West Africa* case.

Paragraph 2 of Article 7 of the Mandate gave a member of the League the right to submit to the Court a dispute relating to the interpretation of the provisions of the Mandate if the dispute cannot be settled by negotiation. As I shall show in more detail later, the Court in 1962 decided that the Applicants qualify in the category "Member of the League"; this is *res judicata* and the Court's Judgment of today does not purport to reverse that finding. The Court in 1962 equally held that the present case involves a dispute which cannot be settled by negotiation; this double finding has the same weight and today's decision does not purport to reverse that finding. I do not understand that it is denied that the dispute refers to the interpretation of provisions of the Mandate. I do not see how this clear picture can be clouded by describing the claims as demands for the performance or enforcement of obligations owed by the Respondent to the Applicants. The submissions may indeed involve that element also, as will be noted, but this element does not exclude the concurrent requests for interpretation of the Mandate.

Whether any further right, title or interest is requisite to support Applicants' requests in this case for orders by the Court directing Respondent to desist from certain conduct alleged to be violative of its legal obligations as Mandatory, may well be a separate question, but the Judgment of the Court denies them even the declaratory judgment. It may however be said that if the Court, properly seised, finds and declares that Respondent is violating its legal obligations in the administration of the Mandate, there is no reason in the Court's Statute or in general juridical principles, which would prevent it from ordering the Respondent to desist. But the Permanent Court and this Court have not usually framed their judgments in this fashion. Under the Statute of this Court, as already noted, the Court's judgment "is final and without appeal". By Article 94 of the Charter, "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party". If the Court in its judgment holds that a certain line of conduct is in violation of a State's legal obligations, that State is under a duty to comply with

the decision by desisting from the illegal conduct. The Court should not act upon an assumption that a State Member of the United Nations would violate its obligation under Article 94. It may be recalled that in the very first judgment rendered by the Permanent Court of International Justice, it refused Applicants' request that it award "interim interest at a higher rate in the event of the judgment not being complied with at the expiration of the time fixed for compliance. The Court neither can nor should contemplate such a contingency." (*S.S. Wimbledon, P.C.I.J., Series A, No. 1* (1923), p. 32.)

Since a dissenting opinion does not speak for the Court, there is no need for me to explore in detail the separate issue whether the Court, if it had reached the real merits of the case, should have granted requests to order Respondent to do or to cease to do certain things indicated in the submissions of the Applicants. Had the Court dealt with those matters, it would have had to consider a great deal of factual material. One of the clearest factual issues related to the sixth submission which alleged that Respondent had established military bases within the Territory; the testimony of one of Respondent's witnesses proved to my satisfaction that this charge of the Applicants was completely without foundation. In the fourth submission, Applicants make general reference to "economic, political, social and educational policies applied within the Territory by means of laws and regulations, and official methods and measures, which are set out in the pleadings herein ...". In appraising this submission, the Court would, *if it were considering issuing an order to cease and desist*, have had to determine whether any changes had been introduced by the Respondent since the Applications in this case were filed with the Court on 4 November 1960. I do not pretend to make a finding on the evidence, but it appears to me probable that the Court would have found that Respondent, perhaps responsive to the general condemnation of its administration of South West Africa, has introduced numerous improvements and ameliorations. This does not mean that it has abandoned the policy of apartheid (which is covered by Applicants' Submission No. 3), nor does it mean that the Court, in a finding whether certain policies or measures were in conformity with the obligations of the Mandatory, could have overlooked the "critical date" which was the date of the filing of the Applications.

The Judgment of the Court today does not constitute a final binding judicial decision on the real merits of the controversy litigated in this case. In effect reversing its Judgment of 21 December 1962, it rejects the Applicants' claims *in limine* and precludes itself from passing on the real merits. The Court therefore has *not* decided, as Respondent submitted, "that the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder".

Further, the Court has *not* decided, as submitted by the Respondent in the alternative, that the Mandatory's former obligations to report, to account and to submit to supervision had lapsed upon the dissolution of the League of Nations.

The Court has *not* rendered a decision contrary to the fundamental legal conclusions embodied in its Advisory Opinion of 1950 supplemented by its Advisory Opinions of 1955 and 1956 and substantially reaffirmed in its Judgment of 1962.

Even more important is the fact that the Court has *not* decided that the Applicants are in error in asserting that the Mandatory, the Republic of South Africa, has violated its obligations as stated in the Mandate and in Article 22 of the Covenant of the League of Nations. In other words, the charges by the Applicants of breaches of the sacred trust which the Mandate imposed on South Africa are not judicially refuted or rejected by the Court's decision.

Nevertheless, the reasoning of the Court and its conclusions on certain underlying questions of fact and of law, require an examination into aspects of all of these questions, as this opinion will demonstrate.

SECTION II. THE FINALITY OF THE COURT'S PREVIOUS PRONOUNCEMENTS

The Judgment of 1962

I do not think it would be adequate to rest on the finalities of the 1962 Judgment of this Court. But I shall briefly indicate the legal principles which dictate attributing more authority to the prior decisions and opinions of this Court than the Court's present decision seems to reveal.

To dispel the fallacy that no decision on a preliminary objection can have finality, and as a preliminary matter of clarifying terminology, one may note that Article 94 (1) of the United Nations Charter uses the word "decision" in English and "*décision*" in French. In Article 94 (2) the terms are "judgment" and "*arrêt*" [1]. In Article 63 (2) of the Court's Statute one finds "judgment" rendered in French as "*sentence*" and in Article 41 (2) of the Statute, "decision" is "*arrêt*" in French. In the Rules of Court, No. 64 (6) speaks of a "decision . . . in the form of a judgment" *(la Cour statue sur la requête par un arrêt)*. The same expressions in both languages are found in Article 81 of the Rules. In Rule 62 (5),

[1] Article 94 of the Charter:

"1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

dealing with preliminary objections, the English text speaks of a "decision" and the French text again uses "s*tatue*". The "decision" (to use the term in Article 26 (5) of the Rules), of 21 December 1962 is labelled a "judgment" and recites at the outset (p. 321) that the Court "*delivers the following Judgment*" (*"arrêt"*). This use of the term "judgment" (*"arrêt"*) is found in every ruling of the Court on a preliminary objection, beginning with the *Corfu Channel* case (*I.C.J. Reports 1947-1948*, p. 15) down through *Barcelona Traction* (*I.C.J. Reports 1964*, p. 6). After analysing passages in the *Asylum* case, Rosenne writes (*The Law and Practice of the International Court*, 1965, Vol. II, p. 627):

> "This, it is submitted, leads to the conclusion that the word 'decision' *(décision)* appearing in Article 59 of the Statute is identical in meaning with the word 'judgment' *(arrêt)* appearing in Article 60, and refers not merely to the operative clause *(dispositif)* of the judgment, but to its reasons as well. This is clearly the case as regards the meaning of the word 'judgment' *(sentence)* appearing in Article 63."

There is no clear distinction between "decision" and "judgment"—the terms can be used interchangeably. Accordingly, after 21 December 1962, *some* obligation with respect to the judgment of that date must have rested upon Applicants and Respondent under Article 94 (1) of the Charter. I shall consider below with what either Party was now obliged "to comply" *(à se conformer)*. Under Article 60 of the Statute, the Judgment of 21 December 1962 was "final and without appeal" although (under Article 59) it "has no binding force except between the parties and in respect of that particular case". Within the meaning of Article 59, the present proceedings are in "that particular case". The words in Article 60 "without appeal" clearly refer only to *the parties*; if they are dissatisfied with the judgment, they may seek a revision under Article 61 of the Statute if they are able to satisfy the conditions stated in that Article. The word in Article 60, "final", may have a broader significance and may address itself to the Court as well as to the parties. Since Respondent has not proceeded in accordance with Article 78 ff. of the Rules of Court, and has not avowedly sought a "revision" of the 1962 Judgment I do not consider that there is before the Court a case under Article 61 of the Statute, despite Respondent's arguments about "new facts" (with which I shall deal later).

The statement in Article 60 of the Statute that "the judgment is final and without appeal", taken in conjunction with the reference in Article 59 to "that particular case", constitutes a practical adoption in the Statute of the rule of *res judicata*, a rule, or principle, cited in the proceed-

ings of the Commission of Jurists which drafted the Statute of the Permanent Court of International Justice in 1920, as a clear example of "a general principle of law recognized by civilized nations". It rests upon the maxim *interest rei publicae ut sit finis litium*, or in an alternate form, *interest rei publicae res judicatas non rescindi*. Judge Anzilotti, in what has been called "the classic enunciation of the law" (Rosenne, *op. cit.*, p. 624) listed as the essentials for the application of the *res judicata* principle, identity of parties, identity of cause and identity of object in the subsequent proceedings—"*persona, petitum, causa petendi*". *(Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 23-27.) These essentials are found in the matter before us. This leads again to the conclusion that *something* must have been finally decided by the 1962 Judgment.

But the rule in Article 60 of the Statute "cannot . . . be considered as excluding the tribunal from itself revising a judgment in special circumstances when new facts of decisive importance have been discovered . . .". (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 47 at p. 55.) Moreover, the Court is always free, *sua sponte*, to examine into its own jurisdiction.

Various pronouncements in the jurisprudence of the two Courts, in various separate opinions and in the "teachings of the most highly qualified publicists" do not provide an automatic test to determine what is within and what is without the *res judicata* rule. I agree with Anzilotti in the opinion already cited (at p. 24):

> "When I say that only the terms of a judgment *(le dispositif de l'arrêt)* are binding, I do not mean that only what is actually written in the operative part *(dispositif)* constitutes the Court's decision. On the contrary, it is certain that it is almost always necessary to refer to the statement of reasons to understand clearly the operative part and above all to ascertain the *causa petendi*."

The Court itself in the same case clearly held (at p. 20) that the "findings" on which was based the "conclusion, which has now indisputably acquired the force of *res judicata*"—"findings" which "constitute a condition essential to the Court's decision"—were among the points "possessing binding force in accordance with the terms of Article 59 of the Statute" [1].

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[1] The complete applicable passage is as follows: "As has been recalled above, the Court, by that judgment, decided that the attitude of the Polish Government in regard to the Oberschlesische was not in conformity with the provisions of the Geneva Convention. This conclusion, which has now indisputably acquired the force of *res judicata*, was based, amongst other things, firstly, on the finding by the Court that, from the standpoint of international law, the German Government was perfectly entitled to alienate the Chorzów factory, and, secondly, on the finding that, from the standpoint of municipal law, the Oberschlesische had validly acquired the right of ownership to the factory—*and these findings constitute a condition essential to the Court's decision. The finding that, in municipal law, the factory did belong to the Oberschlesische is consequently included amongst the points decided*

The Permanent Court in another case indicated that reasons which do not go beyond the scope of the operative part *(dispositif)* are binding. (*Polish Postal Service in Danzig, P.C.I.J., Series B, No. 11*, p. 29.) But it is clear that not every reason or argument given by the Court in support of the decision is part of the *res judicata*.

Paragraph 3 of Article 62 of the Rules of Court provides: "Upon receipt by the Registrar of a preliminary objection filed by a party, the proceedings on the merits shall be suspended ..." On the basis of this provision it is argued that if the Court in delivering judgment on a preliminary objection—whether to jurisdiction or to admissibility—touches on any matter which pertains or appertains to the merits, what it says is just *obiter dicta*. This argument is based on a misconception of the Rule, as its history reveals. It was in the revision of the Rules by the Permanent Court of International Justice in 1936 that there was inserted the provision that "proceedings on the merits shall be suspended". Before that, the Rules contained no such provision. The discussion of the matter in the Court shows that the entire concern was focused on the problem of the time-limits which the Court would already have fixed for the main proceedings. It was noted that extensions would probably have to be granted if the Court overruled the preliminary objection. Thus Judge Fromageot proposed inserting in paragraph 3 the words "the time-limits originally fixed for the proceedings on the merits shall be suspended". (*P.C.I.J., Series D, Third Addendum to No. 2*, p. 706.) When it was suggested by another member of the Court "that the proceedings on the merits were suspended as from the submission of the objection", Judge Fromageot revised his phrasing to read: "From that moment, the time-limits originally fixed for the proceedings on the merits shall be suspended." Thereafter "The Registrar pointed out that there was not, strictly speaking, a suspension of the time-limits. *What was suspended was the obligation of the parties to file a particular written Memorial by a given date.*" (*Ibid.*, p. 707; italics added.) Judge Fromageot then at once proposed the phrasing ultimately adopted: "The proceedings on the merits shall be suspended."

It is perfectly clear that the provision of the Rule in question was purely a matter of administrative procedure having to do with the setting of time-limits and was not conceived to have the substantive implications now sought to be attributed to it. The Court's Judgment of today presses the new theory further than it has been pressed before; it is now pressed too far and the historical origin of the Rule must be recalled.

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by the Court in Judgment No. 7, and possessing binding force in accordance with the terms of Article 59 of the Statute. The very context in which the passage in question occurs is calculated to establish the right of ownership of the Oberschlesische from the standpoint of municipal law.

The Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned." (*P.C.I.J., Series A, No. 13, op. cit.*, p. 20.) (Italics added.)

In proceedings on preliminary objections, the situation of the parties is reversed. The Respondent, who advances the preliminary objection, is called on first by the Court to state his case; the Applicant then responds, the Respondent replies and the oral proceedings close with the oral rejoinder of the Applicant. On the merits, it is the Applicant who begins and it is the Respondent who has the last word. That is why it is said:

> "Preliminary objection proceedings ... now take the form of a self-contained case (in which the objecting State appears as applicant: *In excipiendo reus fit actor*) incidental to the proceedings on the merits ..." (Rosenne, *loc. cit.*, Vol. I, p. 464.)

The principle is a familiar one: Ballantine's *Law Dictionary* (1930), page 1138—"*Reus excipiendo fit actor*. The defendant by his plea may make himself a plaintiff". *The Cyclopedic Law Dictionary*, 3rd ed. (1940), page 975—"The defendant, by a plea, becomes plaintiff". Bell's *South African Legal Dictionary*, 3rd ed. (1951), page 21—"... he who avails himself of an exception is considered a plaintiff; for in respect of his exception, a defendant is a plaintiff".

The Judgment of the Court in this preliminary phase is pronounced, not on the claims of the Applicant, but on the submissions of the Respondent.

In this case, in the stage of the preliminary objections, the Respondent's Agent on 11 October 1962 first read these submissions:

> "the Mandate for South West Africa [has never been, or, at any rate, is, since the dissolution of the League of Nations] is no longer a 'treaty or convention in force' within the meaning of Article 37 of the Statute of the Court, this submission being advanced—
>
> *(a)* with respect to the said Mandate as a whole, including Article 7 thereof, and
>
> *(b)* in any event, with respect to Article 7 itself [1]."

These submissions required the Court to render judgment on this point of law in one or the other alternative forms. The Court did render judgment, finding that the Mandate, despite the dissolution of the League, was a "treaty or convention in force" within the meaning of Article 37 of the Statute, and that the validity of Article 7 was not affected by that dissolution. (See *South West Africa* cases, *I.C.J. Reports 1962*, pp. 330 ff.)

These first submissions of Respondent were a direct challenge to the jurisdiction of the Court by their impeachment of the validity of the treaty clause (Article 7) by which Respondent had consented to the jurisdiction of the Court.

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[1] The bracketed words were inserted in a revised submission of 22 October, as a result of a question posed to the Parties by Judge Sir Percy Spender. Cf. the 1962 Judgment at p. 330.

I am at a loss to understand how the Court can say that the Court's disposal of these first submissions in its 1962 Judgment was merely basing itself upon an hypothesis or some sort of provisional basis. No such thought is expressed in the Court's 1962 Judgment.

The second submission denied the *locus standi* of Applicants:

> "*Secondly*, neither the Government of Ethiopia nor the Government of Liberia is 'another Member of the League of Nations', as required for *locus standi* by Article 7 of the Mandate for South West Africa."

On the basis of several different reasons, the Court dismissed this objection (p. 342). This is a clear decision that Applicants have *locus standi* and the point is *res judicata*.

The third submission argued that there was no "dispute" in the sense of Article 7 because no material interests of the Applicants were involved:

> "*Thirdly*, the conflict or disagreement alleged by the Governments of Ethiopia and Liberia to exist between them and the Government of the Republic of South Africa, is by reason of its nature and content not a 'dispute' as envisaged in Article 7 of the Mandate for South West Africa, more particularly in that no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby."

The Court (p. 344) expressly decided that the objection must be dismissed because there was a dispute within the meaning of Article 7. This decision that the dispute could concern "the well-being and development of the inhabitants" and need not include material interests of the Applicants, is *res judicata*.

The fourth submission in effect argued that collective negotiations in and through organs of the United Nations were not the kind of negotiations contemplated in Article 7:

> "*Fourthly*, the alleged conflict or disagreement is as regards its state of development not a 'dispute' which 'cannot be settled by negotiation' within the meaning of Article 7 of the Mandate for South West Africa."

The Court decided (p. 346) that there having been full collective negotiation by one of the "established modes of international negotiation", this fourth objection must also be dismissed. The decision that this type of negotiation satisfies the requirements of Article 7 is also *res judicata*.

The Judgment of the Court today concludes that all of these objections are to be considered as objections to *the jurisdiction*. As explained in the 1962 Judgment and as emphasized in the dissenting opinion of Judge Morelli, they include objections *to the admissibility* of the claim. The distinction is well established in the jurisprudence of the Court.

The decisions on these four points in the Judgment of 21 December 1962 are final under the provisions of Article 60 of the Statute and Article 94 (1) of the Charter. It is argued, however, that there is nothing with which a party can "comply" in decisions of this character. If Article 60 and Article 94 (1) were indeed to be interpreted as applying only to judgments calling for some affirmative step, the Articles would be largely emasculated.

In *Corfu Channel* (*I.C.J. Reports 1949*, at p. 35), the Court *decided* "that the action of the British Navy constituted a violation of Albanian sovereignty". This was a final judgment or decision and Article 94 (1) applies to it although no action in implementation was required.

In *United States Nationals in Morocco* (*I.C.J. Reports 1952*, at p. 213) the Court *decided* that American nationals were not exempt from certain taxes. This was a final decision and required no action in implementation except acquiescence which is similarly required for judgments upholding jurisdiction.

The decision of the Court in *Northern Cameroons* was final (*I.C.J. Reports 1963*, p. 38) but required no implementation except acquiescence. In any case, indeed, when preliminary objections are sustained (as in *Norwegian Loans* (*I.C.J. Reports 1957*, p. 27)) no implementation by the parties is required. But there is no basis for saying that Article 94 (1) excludes all of these cases.

It should also be noted that by Article 61 (3) of the Statute, compliance may be required by the Court before a revision is considered even though this duty to comply may later be terminated if the judgment is revised.

The Respondent's duty of compliance under Article 94 (1) of the Charter with respect to the judgment of 21 December 1962, was a duty to acquiesce in the findings of the Court and to conduct itself accordingly. By pleading to the merits, Respondent recognized and fulfilled its duty. When the Court decides that it has jurisdiction, a State which denied the correctness of the Court's decision, failed to plead to the merits and maintained that a subsequent adverse judgment on the merits was invalid, would violate its obligation under Article 94. It may be arguable that Respondent's first submission "that the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations", was inconsistent with the Judgment of 21 December 1962, but this could be a matter of interpretation on which argument was justifiable.

The Advisory Opinions on South West Africa

There has also been much discussion of the three Advisory Opinions

given by the Court in regard to South West Africa. The Court invoked them in 1962 and Respondent devoted considerable attention to them. Although an Advisory Opinion or a series of such opinions, is not or are not legally binding on a State Member of the United Nations, whether or not the opinion is accepted and endorsed by the General Assembly, I share the view stated by Judge John Bassett Moore and recalled with approval by Judge Winiarski in his dissenting opinion in *Peace Treaties* (*I.C.J. Reports 1950*, pp. 89 and 91):

> "If the opinions are treated as mere utterances and freely discarded, they will inevitably bring the Court into disrepute: . . . the Court must, in view of its high mission, attribute to them great legal value and a moral authority."

So Judge Azevedo in the same case said that although an ordinary advisory opinion did not produce the effects of *res judicata*, "that fact is not sufficient to deprive an advisory opinion of all the moral consequences which are inherent in the dignity of the organ delivering the opinion, or even of its legal consequences" (p. 80).

On the basic point that the dissolution of the League did not terminate the Mandate or Article 7 thereof as a provision of a convention in force, the Court was unanimous in 1950 and no judge expressed a contrary view in the giving of the Advisory Opinions of 1955 and 1956. The Court having expressly reaffirmed this finding in 1962 (at p. 334), it would indeed have been brought "into disrepute" if it should now have attributed no weight to those prior views.

> "It may be stated that the practical difference between the binding force of a judgment, which derives from specific provisions of the Charter and Statute apart from the *auctoritas* of the Court, and the authoritative nature of an advisory opinion possessed of that same *auctoritas*, are not significant." (Rosenne, *op. cit.*, Vol. II, p. 747.)
>
> "In using judicial decisions as a 'source of law' by virtue of Article 38 (1) *(d)* of the Statute, no distinction at all is made between judicial decisions given in the form of a judgment, and judicial decisions given in the form of an advisory opinion. Recourse is equally had to both types of judicial pronouncement." (*Ibid.*, p. 745, note 1.)

Judge de Visscher, while stating clearly that advisory opinions do not involve the doctrine of *chose jugée*, adds: "*Dans le plan de leur autorité doctrinale, il n'y a guère de distinction à faire entre arrêts et avis.*" (*Aspects récents du droit procédural de la Cour internationale de Justice*, 1966, p. 195.)

As already noted, the Court's present judgment does *not* decide that the Mandate or Article 7 thereof has lapsed and the authority of the Court's prior utterances on that subject remains unimpaired.

SECTION III. RESPONDENT'S ALLEGATIONS OF "NEW FACTS"

Respondent laid great stress on what were alleged to be certain "new facts" which, it was argued, were so important that had they been known to the Court in 1950, the Court would have reached conclusions different from those actually pronounced in the Advisory Opinion which it gave in that year. Waiving the question whether this argument, as advanced, evaded the provisions of the Statute and of the Rules of Court concerning the revision of a prior decision, the so-called "new facts" may be examined, since, if they were "new facts of decisive importance", the Court would certainly need to take them into account even if this required some modification of conclusions previously reached. Some of them bear on the issue of the survival of the Mandate, an issue which cannot be ignored in this opinion. My examination does not lead me to believe any revision of the statement in the Court's Judgment of 1962 (p. 334) is called for: "All important facts were stated or referred to in the proceedings before the Court in 1950." The re-examination of some of these facts reinforces previous conclusions.

Mutatis mutandis, the situation and conclusion are the same as those stated by the Permanent Court of International Justice in the *Monastery of St. Naoum* case with reference to proposed revision of a decision of the Conference of Ambassadors:

> "This decision has also been criticised on the ground that it was based on erroneous information or adopted without regard to certain essential facts . . .
>
> These arguments make it necessary for the Court to ascertain whether, over and above the group of circumstances which led to that decision, there exist new facts or facts unknown at the time when the decision was taken; in other words, whether, as alleged by the Serb-Croat-Slovene State and Greece, the Conference of Ambassadors allocated the Monastery to Albania simply because it was unacquainted with new facts, or unaware of facts already in existence, which, if taken into consideration, would have led to a contrary decision.
>
> As concerns new facts, there are none in the present case. It is true that . . . the Conference was unacquainted with the documents sent by the Serb-Croat-Slovene State in support of its claim for revision . . . But in the opinion of the Court fresh documents do not in themselves amount to fresh facts. No new fact—properly so-called—has been alleged.
>
> As regards facts not known . . . [i]t is . . . difficult to believe that the members of the Conference of Ambassadors were unacquainted with these documents, which are in no sense secret." (*P.C.I.J., Series B, No. 9*, pp. 21-22.)

The "new facts" are listed as four in number in the Respondent's

Preliminary Objections at pages 345-346. In C.R. 65/7, 30 March 1965, at pages 44 and 45, and C.R. 65/16, 12 April 1965, at pages 43 ff., the first of the four "new facts" is omitted [1].

The first "new fact" as listed in the Preliminary Objections is the so-called express reservations made by the South African representative, Mr. Smit, at San Francisco on 11 May 1945. In the Court's 1950 volume of *Pleadings*, etc., at page 114, the United States in its statement set forth the entire text of the declaration by Mr. Smit except for the extra paragraph which Respondent says is not in the official transcript but which, before his death, Mr. Smit said was part of his statement. It is doubtful whether this extra paragraph adds much to what is said in the last three paragraphs of what is printed in the United States statement. The United States statement adds a reference to United Nations, *Official Records; General Assembly, First Session, Second Part, Fourth Committee, Part I* (1946), 200, Annex 13. Doc. A/123 in this annex is a letter dated 17 October 1946 from the Legation of the Union of South Africa to the Secretary-General. It contains a long memorandum on the administration of South West Africa which begins: "1. On 7 May 1945, the delegation for the Union of South Africa informed the United Nations Conference on International Organization, San Francisco, as follows: . . ." Here follows the statement as set out in the Preliminary Objections (at pp. 237-238) but the extra paragraph is not included.

According to the verbatim transcript of the meeting at which the South African delegate made his statement, Running Number 33, the delegate at the end of the prepared statement said: "That is all I have to say." There is no indication that the extra paragraph was pronounced, and one is therefore led to conclude that Mr. Smit's memory may have been faulty [2].

The United States statement to the Court in 1950 noted that the representative of South Africa had subsequently referred to Mr. Smit's declaration as a "reservation". It was said that he had circulated copies of the statement on 7 May before reading it to the meeting. The statement continues by referring to a speech by the South African representative about this "reservation" at the second session of the General Assembly, citing United Nations, A/P.V. 105 Plenary, 1947, 187-190 (final citation 105th Plenary, p. 635). The United States statement also said (p. 116):

> "The effect of the 'reservation' was simply to give notice that the Union of South Africa would later raise in a competent forum the question of the future of South West Africa, with a view to incorporation of that Territory in the Union."

[1] The "C.R." references in this opinion are to the daily verbatim transcripts, the numbering and pagination of which will not be identical in the final printed record *(I.C.J. Pleadings)*.

[2] The acceptance of Mr. Smit's recollection in the 1962 joint dissent at p. 533, was perhaps too facile.

This so-called South African reservation was also discussed by Judge Ingles of the Philippines at pages 251 ff. of the 1950 *Pleadings*. As stated above, Respondent abandoned this "new fact".

The second "new fact" is the rejection by the Preparatory Commission of the United Nations of a proposal for a temporary trusteeship committee. This event cannot be called "new" since it was discussed at length by Dr. Kerno, representative of the Secretary-General [1], in the 1950 *Pleadings* before this Court at pages 161 ff. He gave explanations why the proposal was rejected but the matter was argued at such length in the present phase of the case that it is well to state the facts.

The Respondent seemed to attach importance to this alleged "new fact" in connection with its arguments that the Mandate lapsed on the termination or dissolution of the League of Nations and that the United Nations refused to accept any responsibilities or authority in connection with the territories which had been administered as mandates. Respondent was presumably stimulated by the 1962 joint dissent, pages 536-537, to make this argument.

By decision of the San Francisco Conference, a Preparatory Commission met in London on 24 November 1945. It made a report which was considered in the First Part of the First Session of the General Assembly of the United Nations, which also met in London, beginning on 10 January 1946. One of the matters considered was the establishment of the machinery necessary to inaugurate the United Nations trusteeship system. The account of what happened and the reasons why it happened are to be found in the official records and in authoritative contemporary reports.

The situation in the Preparatory Commission is summarized in the commentary on its report as presented by the Secretary of State for Foreign Affairs to the Parliament in London:

> "Article 85 of the Charter . . . requires that the Trusteeship Council shall advise the General Assembly on the terms of trusteeship proposed for non-strategic areas. On the other hand Article 86, which defines the composition of the Trusteeship Council, lays down that one-half of the members of the Council are to be the States administering trust territories, and this presupposes that the terms of trusteeship for such territories have already been approved. To resolve this dilemma the Executive Committee recommended the creation, under Article 22 of the Charter, of a temporary Trusteeship Committee . . . Certain Delegations opposed this solution on the grounds that it was unconstitutional, but it nevertheless secured the necessary two-thirds majority in the Executive Committee. The Preparatory Commission, however, was unable to reach agreement on this matter and its recommendation to the

[1] Dr. Kerno, in 1946, had been Rapporteur for the Fourth Committee of the General Assembly on Chapter IV (The Trusteeship System) of the Report of the Preparatory Commission.

Assembly is devoted almost entirely to the question of the action to be taken by individual Member States to prepare terms of trusteeship. With regard to the question of United Nations machinery the effect of the draft resolution is merely to defer any solution until the meeting of the General Assembly itself . . ." (Cmd. 6734, Misc. No. 5, 1946, p. 8.)

The same analysis of the situation is presented in the report of the United States Delegation to the President of the United States:

"*(e)* Since establishment of the Trusteeship Council was dependent upon prior negotiation of trusteeship agreements and was therefore likely to be delayed for some time, the United States concurred in a suggestion that a temporary trusteeship committee of the Assembly might be instituted pending establishment of the Council. Some others believed, on the contrary, that such a committee might tend to delay establishment of the Trusteeship Council and might not even be constitutional. The United States, while questioning the validity of the latter point, agreed that a temporary committee was not essential and that the early conclusion of the necessary trusteeship agreements to enable the Trusteeship Council to be established should be encouraged. This view was finally adopted." (*Department of State Publication 2484*, 1946, p. 4.)

The thrust of Respondent's argument about the non-inclusion of the proposal for a temporary trusteeship committee is that this omission proved that it was agreed that the United Nations had no responsibility in regard to mandated territories. As indicated in the two foregoing quotations, the British and United States Delegations reported that the non-inclusion was due to arguments based upon the unconstitutionality of the proposal and on the argument that the establishment of a temporary committee might delay instead of expediting the conclusion of trusteeship agreements. Since this point is important, it may be noted that the *Yearbook of the United Nations 1946-1947*, at page 36, gives the same explanation for the non-inclusion of the provision for a temporary trusteeship committee.

The point of view of the United States delegation is further revealed in an amendment which it proposed in the Preparatory Commission on 4 December 1945 (Doc. PC/TC/11):

"1. The Report by the Executive Committee makes no provision for any organ of the United Nations to carry out the functions of the Permanent Mandates Commission. In Part III, Chapter IX, dealing with the League of Nations there occurs the following statement: 'Since the questions arising from the winding up of the Mandates system are dealt with in Part III, Chapter IV, no recommendation on this subject is included here.' (Section 3, paragraph 5, page 110.) No specific reference to the functions of the Permanent Mandates Commission is to be found, however, in Part III, Chap-

ter IV, relating to the trusteeship system. Section 2, paragraph 4, of that Chapter (page 56) merely assigns to the Temporary Trusteeship Committee a general advisory function in this field: '(iv) 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. In order to provide a degree of continuity between the mandates system and the trusteeship system, to permit the mandatory powers to discharge their obligations, and to further the transfer of mandated territories to trusteeship, the Temporary Trusteeship Committee (or such a committee as is established to perform its functions) and, later, the Trusteeship Council should be specifically empowered to receive the reports which the mandatory powers are now obligated to make to the Permanent Mandates Commission. *The existing obligations and rights of the parties involved under the mandates system with respect to any mandated territory continue in force until such territory is placed under trusteeship by an individual trusteeship agreement or until some other international arrangement is made.* To bridge any possible gap which might exist between the termination of the mandates system and the establishment of the trusteeship system, it would appear appropriate that the supervisory functions of the Permanent Mandates Commission should be carried on temporarily by the organ of the United Nations which is to handle trusteeship matters.

3. In order, therefore, that the report of the Preparatory Commission may be complete in this respect the following amendment is proposed.

4. *Amendment*

Add a new subparagraph *(v)* to paragraph 4 of Part III, Chapter IV [Trusteeship System], Section 2, to be worded as follows:

'*(v)* undertake, following the dissolution of the League of Nations and of the Permanent Mandates Commission, to receive and examine reports submitted by Mandatory Powers with respect to such territories under mandates as have not been placed under the trusteeship system by means of trusteeship agreements, and until such time as the Trusteeship Council is established, whereupon the Council will perform a similar function'." (Italics added.)

At this stage of the debates in the Preparatory Commission, the representative of Yugoslavia introduced a substitute proposal for the appointment of an *ad hoc* committee of the General Assembly which would have functions like those which it had been proposed the Temporary Trusteeship Committee should discharge. The representative of the United States commented on the Yugoslav proposal in Committee 4

of the Preparatory Commission on 8 December 1945. The text of this speech was circulated. (Doc. PC/TC/30.) The speech includes the following statement:

> "My Delegation still feels that there is nothing objectionable whatever in the Report of the Executive Committee proposing the establishment of a Temporary Trusteeship Committee; it still seems to us that that is a perfectly constitutional method of procedure and a perfectly practical method of procedure, and we are willing to agree to that proposal if we cannot agree on any alternative; but we are quite willing to explore any other alternative arrangement and are quite willing, as I indicated, to accept the proposals of the Yugoslav Delegation on the lines which I have indicated."

However, on 10 December the representative of the Soviet Union again objected on the same grounds as before, namely that the proposed *ad hoc* committee of the General Assembly would be just as unconstitutional and would involve the same delays as would the suggested Temporary Trusteeship Committee. In view of this situation, the Chinese representative, Mr. Wellington Koo, proposed that the matter be referred to a sub-committee. The sub-committee brought in a report which made no mention of a temporary or *ad hoc* committee. This report was adopted by 28 votes to none. (Doc. PC/TC/32; see also Vernon McKay, "International Trusteeship—Role of United Nations in the Colonial World", XXII, *Foreign Policy Reports*, No. 5, 15 May 1946, p. 54.)

It thus appears that the reason why the Preparatory Commission did not recommend—as had its Executive Committee—the establishment of any temporary body to deal with the mandates prior to the creation of the United Nations Trusteeship Council, was the impossibility of reaching an agreement between the point of view staunchly supported by the United Kingdom and the United States and others on the one hand, and strongly opposed by the delegation of the Soviet Union and other delegations on the other hand. It must be borne in mind that this was the first meeting of a representative United Nations body after the Charter entered into force and there was evident reluctance to force an issue over important opposition.

However, the ensuing debates in the Fourth Committee of the General Assembly at the First Part of its First Session in London, revealed that there was wide agreement on two points: first, that the dissolution of the League of Nations would not terminate the mandates; and second, that the United Nations had responsibilities in connection with the mandates. Some of the delegates were convinced that mandated territories were included within the scope of Chapter XI of the Charter and therefore favoured setting up machinery to carry out the obligations of the United Nations under this Chapter. However, at this stage, and later, the prevailing opinion concentrated on urging the desirability of placing all mandated territories under the trusteeship system as soon as possible.

Various points of view expressed in the debates in the Fourth Committee of the General Assembly at this First Session are revealed by the following extracts [1]:

> [van Asbeck, Netherlands, p. 12]
>
> "The attention of the Committee was then called to the gap in the administration of the territories under mandate between the winding up of the League of Nations and their coming under the trusteeship system. It should be made clear that the Trusteeship Council should have the power to deal with such territories in the interim period."
>
> [Mr. Makin, Australia, p. 13]
>
> "... that the work of the Committee fell into two distinct parts, the consideration of items pertaining to trusteeship arrangements, and of matters arising under Chapter XI of the Charter. Australia believed that these two functions should be taken up separately ...
>
> It should consider also the functions of the United Nations under Chapter XI of the Charter ...
>
> The importance of Chapter XI was that it was already in effect, and did not depend upon the establishment of the trusteeship system. It applied to all territories which were not fully self-governing, and required no negotiations or decisions.
>
> Mr. Makin then drew the attention of the Committee to the specific undertaking in paragraph *e* of Article 73. He urged that the Committee should advise the General Assembly as to what arrangements were appropriate for discharging its functions under Chapter XI of the Charter.
>
> [He said they would introduce a resolution recognizing the sacred trust.] The machinery should be devised for carrying out the functions of the United Nations which pertained to the fulfilment of this obligation."

On 6 February, Dr. Ivan Kerno, as Rapporteur, made the following explanation about the report which he had submitted:

> "The suggestion that the Committee should consider the procedures for approving trusteeship agreements, including the possibility of providing some interim machinery for this purpose, had not been referred to in the report, because it had not been submitted in written form. The sub-committee which had fully discussed the matter, had agreed that it should be left completely open for the General Assembly to decide later." (P. 37.)

The representative of the United Kingdom objected to the omission—

[1] Counsel for Applicants attached undue weight (19 March 1965, C.R. 65/3, p. 30 and subsequently) to the statement by Mr. Nicholls of South Africa. I do not reproduce this or certain other statements already spread on the record of the case.

"... of any reference to the question of the procedure for dealing with trusteeship matters in the period between this session and the establishment of the Trusteeship Council ...

[He read a statement]: 'The United Kingdom delegation has, throughout the Executive Committee, the Preparatory Commission and this Committee, emphasized the need for such arrangements if delay in bringing the trusteeship system into operation is to be avoided ... the United Kingdom delegation would like to remind the Committee that when we withdrew our pressure for the inclusion of something on this point in the draft resolution we did so ... on the clear understanding that the Committee had reached this decision with its eyes open as to the implications ...

There is, unfortunately, some evidence that our efforts to prevent unavoidable delay, by the creation of machinery for bridging the gap between sessions, are even now not fully appreciated in all quarters.' " (P. 37.)

The Soviet representative stated that his delegation "still maintained the view that the establishment of temporary trusteeship machinery would hamper rather than facilitate the coming into operation of the permanent system" (p. 39).

The representative of the United States suggested an amendment to a proposal advanced by the British delegation as follows:

"The Committee also considered whether it would be desirable to follow up the draft resolution prepared by the Preparatory Commission, by making recommendations to the General Assembly for an interim body to deal with trusteeship matters between the first and second parts of the first session of the General Assembly. The Committee decided to make no recommendation on this subject." (P. 40.)

This proposal was opposed by the Soviet representative because "there was no mention of any interim trusteeship body in the Preparatory Commission's Report", and because the proposal had not been submitted in written form (p. 40).

The representative of Byelo-Russia also objected because the United States proposal implied "that the Committee was not opposed to the creation of an interim body, but merely had not made any recommendation on this subject". The difficulty was overcome by the adoption of a neutral statement submitted by Mr. Ralph Bunche of the United States. In a later statement Mr. Bunche, who was then Acting Chief of the Division of Dependent Area Affairs of the United States Department of State, said that this difficulty (which has just been described) "was one of procedure rather than substance". (XIII *Dept. of State Bulletin*, 1945, pp. 1037, 1043.) If the issue had really been, as contended by the Respondent in this case, whether the mandates would survive the dissolution of the League of Nations and whether the United Nations

had any responsibilities in regard to mandates, the question certainly would have been one of substance.

The third "new fact" on which Respondent relied, is another matter which was developed in the joint dissenting opinion of 1962. The matter to which the joint dissenting opinion called attention occurred at the meeting of the Assembly of the League of Nations at Geneva in April 1946, in other words, shortly after the First Part of the First Session of the General Assembly of the United Nations. The events in question at the meeting of the League Assembly follow in sequence those which have just been described. The Chinese representative, Mr. Liang, introduced a resolution which read as follows:

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

This proposal did not gain general support and, precisely as happened in the Preparatory Commission of the United Nations and in the first meeting of the General Assembly of the United Nations, a neutral text was finally adopted. This text was 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 civilisation:
>
> 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."

It is not surprising that counsel for Respondent should hit upon the contrast between these two resolutions to support the argument that the rejection of the original Chinese resolution proved that the United Nations did not agree that it had any responsibilities in regard to the mandatory régime which had functioned under the League of Nations. However, as anyone familiar with proceedings in the United Nations would know, it is always dangerous to draw inferences from the fact that a particular resolution is not adopted or that its sponsor withdraws it. Many reasons may enter into the unwillingness of delegations to vote for a particular proposition which may have been introduced as a *ballon d'essai*, or for other reasons. In the actual case of the Final Assembly of the League of Nations, it would not be an unreasonable supposition that if a resolution had been introduced saying that on the dissolution of the League all mandates would be terminated, that resolution also would have failed to secure the necessary support.

It is worth noting that the original Chinese resolution suggested the necessity of avoiding "a period of interregnum in the supervision of the mandatory régime". On this point, Professor Bailey of Australia, in his subsequent statement in the League Assembly on 11 April 1946, called attention to the immediate applicability of Chapter XI of the United Nations Charter to mandated territories and said: "There will be no gap, no interregnum, to be provided for." (Professor Bailey's statement is quoted in the Counter-Memorial, Book II, pp. 48-49.)

Although this incident is of no significant weight to support the argument for which it was invoked, it is true that the full story of the two resolutions was not presented to the Court in 1950. One must be aware, however, that the International Court of Justice does not limit itself to considering documents actually presented to it by counsel or, as in the case of the 1950 Advisory Opinion, by representatives of Governments or of the United Nations. Dr. Kerno did mention the final resolution of the League Assembly as quoted above, and it would be surprising if the Court did not examine the entire record of that Final Session of the League Assembly which was cited by Dr. Kerno. (*I.C.J. Pleadings 1950*, p. 164.)

The fourth "new fact" includes various statements made in debates on the Palestine question and, according to Respondent's oral argument, other statements in debates in the United Nations. The kind of argument which counsel for South Africa makes in connection with the Palestine question was not presented to the Court in 1950. However, the relations between the State of Israel and the Arab States, which were matters of front-page news in the world press, presented politically highly sensitive issues. One may note the reticence in the General Assembly resolution requesting the opinion of the Court in the *Injuries* question, and the like reticence in the Court's Opinion on that question in 1949. (*I.C.J. Reports 1949*, p. 174.)

The actualities of the Palestine situation are quite different from what one would suppose solely on the basis of the statements by counsel for Respondent. It should be noted, however, that the Egyptian statement of 18 April 1946 at the Seventh Plenary Meeting of the General Assembly was in the dossier submitted to the Court in 1950 by the Secretary-General. Moreover, Dr. Kerno discussed the Palestine question (pp. 213-214 of the 1950 *Pleadings*).

The most important bit of evidence to be derived from the Palestine case is the fact that, except for the Egyptian position which was based on familiar grounds, everyone, including the Palestine Commission, operated on the assumption that the Mandate continued to exist after the dissolution of the League in April 1946.

The United Kingdom recognized that the Mandate survived the dissolution of the League and admitted its accountability to the United Nations. In a letter of 2 April 1947 to the Secretary-General the United Kingdom said:

> "It will submit to the Assembly an account of its administration of the League of Nations Mandate and will ask the Assembly to make recommendations under Article 10 of the Charter concerning the future government of Palestine." (This quotation is from the Security Council *Official Records*, 271st meeting, 19 March 1948 at p. 165.)

On 7 February 1947, the British delegation to the Anglo-Arab conference in London submitted a new proposal for a five-year British trusteeship over Palestine as a preparation for independence. But due to the impossibility of reconciling conflicting views, the British Government relegated the solution to the United Nations. The United Nations Special Committee on Palestine recommended that "The Mandate for Palestine shall be terminated at the earliest practicable date". The General Assembly resolution of 29 November 1947 (181 (II) A) adopting the plan for partition with economic union, provided that "the Mandate for Palestine shall terminate as soon as possible but in any case not later than 1 August 1948". But on 11 December 1947 Mr. Creech Jones, for the Government, told the House of Commons that the Mandate would

be terminated on 15 May 1948. (*Hansard*, Commons, 11 December 1947, col. 1218.) Put differently, the Mandate would continue in force for some two years after the dissolution of the League. The United Nations fully accepted its responsibility to deal with the problem and even asserted powers which some thought it did not possess. There was a vigorous effort to establish a United Nations trusteeship. This effort ended with the establishment of the State of Israel on 14 May 1948 which, by Israel's admission to the United Nations, was sanctioned by the Organization.

The following notes from the Security Council debates are indicative of the actual situation (271st meeting of Security Council 19 March 1948 (*S.C., O.R.*, p. 154)). The Council was discussing the report of the Palestine Commission. Senator Austin (United States) had said that in the morning four of the Permanent Members of the Security Council had been consulting and that the United Kingdom had not participated in the consultations but had furnished information. He continued (at p. 163):

> "In his statement to the Security Council on 24 February 1948 [253rd meeting], the representative of the United Kingdom said:
>
> 'My Government is bringing to an end the discharge of its responsibilities towards Palestine under the Mandate and is leaving the future of that country to international authority.'
>
> On 2 March 1948 [260th meeting], the representative of the United Kingdom referred in his statement to the Security Council to—
>
> '. . . whatever procedure the United Nations may decide to adopt with a view to assuming responsibility for the government of Palestine on May 15th . . .'.
>
> He concluded with the statement:
>
> 'Finally, I must repeat that the United Kingdom cannot enter into any new or extended commitment in regard to Palestine. Our contribution has already been made over the years and the date of termination of our responsibility is irrevocably fixed.' "

Although Senator Austin did agree that the United Nations was not taking over the mandates system, he asserted: "On the facts reported by the permanent Members, Palestine is a land falling under Chapter XI of the United Nations Charter, a non-self-governing territory".

If it be thought that in advisory proceedings the Court does not receive as full a statement or argument as is presented in contentious proceedings, it may be noted that in 1950 the volume of *Pleadings, Oral Arguments and Documents* on the question of the *International Status of South*

West Africa, contains 350 pages. In the course of the presentation, Dr. Steyn, representative of the Union of South Africa, spoke at four separate sessions of the Court.

In summary, in the Palestine case the British Government recognized and frequently asserted that the Palestine mandate survived the dissolution of the League. It agreed to account to the United Nations for its administration of the Mandate and, by submitting the future of Palestine to the General Assembly, recognized the authority of the United Nations to bring about a change in the status of a mandate.

One may compare the position taken by the British Government in regard to the Transjordan Mandate. The representative of Great Britain informed the United Nations General Assembly on 17 January 1946 that it was the intention of his Government "to take steps in the near future for establishing this territory as a sovereign independent State". The General Assembly in resolution XI of 9 November 1946 welcomed this declaration, and the Assembly of the League of Nations in its resolution of 18 April 1946, quoted above, welcomed Transjordan independence.

However, the Polish representative subsequently denied that the Mandate had been legally terminated and asserted the "rights and obligations" of the United Nations. On 29 August 1946, when the question of the admission of Transjordan as a Member of the United Nations was being discussed, the British representative in the Security Council remarked in response:

> "You expressed a doubt as to the status of Transjordan, in view of the fact that it was formerly under mandate. *You said that the United Nations inherited certain rights and responsibilities in the matter of mandates from the League of Nations. That is quite true.* The League of Nations, recently, on its deathbed, formally declared Transjordan free from the mandate. Therefore on the question of whether the legal formalities have been sufficiently complied with, I fail to see in what way those formalities have not been fulfilled in the case of Transjordan as much as they have been fulfilled in regard to two other States which have been accepted without question as Members of the United Nations." [i.e., Syria and Lebanon.] (See U.N., *S.C.*, *O.R.*, 1st Year, 2nd Series, report of 56th and 57th Meetings at p. 101. Italics added.)

It is apparent that there is nothing in the argument about any "new facts" to induce the Court to alter decisions about the *International Status of South West Africa* which it had reached after full argument and full deliberation.

SECTION IV. THE HISTORICAL BACKGROUND OF THE DRAFTING OF THE MANDATE

The history of the drafting of the mandate instruments has been discussed in these cases with particular reference to the important problem of interpreting Article 7, paragraph 2, of the Mandate for South West Africa. Although I touched on the principal historical facts in my separate opinion in 1962, the joint dissenting opinion of 1962, the arguments of the Parties in the subsequent phase [1], and the present Judgment of the Court, now require a more detailed exposition of certain aspects of the historical record.

It will be more convenient not to follow a strictly chronological scheme. I shall deal first with the interpretation of paragraph 2 of Article 7 of the Mandate because the normal interpretation of its text has been challenged in such a way as to necessitate a resort to the *travaux préparatoires* and subsequent practice, and because the Judgment of the Court, in my view, rests upon an incomplete, inaccurate analysis of the data. This erroneous analysis leads the Court to the conclusion that paragraph 2 of Article 7 of the Mandate did not confer upon Members of the League a right to rely upon the Court for the general purpose of ensuring the proper administration of the Mandate in fulfilment of the obligations of the sacred trust. After dealing with the historical background and other evidence needed for the interpretation of paragraph 2 of Article 7 of the Mandate, it will be necessary to return to the historical background in connection with other issues.

Treaty Interpretation

In my opinion it is not necessary—as some utterances of the two international courts might suggest—to apologize for resorting to *travaux préparatoires* as an aid to interpretation. In many instances the historical record is valuable evidence to be taken into account in interpreting a treaty. It is tradition, rather than law or logic, which has at times led to judicial statements that this evidence is used merely to confirm an interpretation which is supposed to have been already derived from the bare words of the text or even of the text in its context. The appropriate position on these "rules" of treaty interpretation is well stated in *Italian Republic* v. *Federal Republic of Germany*, Arbitral Commission on Property, Rights and Interests in Germany, Second Chamber—Sauser-Hall, Schwandt, Sperduti—(1959) 29 *International Law Reports*, 442, at 449 and 459 ff., for original pagination 260 and 268 ff.

The task of interpretation in this case requires the Court to ascertain what

[1] The Respondent relied heavily on the joint dissenting opinion of 1962; see especially Counter-Memorial, Book II, Chapter V. The present Judgment of the Court does not seem to depart from the arguments of the joint dissent in this respect.

meaning must be given to certain important provisions of the Covenant of the League of Nations, and of the Mandate for South West Africa.

At the outset:

> "... one must bear in mind that in the interpretation of a great international constitutional instrument, like the United Nations Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties do not suffice [1]". (Separate opinion of Judge de Visscher, *Status of South West Africa, I.C.J. Reports 1950*, p. 189.)

In particular it is true that one cannot understand or analyse the proceedings of a great international conference like those at Paris or San Francisco if one regards it as essentially the same as a meeting between John Doe and Richard Roe for the purpose of signing a contract for the sale of bricks.

> "But lawyers who are trained in the methods of interpretation applied by an English court should bear in mind that English draftsmanship tends to be more detailed than continental, and it receives, and perhaps demands a more literal interpretation. Similarly, diplomatic documents, including treaties, do not as a rule invite the very strict methods of interpretation that an English court applies, for example, to an Act of Parliament." (*The Law of Nations* by J. L. Brierly, 6th ed., 1963, by Sir Humphrey Waldock, p. 325.)

It may be agreed that there are dangers in dealing with multipartite treaties as "international legislation", but if municipal law precedents are invoked in the interpretative process, those precedents dealing with constitutional or statutory construction are more likely to be in point than ones dealing with the interpretation of contracts [2].

In interpreting a bilateral treaty, the Court may, but need not, content itself with examining the views of the two parties. In the case of a multipartite treaty, the situation is different. Thus in the *Rights of Nationals of the United States of America in Morocco* case between France and the United States, in considering the Act of Algeciras, the Court concluded that the article in question "requires an interpretation which is more flexible than either of those which are respectively contended for by the Parties in this case". (*I.C.J. Reports 1952*, p. 211.) So in the *Application of the Convention of 1902 Governing the Guardianship of Infants* case, Judge Córdova said:

> "If the 1902 Convention had been a bilateral treaty, their [the Parties'] common interpretation with regard to one of its Articles . . .

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[1] One recalls the famous apothegm of Chief Justice Marshall in *McCulloch* v. *Maryland* (4 *Wheat.* 407): "We must never forget that it is a constitution we are expounding."

[2] The Supreme Court of the United States resorts to the historical background for aid in interpreting the Constitution of the United States (e.g., in *Wesberry* v. *Sanders*, 84 S. Ct. 526 (1964)) and in construing acts of Congress (e.g., in *Brotherhood of Locomotive Engineers* v. *Chicago R.I. & P.R. Co.*, 86 S. Ct. 594 (1966)).

would have been enough for me to consider such a construction as final; but the 1902 Convention being a multilateral treaty, it is possible, I believe, to hold a different opinion from that of the two Parties before the Court with reference to the applicability of its Articles." (*I.C.J. Reports 1958*, p. 143.)

In the *Territorial Jurisdiction of the International Commission of the River Oder* case, the Permanent Court was not satisfied with the various technical arguments advanced by the parties for the interpretation of the Treaty of Versailles and accordingly fell back on principles governing international fluvial law in general (*P.C.I.J., Series A, No. 23, 1929*, p. 26).

Even when dealing with a bilateral treaty, the Permanent Court asserted its judicial freedom in saying in the *Free Zones of Upper Savoy and the District of Gex* case:

"From a general point of view, it cannot lightly be admitted that the Court, whose function it is to declare the law, can be called upon to choose between two or more constructions determined beforehand by the Parties none of which may correspond to the opinion at which it may arrive. Unless otherwise expressly provided, it must be presumed that the Court enjoys the freedom which normally appertains to it, and that it is able, if such is its opinion, not only to accept one or other of the two propositions, but also to reject them both." (*P.C.I.J., Series A/B, No. 46*, p. 138.)

More especially, when the judicial task has been that of interpreting Mandates, national courts have declared:

"In any analysis of the legal and constitutional basis of the government of the Mandated Territory the primary duty of English courts is to attend to the objects and purposes of the mandates system, to avoid 'a quibbling interpretation' and 'a merely pedantic adherence to particular words', 'to discover and to give effect to all the beneficent intentions' embodied in the instrument . . ." (Evatt, J., High Court of Australia, in *Ffrost* v. *Stevenson*, 1937, Vol. 58, *Commonwealth Law Reports*, p. 528 at 579.)

And to the same effect:

"I am of opinion that in seeking the meaning of expressions used in the Covenant of the League and in the Mandate one should not overlook the nature of those documents or be led astray by the terms of art used therein." (van den Heever, J., *in Rex* v. *Offen*, 1934, *South African Law Reports, South West Africa*, p. 73 at 84.)

I repeat also an extract from the opinion of de Villiers, J.A., in *Rex* v. *Christian* (1923), *The South African Law Reports* [1924] Appellate Division, 101 at 121, which Judge Sir Arnold McNair quoted in his separate opinion on the *Status of South West Africa* in 1950:

> "The legal terms employed in Article 22—trust, tutelage, mandate, cannot be taken literally as expressing the definite conceptions for which they stand in law. They are to be understood as indicating rather the spirit in which the advanced nation who is honoured with a mandate should administer the territory entrusted to its care and discharge its duties to the inhabitants of the territory, more especially towards the indigenous populations. In how far the legal principles of these analogous municipal institutions should be applied in these international relations I shall not take upon myself to pronounce. But I may be permitted to say that in my opinion the use of the term shows that in so far as those legal principles are reasonably applicable to these novel institutions, they should loyally be applied. No doubt most difficult questions will arise." (*I.C.J. Reports 1950*, p. 151.)

A much earlier admonition taught that "the letter killeth but the spirit giveth life".

I adopt with emphatic approval what Judge Lauterpacht said in his separate opinion in 1955 on South West Africa about the so-called "clear meaning" rule which to my mind is often a cloak for a conclusion reached in other ways and not a guide to a correct conclusion. Judge Lauterpacht said:

> "This diversity of construction provides some illustration of the unreliability of reliance on the supposed ordinary and natural meaning of words.
>
> Neither having regard to the integrity of the function of interpretation, is it desirable that countenance be given to *a method* which by way of construction may result in a summary treatment or disregard of the principal issue before the Court." (*I.C.J. Reports 1955*, p. 93.) (Italics added.)

I also agree with Judge Sir Percy Spender's discussion of the rule about "ordinary and natural sense" in his separate opinion in the question of *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (*I.C.J. Reports 1962*, p. 184):

> "This injuction is sometimes a counsel of perfection. The ordinary and natural sense of words may at times be a matter of considerable difficulty to determine. What is their ordinary and natural sense to one may not be so to another. The interpreter not uncommonly has, what has been described as, a personal feeling towards certain words and phrases. What makes sense to one may not make sense to another. Ambiguity may lie hidden in the plainest and most simple of words even in their natural and ordinary meaning. Nor is it always evident by what legal yardstick words read in their natural and ordinary sense may be judged to produce an unreasonable result."

With these observations in mind, I re-emphasize the view expressed above about the value of *travaux préparatoires*.

The Milner Commission

The Milner Commission, established by the Council of Four of the Peace Conference on 27 June 1919 to deal with the Mandates, held its first meeting on the following day, 28 June. The Commission had before it a draft for 'C' mandates, prepared by Lord Milner. The Japanese representative noted the absence of what is now referred to as an "open-door" clause for equal commercial opportunities for all Members of the League; this was to remain a Japanese objection over a long period of time. Although the record [1] makes no reference to the distribution of a draft for a 'B' mandate at this time, Viscount Chinda referred to the text of such a 'B' draft, and the American 'B' draft of 8 July has a headnote saying that the modifications in Lord Milner's draft are printed in italics, so it is evident that a Milner 'B' draft had already been circulated.

The original Milner draft for 'C' mandates contained provisions about slavery, forced labour, control of arms traffic, alcoholic beverages, military service and fortifications, but nothing on the requisite consent of the Council of the League for modification of the terms of the mandate and no adjudication clause as in the eventual Article 7.

The second meeting of the Commission was on 8 July. It then had before it a French draft of a 'B' mandate [2], and an American draft of a 'B' mandate. The French draft had been sent to Lord Milner on 5 July. The later appearance of the American draft may have been due to the fact that only Mr. Beer represented the United States at the first meeting on 28 June whereas Colonel House was also present on 8 July and subsequently. I find no justification for the position taken in the Court's Judgment that this American draft was not one of the "original" drafts. The Commission continued its discussion of the draft of the 'C' mandate but members made cross-references to the new 'B' drafts. Thus Colonel House suggested inserting in the 'C' draft, Article 14 of his 'B' draft which, in expanded form, deals with the necessity for the consent of the Council to any changes, as is now recorded in paragraph 1 of Article 7 of

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[1] The only detailed available record is an official French document printed as a confidential paper in 1934 but not released until much later: *Conférence de la Paix 1919-1920, Recueil des Acts de la Conférence*, Partie VI A, Paris, 1934, Confidentiel. This is the source referred to in the following pages unless otherwise noted.

[2] Erroneously identified in my separate opinion in 1962 as a "British-French draft".

the South West Africa 'C' mandate [1]. The decision on Colonel House's suggestion was deferred. Colonel House suggested additions to what has come to be called the "missionary clause" which in some form was in all three original drafts of the 'B' mandate and which now figures in Article 5 of the 'C' mandates. Colonel House telegraphed President Wilson from London on 9 July that in discussing the 'C' mandates "I offered a clause for the protection of missionaries which was agreed to in substance and the form will be drafted tomorrow" [2].

Colonel House did not at this point suggest the inclusion in the 'C' mandate of the adjudication clause which figured in Article 15 of the American 'B' draft since the Commission at this point passed to a consideration of the draft of 'B' mandates. For this purpose, they took the French draft as a basis for discussion. A clause in the preamble of the American text was discussed. As was to be true during many subsequent discussions, the meeting ended on disagreement over the French view about the recruitment of Native troops.

On 9 July, the third session of the Commission opened with a further discussion of the French text of a 'B' mandate and the problem of recruitment. However, from point to point, the United States representatives asked for the inclusion of provisions from the American draft, which was much more detailed in specifications of commercial and other economic rights, although most of these were covered in general terms in the French draft. The French representative, M. Simon, questioned whether the detailed specifications were necessary. It was at this point, and *before any reference by Colonel House to the adjudication clause in the American draft*, that Lord Robert Cecil made the statement which is quoted out of context in the 1962 joint dissenting opinion at page 556 (and I adopt their translation):

> "*Lord Robert Cecil (British Empire)* thought that that question was linked with the right of recourse to the International Court. If the right of recourse were to be granted, it would be preferable merely to lay down the principle of equality and leave it to the Court to apply the principle to particular cases. He thought however it would be desirable to replace the words 'commercial equality'

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[1] The text as printed in Annex I on page 339 is as follows: *[Translation]* "Art. 14. The consent of the League of Nations is required for any modification of the terms of this mandate and the Council shall at any time recommend their reconsideration if, in its opinion, these provisions are no longer appropriate in the existing circumstances."

[2] See Miller, *Diary*, Vol. XX, p. 348 and *Foreign Relations of the United States, Paris Peace Conference*, 1919, Vol. XI, p. 647.

Representations on behalf of missionary interests had been made to the American delegation to the Peace Conference as early as April 1919; see Miller, *Diary*, Vol. I, p. 218, and Vol. VII, p. 398.

('égalité commerciale')—which appeared in the French draft—by the words 'commercial and industrial equality'. If on the other hand, no right of recourse to the Court was to be given, it would be necessary to elaborate stipulations in detail."

As the joint dissent correctly states: "The morning session concluded with this observation." It was not discussed.

It was not unnatural for Lord Robert Cecil to refer to the International Court since at the Peace Conference he had been the champion of the Court and it was largely his insistence that finally led to the inclusion in the Covenant of Article 14 which placed upon the Council the duty of providing for such a Court. (See Temperley, *A History of the Peace Conference of Paris*, Vol. VI, 1924, p. 486; Hudson, *Permanent Court of International Justice, 1920-1942*, 1943, p. 95.) On the other hand, M. Simon, who was the French representative on the Milner Commission, had opposed at Paris the whole idea of international supervision of the former enemy territories which eventually were placed under mandates; he advocated "annexations pure and simple". (See Lloyd George, *Memoirs of the Peace Conference*, 1939, Vol. I, p. 350.) The observation of Lord Robert Cecil just quoted above had no relevance to the intention of the United States representatives in proposing an adjudication clause which—as will be shown—distinguished between judicial recourse to safeguard special individual economic rights, and recourse to the Court to protect the general rights of member States in the proper carrying out of the mandate. There is nothing in the record to support the conclusion in the joint dissenting opinion (at p. 556) that the debate at this meeting—when the adjudication clause was not yet being advocated by its American proponents—shows that the "sole context in which it [the adjudication clause] was considered" "was the protection of the commercial and other rights of the States Members of the League, and those of their nationals, as intended to be conferred on them by the mandate instruments".

At the fourth session, later on 9 July, it is correct that Colonel House suggested that they consider Article 15 of the American draft—the adjudication clause. The ensuing debate was on the procedural question whether suits in the International Court could be initiated by individual citizens—as suggested in the second paragraph of the American text—or whether it should, in accordance with traditional diplomatic practice in claims cases, be left to the State to espouse the claims of its citizens and act as plaintiff on their behalf.

The text of the two paragraphs of the American adjudication clause was as follows *[translation]*:

"*Article 15*

If a dispute should arise *between the Members of the League of Nations* relating to the interpretation or the application of the present

Convention and if this dispute cannot be settled by negotiation, it will be referred to the Permanent Court of International Justice which is to be established by the League of Nations.

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

M. Simon had no objection to the principle of a resort to an international court but he thought that if individuals could utilize that procedure any administration would become impossible. Lord Milner also thought that this individual right of appeal to the Court would make any administration difficult. He added: "The question of the performance or of the non-performance of the terms of the Mandate, was a very serious one and should only be put forward under the responsibility of a Government, otherwise difficulties would arise which might entail the liquidation of the League of Nations." *[Translation.]* This important statement is not mentioned in the joint dissent of 1962.

Clearly "the performance or non-performance of the Mandate" is an expression which includes all the provisions for the welfare of the native peoples and not merely commercial rights of citizens of members of the League. It was scarcely the latter type of claims which might involve "the liquidation of the League of Nations". It was after having thus emphasized that governments themselves must take the responsibility for bringing to the Court complaints about the "non-performance" of the mandate, that Lord Milner went on to say (as indicated in the joint dissent) that there would certainly be some advantage in transferring from the political plane to the legal plane the settlement of questions such as those concerning property rights *(droit de propriété)*, but he asked that the government which would decide whether the claim should be brought before the Court should take the responsibility for that decision. It should be noted that this last statement by Lord Milner was preceded by a comment by Lord Robert Cecil to the effect that the Foreign Office had often been embarrassed by the question of claims of citizens and it would be helpful if these questions no longer remained in the diplomatic sphere.

Now the discussion of the commercial or economic rights of nationals of other members of the League up to this point had not used the term "*droit de propriété*" but in this session of 9 July, there had been a long and detailed discussion of provisions of the Milner, French and American drafts which dealt with transfers of title to property rights *(propriété foncière)* of native peoples. Mr. Beer (United States) urged the addition of a provision from the American draft which would state that no such

transfer of property would be valid without the authorization of public authorities designated for that purpose. Lord Milner thought that this stipulation should be limited to transfers of land from a native to a non-native. He thought the American proposal might lead to useless interventions. But Lord Robert Cecil supported the American point of view noting that he had heard of many abuses in practice in the purchase of native lands. After a long discussion they agreed on a text dealing with *propriété foncière indigène* and *bien foncier indigène*. This was distinctly a provision for the protection of the natives, not of the economic rights of nationals of other members of the League. The most natural interpretation of Lord Milner's remark is that it referred to questions concerning native real property rights—a matter which he thought might well be transferred to the legal plane, that is to say, be capable of submission to the Permanent Court.

Lord Robert Cecil then proposed his substitute for the second paragraph of the American draft adjudication clause:

> "The Members of the League of Nations will likewise *[également]* be entitled on behalf of their subjects or citizens to refer claims for breaches of their rights, etc." *[Translation.]*

The word "likewise" shows that they had in mind two different types of actions in the Court. Mr. Beer for the United States accepted this text and it was adopted.

The joint dissent (at p. 557) then correctly states that it was agreed to omit the last sentence of the second paragraph of the American draft adjudication clause which read as follows:

> "The judgment given by the Court will be without appeal in the *two* above mentioned cases and will have the same effect as an arbitral award rendered pursuant to Article 13 of the Covenant [1]." (Italics added.)

But the joint dissent draws the wrong conclusion when it says "this sentence became superfluous if all claims had to be referred to the Court

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[1] The text of Article 13 of the Covenant is in part as follows:

"Art. 13.1. The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration *or judicial settlement*, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration *or judicial settlement*.

. . . . . .

4. The Members of the League agree that they will carry out in full good faith any award *or decision* that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award *or decision*, the Council shall propose what steps should be taken to give effect thereto."

by *Governments*, whether in respect of their own rights under the Mandates, or of those of their nationals".

If this sentence was superfluous in regard to governmental claims, why did it expressly provide, in the original text, that it applied to the "two" situations, that is to governmental claims in paragraph one, and individual claims under paragraph two? The summary record (and it must always be remembered that this is not a *verbatim* record) does not state any reason offered for the deletion [1].

The joint dissent also asserts (p. 555):

> "Briefly, the position appears to have been that no one thought of having a provision for compulsory adjudication until the United States made detailed proposals for commercial and other State rights for Members of the League and their nationals . . ."

The fact is, as pointed out above, that the American draft was introduced at the second session of the Commission on 8 July, at the same time that the French draft was proposed. The American draft included a number of new points not appearing in the earlier British drafts of 'C' and 'B' mandates, namely:

(i) detailed specifications of the contents of the annual report;
(ii) the detailed specification of commercial and economic rights;
(iii) the clause concerning Council consent to changes in the mandate; and
(iv) the adjudication clause.

The adjudication clause was no more limited to the economic and commercial and similar clauses of the mandates than was the clause concerning the necessity for Council consent to changes in the mandates. Both were applicable to all provisions of the mandates and both were introduced at a very early stage in the Commission's work.

On 10 July, at the fifth session of the Commission, there was a discussion of Article 11 of the French draft which required a report by the mandatory to the Council. The American draft had again included numerous details concerning the contents of the report. After Lord Milner suggested the mandatory would supply the information it thought appropriate and that the Council could then ask for more details if it wished them, it was agreed to substitute the expression which is now found in Article 6 of the South West Africa Mandate, namely "an annual report *to the satisfaction of the Council*". This did not and does not mean

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[1] It may be noted that in Article 17 of the Memel Convention of 1924, which is quoted later in this opinion, a paragraph in the adjudication clause which deals solely with disputes which might arise between Lithuania and any one of the Principal Allied Powers Members of the Council, after providing for recourse to the Permanent Court adds the sentence: "There shall be no appeal from the Permanent Court's decision, which shall have the force and value of a decision rendered in virtue of Article 13 of the Covenant."

that the Council must be satisfied with the actual measures taken to carry out the obligations of the mandatory; it means satisfied with the amount of information supplied. The whole subsequent practice of the Permanent Mandates Commission and of the Council of the League confirms this interpretation.

It was at this fifth session that the amended texts of Articles 14 and 15 of the American draft were adopted.

At the same session they took up an amended draft of the 'C' mandate which reflected the preceding discussions. It included Colonel House's missionary clause, and the American proposals requiring Council consent to changes and providing for appeals to the International Court. BUT, the 'C' mandate did not provide for the various economic and commercial rights specified in the 'B' mandate AND it did not include the second paragraph of the adjudication clause permitting a government "likewise" to refer to the Court claims on behalf of its subjects or citizens. If Article 5, which contains the "missionary clause" was, for example, considered to involve the kind of rights of individuals which were specified in the economic and commercial sections of the 'B' mandate, presumably the second paragraph of the adjudication clause would have been included because it was continued in the subsequent drafts of the 'B' mandates. Actually the "missionary clause" as it originally appeared in all three 'B' drafts contained no reference to the nationality of the missionaries—no mention in this connection of the members of the League. Colonel House on 8 July suggested inserting in the 'C' draft the same rights which were provided in the 'B' drafts for missionaries. This was agreed. In the revised 'C' draft of 10 July, the reference to members of the League, as a limiting description of missionaries suddenly appears, but it was not put in the 'B' drafts by the Milner Commission. It is thus clear that the missionary clause was considered one for the benefit of the Natives—not for the benefit of League members [1]. It goes with freedom of conscience and religion. This is clear also from Articles 8-10 of the 'A' Mandate for Syria and the Lebanon. It seems clear that the adjudication clause was intended to cover, in the words of Lord Milner, any objection raised by a member of the League against the Mandatory's "execution or non-execution of the Mandate". That is why the adjudication clause refers to "any dispute" concerning interpretation or application of the mandate—an expression made more emphatic later in the final text by saying "any dispute whatever". It is to be noted that while paragraph two, dealing with individual claims, refers to breaches of their rights *(infractions aux droits)* there is no equivalent mention of "rights" in the first paragraph.

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[1] But members of the League could also invoke it in the interest of their nationals as I showed in my separate opinion in 1962, pp. 410 ff.

Also at the fifth session they continued the discussion of the 'B' draft and in adopting the adjudication clause, kept in the two paragraphs as revised. At the sixth session on the evening of 10 July, the full texts of 'B' and 'C' were again reviewed and adopted.

On 15 July, Lord Milner sent the texts of the 'B' and 'C' drafts to the Secretary-General of the Peace Conference. To show the drafting differences, it is advisable to reproduce the texts of the 'C' and 'B' jurisdictional clauses as thus despatched:

Article VI of the 'C' draft reads:

> *[Translation]* "In the event of a dispute between the Members of the League of Nations, relating to the interpretation or the application of these provisions, and if this dispute should not be capable of being settled by negotiations, it shall be submitted to the Permanent Court of International Justice to be established by the League of Nations."

Article XII of the 'B' draft reads as follows:

> *[Translation]* "1. If a dispute should arise between the Members of the League of Nations, with regard to the interpretation or the application of this Mandate, which cannot be settled by negotiations, it shall be submitted to the Permanent Court of International Justice, which is to be established by the League of Nations.
>
> 2. The States Members of the League of Nations may likewise bring claims on behalf of their subjects or citizens before the said Court for decision in respect of infractions of the rights conferred on them by this Mandate."

At the ninth session of the Commission on 5 August, there was submitted an American draft for 'A' mandates which contained the following Article XVIII:

> *[Translation]* "Should any dispute arise between the States Members of the League of Nations concerning the interpretation or the application of this Mandate, which cannot be settled by direct negotiations, the matter shall be referred to the Permanent Court of International Justice, which is to be established by the League of Nations.
>
> The States Members of the League of Nations may bring the claims of their nationals before the Permanent Court of International Justice for infractions of their rights [1]."

In a telegram from Colonel House to the President and Secretary of State on 9 August 1919 there is what he describes as the text of the form of mandate 'A' which he had introduced. In this text the adjudica-

[1] According to Hunter Miller's *Diary* (Vol. XX, p. 383) this text was drafted by Beer and agreed to generally by Lord Robert Cecil.

tion clause is in Article XV—not Article XVIII—and reads as follows:

> "Article Fifteen, paragraph one. If any dispute whatever should arise between states, members of the League of Nations, relating to the interpretation of *(sic)* the application of this mandate which cannot be settled by negotiation this dispute shall be admitted to the Permanent Court of International Justice to be established by the League of Nations.
>
> Two. States, members of the League of Nations, may likewise bring any claims on behalf of their subjects or citizens for infractions of their rights under this mandate before this said court for decision [1]."

At this time, there were available the two precedents, the adjudication clause in two paragraphs in the two 'B' mandates, and the adjudication clause in one paragraph in the 'C' mandate. In drafting the 'A' mandate the American draftsmen could have chosen either one of these formulæ. They chose to take the formula containing the two paragraphs since the other articles of the draft included detailed specification of economic, commercial, archaeological and other rights. But Lord Milner informed the Secretary-General of the Peace Conference by a letter of 14 August that since the French representative was opposed to dealing with 'A' mandates at that time, the American draft was withdrawn.

The French document cited above contains a note to the effect that the texts of the 'B' and 'C' mandates had been referred to the drafting committee of the Peace Conference which had not discussed the merits but had put them in the form of treaties. The texts of the 'B' Mandates to Great Britain and to Belgium for East Africa are then printed; the text of Article 15—the adjudication provision in two paragraphs—is identical in the two Mandates. The text of the 'C' Mandates for South West Africa, for Nauru, for Samoa, for possessions south of the Equator except Samoa and Nauru, and for islands north of the Equator, are printed and the adjudication clause is the same in each one although in some mandates it is No. 8 and in others No. 9. These texts are the same as those given in English in the Peace Conference volumes of *Foreign Relations of the United States*. From Volume 9, Appendices B, C and D, pages 649 ff., the following appears:

Article 15 of the 'B' Mandate to Great Britain for East Africa:

> "15. If any dispute whatever should arise between the members of the League of Nations relating to the interpretation or application of this mandate, which cannot be settled by negotiations, this dispute shall be submitted to the Permanent Court of International Justice to be established by the League of Nations.
>
> States, members of the League of Nations, may likewise bring any claims on behalf of their subjects or citizens for infractions

[1] Miller, *Diary*, Vol. XX, pp. 383, 388.

of their rights under this mandate before the said Court for decision."

In Appendix C the formal introductory paragraphs of the Belgian 'B' Mandate for East Africa are printed and it is then stated that the ensuing articles are the same as in the British Mandate, *mutatis mutandis*.

In Appendix D, Article 8 of the 'C' Mandate for South West Africa is as follows:

"Article 8

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

The text for the 'C' Mandate for Nauru is identical but in the Mandate for Samoa the word "those"—signalled in the text just quoted—is corrected to "these". It is noted that for the other 'C' mandates for the islands the text is the same; the actual texts are not duplicated [1].

It may be noted also that in the same documents, the French text of Article 14 of the two East African 'B' Mandates corresponds to the English text but that in the South West Africa 'C' Mandate, the first sentence has a slight variation: "Toute modification aux termes de ce Mandat devra être approuvée au préable par le Conseil de la Société des Nations". In the English versions, this sentence has been made identical with the text used in the East Africa 'B' Mandates. In the French text finally adopted, it is this French version which is maintained in 'C' mandates, while the English text as in the first paragraph of Article 7 of the South West Africa Mandate, follows the English text given in the *Foreign Relations* volume.

The So-Called "Tanganyika Clause"

It is impossible to accept the explanation in the Judgment of the Court of the existence of the so-called "Tanganyika clause", which is the second paragraph of the adjudication clause as introduced by the United States on 9 July and subsequently adopted in amended form. This is the clause which relates to the rights of individuals.

The joint dissent of 1962 concluded that in the Tanganyika Mandate "there was simply a failure to drop the second part as being superfluous" (p. 560, and see the footnote on that page). President Winiarski, in his dissenting opinion in 1962 states that: "No one has been able to explain

[1] In the French documents, the text of the Mandate for South West Africa refers to the "Ligue *(sic)* des Nations"; this error is corrected to "Société des Nations" in the ensuing texts of the other 'C' mandates.

how this paragraph . . . got into the Mandate for Tanganyika and that Mandate alone . . ." (p. 454). The present account sheds some light on the problem.

As has been shown, it seems to have been the original intent that this second paragraph would cover claims arising out of economic and commercial rights which normally would be claims on behalf of citizens who asserted a denial of some right covered by the terms of the mandate. This was later illustrated in the *Mavrommatis* cases arising under the Palestine Mandate. On the other hand, the first paragraph of the adjudication clause provided for Court review at the request of any member of the League of any question whatever concerning the interpretation or application of the mandate—a much broader provision. It has been pointed out that since the general "open-door" clauses were not included in the 'C' mandates, the second paragraph of the adjudication clause, covering individual rights, was similarly not included in the 'C' mandates. The inclusion in the 'C' mandates of the "missionary" clause is a reflection of a general interest in the welfare of the indigenous peoples. As stated in Article 5 of the South West Africa Mandate, it imposes on the Mandatory a general duty in regard to freedom of conscience and the "free exercise of all forms of worship". It provides further for the entry and activity of "all missionaries, nationals of any State Member of the League of Nations".

Now when the drafts were sent by Lord Milner to Paris, the only 'B' mandates about which agreement had been reached were the East African Mandates for Great Britain and Belgium. In *both* of these Mandates, the second paragraph of the adjudication clause was included. It was similarly included when those two drafts had been dealt with by the drafting committee of the Peace Conference; these are the texts quoted above from the *Foreign Relations of the United States*. In the subsequent processes of redrafting, the second paragraph was left out of the Belgian Mandate for East Africa. Viscount Ishii, as Rapporteur for the Council of the League, said in his report of February 1921 (Annex 374 *b* of League of Nations, *Official Journal* of August 1922, p. 849) that the British Mandate for East Africa reproduced most faithfully the type of the drafts for 'B' mandates drawn up by the Milner Commission. Yet in the texts presented to and approved by the Council at that time, the second paragraph of the adjudication clause is not contained in the Belgian Mandate for East Africa.

In his comments on the Belgian Mandate for East Africa, Viscount Ishii referred to a letter of transmittal from M. Hymans, the Belgian representative, in which it was explained that the Belgian draft had been based on the wording used in the French and British drafts for Togo and the Cameroons, in order to give "the Belgian mandate a little more elasticity as regards the administration of the territory . . ." (*loc. cit.*, p. 860). Now those two French and British drafts were not prepared in the Milner Commission but were drafted subsequently after the French and British Governments had agreed on the division of the territories

and had decided to place them under mandates. These mandates had not been allocated with the others on 7 May 1919. The Togo and Cameroon Mandates all had just the one paragraph in the adjudication clause, and revised Belgian Mandate for East Africa followed suit. Viscount Ishii had taken note of the fact that the Togoland and Cameroons drafts had an adjudication clause which was "identical with the first paragraph of Article 13 of the British Mandate for East Africa" (*ibid.*, p. 857). But he made no comment on the omission of the second paragraph and in dealing with the same clause in the draft Belgian Mandate he merely referred back to his observations on the drafts for Togoland and Cameroons (*ibid.*, p. 861) [1].

It may well have been thought that a mandatory Power was more likely to be brought to Court on the usual type of diplomatic claims advanced by a government on behalf of its nationals than on governmental complaints about the treatment of the Native inhabitants. The elimination of the second paragraph covering the usual type of diplomatic claims, it may have been thought (as some dissenting judges later thought in the *Mavrommatis* cases) would therefore leave to the Mandatory a freer hand. Since the Judgment of the Court in the attempted analysis of motives of those responsible for the drafting of the Covenant and the mandates in 1919-1920, in several places rests on what the Court thinks might have been likely or probable or plausible, I feel free to offer what seems a reasonable speculation about the reasons why the drafters of the Togo, Cameroons and Belgian East African Mandates left out a provision agreed upon in the Milner Commission and from which it was less easy for the British Government to withdraw.

The Permanent Court of International Justice was called upon to deal with a case arising under the Palestine Mandate in the *Mavrommatis* cases; the first judgment in these cases was handed down on 30 August 1924. The Palestine Mandate contained an adjudication clause in one paragraph corresponding to the clause in the 'C' mandates. The Court upheld and applied the usual rule of diplomatic protection and allowed the Greek Government to maintain this claim on behalf of its national. Three of the dissenting judges called attention to the fact that in the British Mandate for East Africa the adjudication clause contained the second paragraph—the "Tanganyika" clause. Two of the dissenting judges considered that the omission of this second paragraph was of significant importance. In commenting upon this point Judge de Bustamante said:

> "Great Britain is not a sovereign of Palestine but simply the Mandatory of the League of Nations and she has accepted the

[1] Great Britain and France made an agreement in 1916 about the division between them of Togoland and the Cameroons. The provisions for these Mandates are described in my 1962 separate opinion, pp. 395-396.

Permanent Court's jurisdiction for any dispute arising between her, as Mandatory, and any Member of the League from which she holds the Mandate. As the latter could not appear as a party to a dispute concerning the application or interpretation of the Mandate, having regard to the restrictive terms of Article 34 of the Court's Statute, it is the Members of the League who have been authorized, in their capacity as Members, to bring before the Court questions regarding the interpretation or application of the Mandate.

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." (*P.C.I.J., Series A, No. 2*, p. 81.)

Dissenting Judge Oda expressed his opinion as follows:

"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. That this is the case is clearly shown by a reference to Article 13 of the Mandate for East Africa, in which Members of the League of Nations are specially authorized to bring claims on behalf of their nationals. It is impossible to ascertain why this special provision was only inserted in the East African Mandate; but, as it appears that in all the drafts of 'B' Mandates the same provision was inserted, but deleted in the final documents, except in the case of the Mandate for East Africa, it is at all events clear that it was intended to establish a difference between 'B' and 'A' Mandates to which latter category the Palestine Mandate belongs." (*Ibid.*, pp. 86-87.)

The pleading of the British Government itself seemed to take the position that the adjudication clause in the Palestine Mandate gave a broad right to any member of the League to raise before the Court any question involving an alleged breach of the Mandatory's obligations under the Mandate. In its plea to the jurisdiction, after quoting Article 11 of the Mandate dealing with concessions, the following statement was made:

"The Mandate over Palestine is exercised by His Britannic Majesty on behalf of the League, and the League of Nations is pledged to the maintenance of various beneficent principles, such as freedom of transit and communications, equality of commercial

opportunity for all Members of the League, suppression of the arms traffic, and so forth. This is the type of international obligation which the Mandatory has accepted and to which any concessions granted under Article 11 of the Mandate must conform.

The concessions granted to Mr. Rutenberg in September, 1921, for the development of electrical energy and water-power in Palestine . . . were obliged to conform to this Article 11, and it would have been open to any Member of the League to question provisions in those concessions which infringed the international obligations which His Britannic Majesty as Mandatory for Palestine had accepted.

There is nothing in this article which affects the *Mavrommatis* case." (*P.C.I.J., Series C, No. 5-I*, p. 445.)

The Permanent Mandates Commission of course remarked this first case in the Permanent Court involving a mandate. In his opening statement as Director of the Mandates Section of the League Secretariat on 23 October 1924, M. Rappard called attention to the difference in wording in the Tanganyika Mandate which had been the subject of comment by dissenting judges in the *Mavrommatis* case. He said: "Now I have every reason to believe that this difference is entirely due to an accident in the drafting of the Tanganyika mandate." He suggested that the Permanent Mandates Commission should draw the matter to the attention of the Council. In the subsequent discussion: "Sir F. Lugard (Great Britain) observed that on the assumption that this clause had been introduced into the mandate intentionally, the Commission might ask the Council why it appeared in the Tanganyika mandate only . . .".

At the sixth session of the Commission, on 29 June 1925, M. Rappard and M. van Rees both submitted memoranda on the subject, taking opposing positions [1]. M. Rappard still insisted that the discrepancy was accidental. M. van Rees considered that the second paragraph of Article 13 in the Tanganyika Mandate "created a special guarantee". He said that the rights of nationals secured to them by the Mandate are those arising out of Article 7 which in its last paragraph speaks of "rights conferred" by this Article and says they extend "equally to companies and associations". He believed that the deletion of the second paragraph would "entail legal consequences of the gravest nature, since it would deprive nationals of the States Members of the League, in their relations with Tanganyika, of a means, which they at present possess, of defending the rights in question". He would prefer to add a clause to all the other mandates. But M. Rappard maintained that the decision of the Court in the *Mavrommatis* case had shown that the same right existed without the inclusion of the second paragraph. This view would mean that paragraph one could *include* the claims cases

[1] Annexes 5*a* and 5*b* to the Permanent Mandates Commission *Minutes*, 6th session.

covered by paragraph two (the Tanganyika clause) but it would still be true that paragraph one must cover also other types of cases as its broad language indicates. As against the "accidental" thesis of M. Rappard, Sir F. Lugard said that "he had asked his Government [Great Britain] whether it was aware of any reason for or against an amendment of the text. His Government had replied that it had no objection to the text being altered, but at the same time it appeared incorrect to assert that the clause was accidental".

The Commission decided to do nothing about the matter but M. van Rees noted that there were other differences in the Tanganyika Mandate. The reason for the differences has been noted.

For doctrinal support, the joint dissent of 1962 cites only the Hague Lectures of Mr. Feinberg which were also relied on in 1962 in the dissenting opinion of Judge Winiarski. But Mr. Feinberg himself refers to the fact that Professor (as he then was) McNair and Professor Quincy Wright held views differing from his. Judge Charles de Visscher in his *Aspects récents du droit procédural de la Cour internationale de Justice*, 1966, page 73, states that the doctrine was completely divided on the question. One can cite many views on each side of the question. I call attention merely to the following.

Wright, in his magistral treatise on the mandates, in discussing the Tanganyika clause at page 158 concludes that the Court in *Mavrommatis* did hold that a claim may be brought by a State on behalf of a citizen when the citizen's rights in the mandate are violated. At this point he says it had not been decided (*semble* by the Court) whether any member of the League could invoke the Court's jurisdiction in connection with observance of the mandate "where no citizen and no material interest of its own is involved". But at page 475 he states his own conclusion flatly:

> "Every member of the League can regard its rights as infringed by every violation by 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."

The history of the drafting and sound reasoning sustain the correctness of this conclusion.

Professor McNair writing in 1928 made two statements which Feinberg and de Visscher both interpreted—quite properly—as indicating the author's at least tentative agreement with Professor Quincy Wright's view. In McNair's article in the *Cambridge Law Journal*, April 1928, entitled "Mandates", at page 6, note 8, one reads:

"There is no provision for the reference of a petition to the Permanent Court, but it has been suggested that this could occur if some other member of the League were prepared to take up the question, which might then become a dispute between that member and the mandatory."

And at page 11, note 8:

"All the mandates contain a clause which provides that any dispute between a mandatory and a member of the League which cannot be settled by negotiation shall be referred to the Permanent Court of International Justice: see the *Mavrommatis Palestine Concessions* case . . . Is this right of bringing a dispute with a mandatory before the Court only available when the interests of the other party or its nationals are affected, or can it be used altruistically by a member of the League having no such interests to protect, but merely seeking the faithful observance of the terms of a mandate?"

Twenty-two years later, as a judge on the International Court of Justice, Sir Arnold McNair (as he then was) answered his own question in his separate opinion attached to the Court's Advisory Opinion of 11 July 1950, on the *International Status of South West Africa*. He said:

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

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

Commission of the League." (*I.C.J. Reports 1950*, p. 158.) (Italics added, except for the words "judicial" and "administrative".)

Judge Read in his separate opinion on the same matter shared this view, saying:

> "The first, and the most important [of the international obligations of the mandatory], were obligations designed to secure and protect the well-being of the inhabitants. They did not enure to the benefit of the Members of the League, although *each and every Member had a legal right to insist upon their discharge . . . Each Member of the League had a legal interest, vis-à-vis the Mandatory Power, in matters 'relating to the interpretation or the application of the provisions of the Mandate'; and had a legal right to assert its interest against the Union by invoking the compulsory jurisdiction of the Permanent Court* (Article 7 of the Mandate Agreement)." (*Loc. cit.*, pp. 164, 165.) (Italics added.)

Norman Bentwich concluded his Hague lectures in 1929 as follows:

> *[Translation]* "The Court has not as yet been called upon to deal with the application or interpretation of the other articles concerning public rights, economic equality, or the other international obligations undertaken by the Mandatory. But, above the Mandates Commission and above the Council of the League, it remains the supreme guardian of the rights of nations in the fulfilment of the international trust which is conferred on the Mandatory. If the Permanent Commission constitutes the international Areopagus, the Court is the international Palladium of justice in all the activities of the League of Nations, of which the mandates system forms an important part." (29 *Recueil*, 1929, p. 119 at 180.)

Since the Tanganyika clause is in a British mandate and since the British representative on the Permanent Mandates Commission was Sir Frederick Lugard who has already been quoted on the fact that the inclusion of the second paragraph of the jurisdictional article was not accidental, one may also recall a statement he made in a memorandum submitted at the fifth session of the Permanent Mandates Commission in 1924, which shows his conception of the vital role which the Court might play in connection with the mandates. His memorandum discussed the hesitancy of capital to invest in mandates and he wrote (at p. 177 of the *Minutes* of the Fifth Session):

> "Wherever the power of revocation (in consequence of breach of contract by mal-administration) may exist, there can be no doubt that in this almost inconceivable contingency the International Court of Justice *(sic)* would be the agency employed and that it would make full provision for all legitimate claims and rights."

Finally, one may note the dissenting opinion of Judge Nyholm in a further phase of the *Mavrommatis* case. In sketching the history of the establishment of the mandates, he says the Powers wanted—

> ". . . a guarantee that the administrations should act in accordance with the principles adopted in the interests of the community of nations by the Covenant.
>
> The guarantee which offered itself consisted in conferring on the Court—a new international institution—jurisdiction to decide any questions regarding the interpretation and application of the Mandate.
>
> Mandatories were not to infringe the rights either of States or of individuals. Each State therefore has a right of control which it may exercise by applying to the Court. It is true that there is no provision giving the Court jurisdiction as regards the relations between individuals and the mandatory, but it is to be presumed that, if a subject of a certain State suffered injury, his government would, if necessary, take action on his behalf. When a suit is conducted between a mandatory and another Member of the League of Nations, regarding a question of interpretation or application —which is precisely the case in the present suit—Article 26 of the mandate gives the Court jurisdiction." (Case of the *Readaptation of the Mavrommatis Jerusalem Concession (Jurisdiction), Series A, No. 10, 1927*, p. 26.)

SECTION V. THE MOTIVATION AND OPERATION OF CERTAIN OF THE PEACE SETTLEMENTS OF 1919-1920—THE LEGAL RECOGNITION OF "GENERAL INTEREST"

Arguments which avoid the actual text of the jurisdictional clause in paragraph 2 of Article 7 of the Mandate for South West Africa have been supported by a general assertion that it is inconceivable that the statesmen of 1919 would have had in mind the possibility of recognizing that States may have a general interest—cognizable in the International Court—in the maintenance of an international régime adopted for the common benefit of the international society. This argument ignores the historical fact of the wave of idealistic aspiration which responded after the long agony of the war years to the vision proclaimed by President Wilson. As Lord (then Professor) McNair wrote in 1928:

> "There was perhaps no part of the Covenant that called forth more derision from the cynical and the worldly-wise than the Mandates System contained in Article XXII . . . The Mandates System represents the irruption of the idealist into one of the periodical world settlements which have in the past lain too much in the hands of so-called 'practical men'." (Editor's Preface to Stoyanovsky, *The Mandate for Palestine*, 1928.)

No doubt some statesmen were cynical but great charters of human liberties were signed and ratified and became binding on States.

The facts are dealt with rather fully in my separate opinion in the *South West Africa* cases in 1962 (at pp. 425 to 433). It is there recalled that Article 11 of the Covenant of the League of Nations which formed part of the Treaty of Versailles, recognized that peace was indivisible. From the Constitution of the International Labour Organisation, which was also part of the same treaty, passages were quoted which reveal agreement upon the common interest of all States in humane conditions of labour throughout the world. The provisions for appeal to the Permanent Court of International Justice and subsequent judicial proceedings to give effect to this common concern in labour problems, were noted [1].

Attention was also called to the fact that the Permanent Court was likewise given a role in systems established—partly in the peace treaties and partly by subsequent international agreements—for the protection of minorities. It was in keeping with the same spirit and action of the time of the Paris Peace Conference of 1919, that the Covenant of the League contained its famous Article 22 which recognized that the "well-being and development" of "peoples not yet able to stand by themselves under the strenuous conditions of the modern world" "form a sacred trust of civilisation". It was therefore natural one may even say inevitable, that when the mandates were drafted, provision was made for resort to the Permanent Court of International Justice by any member of the League.

To be sure, each area of general interest in the Peace Settlements had its own system and the role of the Court was different as suited the needs of each case. But the point which stands out is the recognition of the right of States *in the general interest*, and without needing to assert direct injury suffered by them or their nationals, to resort to the Court for an authoritative interpretation of the meaning of the obligations which States had assumed in order that labour, and minorities and dependent peoples might enjoy international protection. It is true that the only cases involving mandates which were referred to the International Court were the *Mavrommatis Palestine Concession* cases; why this was true may be a matter of speculation but some evidence relative thereto will be adduced later in this opinion. At the moment, it is pertinent to cite authority for the broad proposition asserted above, that in the era of the Paris Peace Treaties, States could invoke the Court in the general international interest when their own particular interests were not involved.

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[1] The case of *Ghana* v. *Portugal* was described; since then the I.L.O. has had a further judicial inquiry and decision in the case of *Portugal* v. *Liberia*, which also involved the question of a contract labour convention; see International Labour Office, *Official Bulletin*, Vol. XLVI, No. 2, April 1963.

The case of the *Interpretation of the Statute of the Memel Territory* (*P.C.I.J., Series A/B, No. 47*, p. 243) is instructive. Article 17 of the Convention of 8 May 1924, concerning Memel, reads as follows:

> "The High Contracting Parties declare that any Member of the Council of the League of Nations shall be entitled to draw the attention of the Council to any infraction of the provisions of the present Convention.
>
> In the event of any difference of opinion in regard to questions of law or of fact concerning these provisions between the Lithuanian Government and any of the Principal Allied Powers members of the Council of the League of Nations, such difference shall be regarded as a dispute of an international character under the terms of Article 14 of the Covenant of the League of Nations. The Lithuanian Government agrees that all disputes of this kind shall, if the other Party so requests, be referred to the Permanent Court of International Justice. There shall be no appeal from the Permanent Court's decision, which shall have the force and value of a decision rendered in virtue of Article 13 of the Covenant."

Germany brought to the Council under the first paragraph of Article 17 a complaint against certain actions of Lithuania in Memel. M. Colban, as Rapporteur of the Council, said it was apparent that there would not be a unanimous vote to ask the Permanent Court for an advisory opinion [1] but he reminded the four Principal Powers of their right to bring a case to the Court under paragraph 2 of Article 17. Although the British representative on the Council, the Marquess of Londonderry, also regretted the objection to asking for an advisory opinion "which, in his view, was the natural method of obtaining an answer to those questions" of law which were involved, Great Britain, France, Italy and Japan instituted proceedings by filing an application in the Court. Lithuania filed an objection to the jurisdiction in respect of two points in the case of the four Powers since those two matters had not been previously submitted to the Council, a step which Lithuania considered was a prerequisite under the treaty. In their observations on the Lithuanian objection, the four Powers insisted that the procedure before the Council and the procedure in the Court were two separate and distinct actions and one was not dependent on the other. They said (*Series C, No. 59*, 1932, p. 135):

> *[Translation]* "The object of the procedure before the Council is the examination of an 'infraction of the provisions of the Convention'. The procedure before the Court is concerned with 'any difference of opinion in regard to questions of law or fact'. Such

[1] There was at the time some uncertainty as to whether the Council could ask for an advisory opinion by a majority vote; see Hudson, *The Permanent Court of International Justice, 1920-1942*, 1943, sec. 469.

difference of opinion may well arise without any infraction having been noted; it may become apparent in the course of negotiations with regard to the correct construction of the 1924 Convention, and the Court may be called upon to give a declaratory judgment."

In his oral argument, Sir William Malkin, as Agent for the British Government, said:

"In this case the Applicant Powers are not here to defend their particular interests, nor to maintain any rights of their own which they allege to have been infringed. Their only interest to is to see that the Convention to which they are Parties is carried out by Lithuania in accordance with what they conceive to be its proper interpretation . . ." (*Ibid.*, p. 173.)

In his observations on the preliminary objection of Lithuania, M. Pilotti, Agent for the Italian Government, also stated that no one of the Applicant Powers had any individual interest which it wished to have established against Lithuania. He said that they had "un droit de caractère international à ce que l'autonomie du Territoire . . . soit respectée" (*loc. cit.*, p. 190). (How similar this is to Applicants' right to have respected the mandate character of South West Africa!)

The Court, in rejecting the Lithuanian objection, closely followed the observations of the four Powers. In agreeing that a case could be brought in the Court where there was a difference of opinion even when there had been no infraction of the treaty, the Court in effect agreed also with the position of Sir William Malkin and, in its later judgment on the merits (*Series A/B, No. 49*, 1932, p. 294 at 337), took account of the apparent fact that the four Powers merely wanted "to obtain an interpretation of the Statute which would serve as a guide for the future" [1].

It is, to be sure, true that the above observations were made with reference to a treaty to which the four Applicant States were parties, but the point was not whether they were parties, but whether they had standing under the treaty to resort to the Court. Their standing derived

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[1] In its judgment on the preliminary objections at pages 248-249, the Court said:

"The object of the procedure before the Council is the examination of an 'infraction of the provisions of the Convention' which presupposes an act already committed, whereas the procedure before the Court is concerned with 'any difference of opinion in regard to questions of law or fact'. *Such difference of opinion may arise without any infraction having been noted.* It is true that one and the same situation may give rise to proceedings either before the Council under the first paragraph, or before the Court under the second; but that will not always be the case, and this suffices to prove that the two procedures are not necessarily connected with one another . . . If the principle of the unity of the proceedings were to be adopted, it would follow that a case could not be proceeded with before the Court, under paragraph 2 of Article 17, if it had been brought before the Council, under paragraph 1 . . ." (Italics added.)

from the adjudication clause, not from some other conferment of a substantive right. This Court has held that the Mandate is a treaty and as a matter of historical fact, the Principal Powers were just as much the authors of the Mandate for South West Africa as they were of the Statute of the Memel Territory which was annexed to the Treaty of 8 May 1924. In the Memel case the burden of obligations was on a single State—Lithuania—while the Principal Powers were given rights and interests. In the South West Africa case, the burden of obligations is on a single State—the Mandatory, South Africa—while all member States were given rights and interests. The mandates system was of concern, not just to the Principal Powers, but to all Members of the League and it was for that reason that Article 7 of the Mandate recognizes the right of all Members of the League to refer to the Court any dispute whatever concerning the interpretation or application of the Mandate. It is the same situation in the International Labour Organisation, where, according to Article 411 (later renumbered Article 26) of the Constitution:

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

As has been explained above, such a complaint may lead to a judicial proceeding as in the cases of *Ghana* v. *Portugal* and *Portugal* v. *Liberia* and there may be ultimate resort to this Court; but at no stage is the applicant State required to prove a direct injury to its own individual interests.

In the minority treaties, one sees a further illustration of the fact that the statesmen of 1919 recognized the right of States to invoke the jurisdiction of the Court in the interest of special groups even when their individual interests were not affected. This is brought out very clearly in the dissenting opinion of Judge Huber in the case of *Minority Schools in Upper Silesia* (*P.C.I.J., Series A, No. 15* (1928), at p. 50):

> "Article 72, paragraph 3 [of the Geneva Convention] is the literal reproduction of Article 12 of the Minorities Treaty of June 28th, 1919, and of analogous provisions of other treaties. The jurisdiction conferred by this clause is in every respect very particular in character and goes beyond the province of general international law; for Article 72, paragraph 3, confers on every Power being a Member of the Council, *even if it is not a contracting Party to the Minority Treaties* or to the Geneva Convention, the right of appealing to the Court, and *such judicial action is based upon stipulations which relate not to rights of the applicant State or to those of its nationals*

on whose behalf it might take action, but to the relations between the respondent State and its own nationals." (Italics added.)

The principle that States were entitled to bring to the Court cases which did not involve their own direct interests is not affected by the fact that the right of recourse in the minority treaties was limited to Members of the Council of the League. Although in the *Memel* case, the Powers who could resort to the Court were all parties to the treaty, in several of the minority cases, the right of recourse belonged not only to the Permanent Members of the Council who may have been parties, but also to the non-permanent Members who were elected from time to time and who, as Judge Huber pointed out, did not need to be, and often were not, parties to the minority treaties which gave them the right to invoke the Court [1]. The States in question derived their "standing" before the Court from the adjudication clause, not from some other conferment of a substantive right.

The point which has been made is underscored by another aspect of the minorities treaties. For example, the Treaty with Czechoslovakia of 10 September 1919 (I. Hudson, *International Legislation*, p. 298) has an Article 14 which is an adjudication clause giving to any Member of the Council of the League the right to submit to the Permanent Court of International Justice any difference of opinion as to questions of law or fact arising out of the articles which contain the stipulations for the protection of the minorities. Thereafter, the Treaty includes a third chapter which contains specific clauses assuring certain economic and commercial rights to the Allied and Associated Powers; *but the adjudication clause does not apply to the articles in this Chapter*. The same construction is found in the minorities treaties with Yugoslavia (*ibid.*, p. 312) and with Romania (*ibid.*, p. 426). This structure of the treaty was a natural one since normally an adjudication clause would not be included in the usual treaty of commercial and economic rights to which the economic chapters of the minorities treaties corresponded. But the minorities provisions themselves were a special feature of the post-war treaties with certain States and here the system was controlled by both the Council of the League and the Court. In the mandates, the economic clauses—as will be demonstrated shortly—were an integral part of the whole system which included the "open door" and since mandatories did not have sovereignty over the mandated territories, submission to the Court's jurisdiction was part of the control of all aspects of mandatory administration. Just as in the minorities treaties, the provisions for the protection of certain peoples who, in the case of the mandates, were considered not yet able to stand by themselves, were also covered by the compulsory adjudication clause. If it be thought that all Members

[1] This precedent is one of the reasons why I do not find it necessary to discuss the issue whether the Members of the League were "parties" to the Mandates.

of the League were not "parties" to the mandates, then one must remember that the judicial protection of the minorities could be set in motion by States which were not parties to the treaties but who were elected non-permanent members of the Council.

My separate opinion in 1962 also called attention (at p. 426) to the fact that in more recent times, the same general appreciation of a right to turn to the International Court of Justice for interpretation, application or fulfilment of a treaty having a broad humanitarian interest, is recognized in—

> "the Genocide Convention, which came into force on 12 January 1951 on the deposit of the twentieth ratification. [It] provides in Article IX:
>
> > 'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute'. (Vol. 78, United Nations *Treaty Series*, pp. 278 at 282).
>
> As this Court said of the Genocide Convention: 'In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.' (*I.C.J. Reports 1951*, at p. 23.)"

In this case there was a joint dissent of Judges Guerrero, McNair, Read and Hsu Mo. They expressed no disagreement with the passage just quoted. At page 46 they said:

> "It is an undeniable fact that the tendency of all international activities in recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States. So, when a common effort is made to promote a great humanitarian object, as in the case of the Genocide Convention, every interested State naturally expects every other interested State not to seek any individual advantage or convenience, but to carry out the measures resolved upon by common accord."

There are various other situations recognized in law where standing to sue and to recover judgment is accorded by an adjudication clause to those who have a somewhat more direct interest than that which appertains to those whose concern is based upon the general welfare, the orderly operation of the international community and the avoidance of threats or dangers to the peace. For example, any maritime or ship-owning State may have a right under a treaty or other international instrument to ask the Court for an interpretation of a provision for passage in a waterway even though its own ships have not been involved in any alleged infraction. Thus in the *Wimbledon* case (*P.C.I.J., Series A, No. 1*, at p. 7), the Governments of Great Britain, France, Italy and Japan joined in an application to the Court under Article 386 of the Treaty of Versailles which gave to "any interested Power" a right of appeal to the Court "in the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these Articles". It did not specify that this right of appeal was confined to States parties to the treaty. The case was one in which a British ship, chartered to a French company, was denied by Germany passage through the Kiel Canal. Germany having challenged their right to bring the action, the Applicants said that—

> ". . . les quatre Puissances de qui émane la requête sont intéressées au respect du *principe* du libre passage dans le canal de Kiel et à l'exact exécution des clauses du traité de Versailles". (*Series C, No. 3*, Add. Vol., p. 65.) (Italics added.)

This was the interest they avowed. The French claim for damages was a separate and rather incidental point. The Court went further. It said that all four Powers had a "clear interest"—

> ". . . since they all possess fleets and merchant vessels . . . They are therefore, even though they may be unable to adduce a *prejudice* to any pecuniary interest, covered by the terms of Article 386 . . ." (*P.C.I.J., Series A, No. 1*, pp. 20 and 33.) (Italics added.)

It must be noted that Article 386 was an adjudication clause and Article 380 did not specifically confer a substantive right on "interested Powers". Article 380 merely imposed an obligation on Germany and the substantive right of a maritime Power needs to be implied from Article 386.

Similar applications to the Court might be made by any of the large number of States parties to the Statute on the Régime of Navigable Waterways of International Concern annexed to the Barcelona Convention in 1921, in force on 31 October 1922, of which convention it forms "an integral part". Under Article 22—

> ". . . any dispute between States as to the interpretation or application of this Statute which is not settled directly between them

shall be brought before the Permanent Court of International Justice, unless under a special agreement or a general arbitration provision steps are taken for the settlement of the dispute by arbitration or some other means". (I. Hudson, *International Legislation*, p. 658. See comparable provision in the Statute on Freedom of Transit annexed to the Barcelona Convention on Freedom of Transit of the same date; *ibid.*, p. 631.)

The burden of the obligations of this Convention would fall on States controlling a waterway of international concern, but a larger number of States have the right to appeal to the Court. "In the case of states having treaty rights in the waterway, no reliance on the use of the highway is needed as a basis for a complaint of discrimination or exclusion." (Baxter, *The Law of International Waterways*, 1964, p. 183, with particular reference to the Suez Canal but equally applicable in a broader context.)

The standing of Applicants in the present cases rests squarely on the right recognized in paragraph 2 of Article 7 of the Mandate for South West Africa, which is a right appertaining to many States. But it must also be recognized that Applicants as African States, do in addition have a special interest in the present and future of the mandated territory of South West Africa and its inhabitants. This special interest is perhaps even greater than that of some maritime State in the right of passage through the Kiel Canal. "Geographical contiguity" is recognized in paragraph 6 of Article 22 of the Covenant of the League as one of the bases for the allocation of the 'C' mandates. It is trite to refer to the shrinkage of territorial space by modern means of transportation and communication, but in a very real sense all African States south of the Sahara are contiguous to each other, and their interrelated interests—geographical and other—cannot be denied. Although the Court's Judgment of today does not seek to explore this point, the conclusion which it reaches denies the existence of any special right or interest of the Applicants, a finding which would need to be fully buttressed by argument and not left to implication.

The impact on other African States south of the Sahara of racial conflict and the practice of apartheid in South West Africa could be, and is, just as great if not greater than certain impacts which Respondent concedes. In the Counter-Memorial, Book II, page 177, it is stated:

"Then there were also contained in the Mandate instruments other provisions, primarily intended for the benefit of the inhabitants, the non-observance of which could, however, affect also the material interests of individual League Members. Examples would be the provisions with regard to the slave trade, and provisions with regard to traffic in liquor which, if violated by a Man-

datory, could possibly affect neighbouring or even other States, which, being Members of the League, would then have a legal right to object. In respect of these provisions, individual League Members would have been vested with rights or legal interests either because the instruments clearly indicated an intention that such rights should vest in Members individually, or because the impact of a violation of the terms of the Mandate on the material interests of individual Members suggests that it was intended that such Members would be entitled as of right to resist such a violation."

Respondent here concedes a principle which the Judgment of the Court denies, that is that under certain circumstances, Members of the League did have a legal right to complain about violations of those clauses of the Mandate which the Judgment calls "conduct" clauses, i.e., clauses for the performance of the sacred trust. It then becomes a question of factual appraisal whether policies of racial discrimination in South West Africa have an impact on States such as the Applicants. An allegation of racial discrimination, like allegations of the existence of the slave trade or traffic in liquor gives them, under paragraph 2 of Article 7, a right to have the Court pronounce upon the merits of their claim. But this approach does not negative other conclusions in this opinion concerning the origin and nature of Applicants' right to judgment on their Applications filed under paragraph 2 of Article 7. It does show that Applicants have standing to secure from the Court judgment on their submissions, whether the judgment be favourable or not.

The Judgment of the Court rests upon the assertion that even though—as the Court decided in 1962—the Applicants had *locus standi* to institute the actions in this case, this does not mean that they have the legal interest which would entitle them to a judgment on the merits. No authority is produced in support of this assertion which suggests a procedure of utter futility. Why should any State institute any proceeding if it lacked standing to have judgment rendered in its favour if it succeeded in establishing its legal or factual contentions on the merits? Why would the Court tolerate a situation in which the parties would be put to great trouble and expense to explore all the details of the merits, and only thereafter be told that the Court would pay no heed to all their arguments and evidence because the case was dismissed on a preliminary ground which precluded any investigation of the merits?

Economic Equality

Since the Judgment of the Court undertakes to analyse the whole mandates system and not only the 'C' mandates, the intention of the drafters of 1919 in providing for recourse to the Court in relation to provisions of the mandates other than those already considered, is relevant to the

general problem of this analysis. It is well known that in addition to the idealistic concern for the welfare of the indigenous peoples who were not yet able to stand by themselves, the mandates system, in rejecting the idea that colonies formerly belonging to the defeated enemy would be appropriated as part of the spoils of war and for the benefit of the conquerors, built upon the practical proposition that the mandated areas—at least those under the 'A' and 'B' categories—should offer equal economic opportunities to all Members of the League; this was the principle of the "open door". It was incorporated in the 'A' and 'B' mandates and the long delay in approving the 'C' mandates was due to unsuccessful Japanese insistence on having it applied to 'C' mandates in the Pacific area. The Japanese representative at the Peace Conference was able to invoke an argument which continued to be advanced in ensuing years. In the Council of the Heads of Delegations at Paris in December 1919, he said that "the principle of equality of treatment in the economic sphere must be understood among the guarantees provided . . . in the interest of the native population". (*United States Foreign Relations, Paris Peace Conference 1919*, Vol. IX, p. 642.) He argued further that the guarantees in paragraph 6 of Article 22 included the equality of treatment mentioned in paragraph 5 since "that equality of treatment too was as much in the interests of the native population as in that of foreign nationals". (*Ibid.*, p. 645.) The Japanese view did not prevail in regard to the 'C' mandates but in regard to the system as a whole the point was clearly made.

> "The Mandates conception as first set forth by General Smuts and President Wilson did carry a general requirement of the open door, and the United States subsequently insisted that it was only after this requirement had become an 'understanding' of the Peace Conference that it 'felt itself able and willing to agree that the assignment of certain enemy territory by the victorious powers would be consistent with the best interests of the world'." (Quincy Wright, *Mandates under the League of Nations*, 1930, p. 260; see also, *ibid.*, pp. 475, 477 and 479.)

One of the leading French commentators on the League of Nations (Ray, *Commentaire du Pacte de la Société des Nations*, 1930, pp. 625-626) is emphatic in saying that the provisions for equality of economic treatment found their justification in the last analysis in the interests of the indigenous population. He agrees with the contention of the Japanese representative that the guarantees stipulated in paragraph 5 of Article 22 extend equally to the mandates covered by paragraph 6, that is, to the 'C' mandates.

The Permanent Mandates Commission included in its questionnaire—even for the 'C' mandates—a question about economic equality and its reports to the Council frequently refer to these matters. It is, there-

fore, correct to say that the economic rights which the Judgment of the Court concedes belong to individual Members of the League, were of concern to the League itself. The question of economic equality was for example discussed at some length at the 12th Session of the Permanent Mandates Commission on 29 October 1927. There was frequent emphasis upon the importance of the principle of economic equality and upon the fact that the safeguards of this equality were inserted for the advantage of the inhabitants and not merely for the benefit of individual Members of the League. In the discussion M. Rappard stated:

> "The clause prescribing economic equality had been inserted in the Covenant both in the interests of the territory and in the interests of the States Members of the League. In his opinion, those interests were one and the same. There might, however, arise a contradiction between the interests of the mandatory power and the interests of the mandated territory, and in that case it was for the Mandates Commission to intervene in order to obtain a solution favourable to the mandated territory." (*Minutes of the 12th Session*, p. 66.)

Similarly, the Marquis Theodoli, Chairman of the Commission, emphasized that—

> "the opinion had been formed in the public mind and in the Mandates Commission that the mandates system had been established in the interests of the natives, and that the rules imposed on the mandatory Powers with that object in view indicated a progress toward increasing the welfare and development of the indigenous populations of certain territories whose civilisation was backward. He shared that opinion . . ."

He continued, however, to emphasize that "there lay at the basis of the whole system another principle of the highest importance, namely, the principle of economic equality" (*ibid.*, p. 168).

Since it is agreed in the Judgment of the Court that Members of the League might invoke the adjudication clauses of the mandates in order to assure observance of the provisions directed to the maintenance of economic equality, and since these same provisions were designed also for the benefit of the indigenous populations, it is clear that arguments which seek to dilute the reach of the adjudication clause by the theory that the mandatories would never have agreed to a system which might subject them to litigious harassment, is ill-founded and cannot be accepted. It may be well to recall at this point what has been described above, namely that the so-called "missionary" clause was more in the nature of a guarantee for the welfare of the indigenous populations than for the benefit of nationals of Members of the League.

In a very recent study of the origins of the mandates system one reads:

> "The open door principle, especially as understood in the late

> nineteenth century, is an integral part of the dual mandate [i.e., obligations owed both to the peoples under trust and to the family of nations] in that it rests on the implicit assumption that a dependent people's economic interests are best served when the benefits of colonial trade are open to all." Twitchett, "The Intellectual Genesis of the League of Nations Mandate System", III *International Relations*, No. 13, April 1966, p. 16 at p. 18.

It has now been shown that the mandates, in providing, through recognition of general rights in an adjudication clause, access to the International Court, present no juridical impossibility and no inherent improbability so far as the international practices of the period following the end of the First World War are concerned. The alleged juridical impossibility or at least legal novelty, of the recognition of substantive legal rights in a general interest may also be examined in the light of certain municipal legal principles and practices.

The Problem of "Standing" in Municipal Law

In his dissenting opinion of 1962 (at p. 452) Judge Winiarski speaking of the argument about a right of action in a general interest, said that—

> ". . . reference has been made in this connection to an institution under the old Roman penal law known as '*actio popularis*' which, however, seems alien to the modern legal systems of 1919-1920 and to international law".

I would leave to others explanations of ancient precepts of *penal* law, but at least one modern legal system is entirely familiar with court actions which are allowed when the plaintiff shows no direct individual injury.

The problem of "standing" *(locus standi)* is familiar in the law of the United States. The law of standing particularly in terms of American constitutional law, or the law of federal jurisdiction, has to do with challenges of governmental action. The parallel situation in international law might be considered to be the right of recourse against an international organization or one of its organs. That subject was explored by the Institut de droit international in 1957, but is not involved here. The right of individual Members of the League of Nations to resort to the Permanent Court of International Justice in case of certain disputes with a mandatory over the interpretation or application of the mandate, as provided in paragraph 2, Article 7, of the Mandate, could involve a situation in which a judicial decision of the Court might conflict with a political decision of the Council of the League. But even in those situations, the Court action would not be against the League or one of its organs or officers, nor need it be an attack on the validity of the

Council's decision as if such decision were *ultra vires*. No suggestion is made here that there existed in the international judicial system a remedy comparable to a writ of mandamus under the law in the United States to compel an officer or organ of the United States Government to desist from taking some action alleged to be unconstitutional. The interest which the American law of standing has for the present case lies in the question whether in some legal systems a party "interested" and "adversely affected in fact", or as expressed in some statutes, "any part aggrieved", has standing, that is, a legal right which the courts will protect.

Many aspects of the problem of "Standing to Secure Judicial Review" [1] have no parallels in the International Court of Justice. But the argumentation in the Judgment of this Court in this *South West Africa* case, in challenging the right of any State to secure a judgment of this Court in cases where the right of judicial recourse is granted by treaty but where the applicant State does not allege a particular substantive legal interest would—if it were correct—lead to the conclusion that the large body of United States common and statutory law on the matter is almost a juridical impossibility. In the American jurisprudence there are cases which insist that the plaintiff should show a direct injury to his interest, as in some of the taxpayers' suits. But this is by no means a universal rule. A "taxpayer, or *citizen and voter*, has such an interest in the form of government under which he lives as to be entitled to maintain the action for a declaratory judgment with respect to matters relating thereto", e.g., matters "relating to an amendment of the city charter with respect to the election of councilmen" (26 *Corpus Juris Secundum*, p. 271. Italics added). A State, a member of the international community, has a stronger and even more direct interest in matters relating to the fulfilment of fundamental treaty obligations contained in a treaty which has what may fairly be called constitutional characteristics.

Although the law of England has not developed on this matter as has that in the United States, as far back as 1898, the Court of Queens Bench held that a parish vicar "clearly has sufficient interest" to seek mandamus against liquor licensing authorities. (*The Queen* v. *Cotham*, [1898] 1 Q.B. 802.) Citizens in the United States are recognized to have a right to resort to the courts to seek to have public grievances remedied. The "public action—an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations—

[1] This is the title of two articles by Professor Louis L. Jaffe in the *Harvard Law Review*, Vol. 74, 1961, p. 1265, and Vol. 75, 1961, p. 255.

has long been a feature of our English and American law". (Jaffe, *op. cit.*, p. 302.) Article 7 (2) of the Mandate recognized that any Member of the League of Nations had a similar right in the interest of upholding the "sacred trust".

That the law in Italy and in other countries may be different (cf. Galeotti, *The Judicial Control of Public Authorities in England and in Italy*, 1954) is not relevant to my argument since I am not seeking by the methods of comparative law to establish a "general principle of law". I agree with the observation that it was "rhetorical abuse rather than reasoning" (Jaffe, *op. cit.*, p. 1289) when an Ohio court said that to allow a citizen to secure enforcement of Sunday laws would be to permit "any crusading zealot to ride off, helter-skelter, throughout the state compelling police or municipal courts to arrest persons for alleged offences in which the relator has no legitimate concern". The right of action given to Members of the League by Article 7 (2) of the Mandate, was not granted as a concession to helter-skelter zeal.

I accept the proposition that—

> ". . . the very recognition of the plaintiff's right to sue is the law's best testimony to the existence of a substantive right. To put it another way: the quest for a legal right on which to ground standing is a tautology, since the grant of standing itself manifests a legal right . . . the grant of the procedural right of standing confers ipso facto substantive rights so that in all cases where there is standing there is also a legal right [1]."
>
> "Where the legislature has recognized a certain 'interest' as one which must be heeded, it is such a 'legally protected interest' as warrants standing to complain of its disregard [2]."

In the case of the mandates, the Peace Conference of 1919-1920 played the role of the "legislature"—using this analogy in a restricted and qualified sense. If "the plaintiff has standing his interest is a legally protected interest, and that is what is meant by a legal right [3]".

I must repeat, as indicated above, that the municipal law analogy which I have been discussing is far from perfect and the differences in the international law situation must be clearly noted [4]. I agree that there is no generally established *actio popularis* in international law. But

[1] See Jaffe, *op. cit.*, p. 256, but his approach is different.
[2] *Ibid.*, p. 264.
[3] Davis, *Administrative Law Treaties*, 1958, sec. 22.04 at p. 217.
[4] I have not dealt with the American constitutional requirement concerning the existence of a "case" or "controversy".

international law has accepted and established situations in which States are given a right of action without any showing of individual prejudice or individual substantive interest as distinguished from the general interest.

SECTION VI. THE CHARACTER AND STRUCTURE OF THE LEAGUE OF NATIONS AND ITS ROLE IN THE MANDATES SYSTEM

In its Advisory Opinion of 1950 on the *Status of South West Africa*, this Court reached the conclusion that the supervisory functions of the League of Nations had not faded away with the dissolution of the League but rather that the General Assembly of the United Nations could now exercise those supervisory functions 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". (P. 137 of the Opinion.) In dealing with related issues in 1955 and 1956, the Court did not modify this view. The Judgment of the Court in 1962 reveals continued agreement with the same conclusion. The Court's Judgment today does not pass upon the question of the survival of the Mandate or its Article 6 which contains the provision requiring annual reports to the League Council. The authority of the earlier pronouncements therefore rests—as already stated in another connection—unimpaired. Accordingly I do not find it necessary to deal with the extensive argumentation of Respondent about the lapse of the League's supervisory powers. Similarly, I find it unnecessary to deal further in this opinion with Applicants' Submissions 2, 7 and 8.

It is equally clear that the Court's earlier conclusion that nothing has sapped the vitality of Article 7 (1) of the Mandate, stands on the same footing. In other words, the Mandatory could not modify the Mandate without consent. The consent originally was to be given by the Council of the League and now by the General Assembly of the United Nations. "Modification" of course includes "termination". Respondent admitted that some consent would be, or at least might be, required in order to make changes. *Inter alia*, counsel for Respondent on 7 April 1965 (C.R. 65/13, p. 6) explained that the South African Legislative Assembly had "contemplated" the competence of the General Assembly to grant a South African "request" for the incorporation of the Territory. This position would be in line with the British position which recognized that United Nations consent should be secured for any change in the Palestine Mandate. But counsel for Respondent considered that a competency to grant a "request" for the ending of the Mandate "is totally unrelated to the subject of a supervisory power". *Per contra*, the correct conclusion is that such a "competency" is one of the highest manifestations of supervisory power. On another occasion, the argument of Respondent seemed to be that an agreement to change or terminate the Mandate did not need to be reached with an organ of the United Nations but an agreement expressed through a resolution

of the General Assembly would be a convenient "short-cut", so to speak, to securing the agreement of various States. But Article 7 (1) does not contemplate the need for consent of various States as such; it contemplates the need for the consent of the supervisory organ which originally was the Council of the League and now is the General Assembly of the United Nations.

The Court's Judgment today lays considerable stress on the nature of the supervision of the mandates. It points to the Council as the principal supervisory body. It recognizes that the Assembly of the League could interest itself in the mandates but concludes that individual members of the League played no part except as members of the Council or Assembly. The Judgment seems to emphasize the *persona*, the separate personality, not only of the League of Nations itself, but also of the Council. It emphasizes also the provision of paragraph 1 of Article 22 of the Covenant which says that to the areas which are under mandate,

> "there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization *and that securities for the performance of this trust should be embodied in this Covenant*".

I shall return later to the significance of the words which I have emphasized. The Court's Judgment today of course also recognizes the role of the Permanent Mandates Commission which screened the annual reports of the Mandatories and advised the Council. It minimizes the role of the Permanent Court of International Justice. By this progression it reaches the interpretation of paragraph 2 of Article 7 of the Mandate, from which I have to dissent.

The argument of Respondent also stressed the role of the Council and of the Permanent Mandates Commission as exclusive instrumentalities, of supervision. These instrumentalities, so the argument ran, were ones known in advance to the Mandatory and accepted by the Mandatory, not in terms of a general submission to *any* type of international supervision, but solely in terms of *that* Council and *that* Commission.

These inter-related positions and contentions are based upon an interpretation of historical events and of international instruments different from my own and I shall therefore state the understanding which I have derived from a study of the relevant data. I shall seek to follow the course to which the Judgment itself points, by examining the scene contemporary to the drafting of the Covenant, to the inauguration of the League, and to the ensuing operation of the mandates system.

It is not always easy to distinguish between actions of the League or its organs as corporate bodies and actions of the States which composed the League. I am not concerned here to reach a conclusion whether the League of Nations had separate international juridical personality but I am concerned with a realistic appraisal of its activities as an organization. In connection with the problems here under discussion, importance must be attached to the views and attitudes of Governments and their spokesmen in the nineteen-twenties. One may take as a back-drop certain statements in 1923 and 1924 by one of the great proponents of the League, Lord Robert Cecil:

> "From a constitutional point of view, the League of Nations was nothing but the Governments which composed it." (League of Nations, *Official Journal*, 1923, p. 938.)
>
> "The League was not a super-national organization; it was nothing more than the Governments represented in its Council and at its Assembly ... Influence could therefore never be usefully exerted on the League as a corporate body, but only on the individual Governments which composed it." (*Ibid.*, 1924, pp. 329-330.)
>
> "... he was a little afraid of any proposals which might have the effect of transforming the Council into a body seeking to achieve the suppression of slavery by its own initiative. The Council had been created solely for the purpose of enabling Governments to co-operate and to assist them whenever necessary." (*Ibid.*, p. 331.)

This realistic appreciation of the fact that, at least in the years when the League began to function, the Governments of the member States were the real actors, is underscored by the history of the action taken under paragraph 8 of Article 22 of the Covenant which reads as follows:

> "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."

Section IV of this opinion traced the history of the drafting of the mandates in the Milner Commission up to their transmission to the Peace Conference in August 1919. As already noted, they were not finally confirmed by the Council of the League until 17 December 1920. In the interval, there were negotiations with the United States, discussions of the Japanese insistence on "open-door" clauses in the 'C' mandates, and the preparation of the 'A' mandates and the mandates for the Togos and Cameroons which had not been drafted by the Milner Commission. The League Assembly became impatient at the delay and there was public demand for the publication of the text of the mandates [1].

[1] At this point, it is convenient to repeat, with some modifications and additions, a portion of my separate opinion of 1962—at pp. 390 ff.

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

. . . . . .

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

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

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

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

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

This Report stated:

> 'With regard to Mandates B and C, it appears that the Principal Powers are in agreement on many points, but that there are differences of opinion as to the interpretation of certain of the provisions of Article 22, and that the negotiations have not yet been concluded.
>
> Beyond doubt, *it is in every way desirable that the Principal Powers should be able to arrive at a complete understanding and to submit agreements to the League. Failing this very desirable agreement* however, the Covenant provides for the intervention of the Council with a view to determining the degree of authority, of control or of administration to be exercised by the Mandatories.' ... 'We sincerely hope therefore that before the end of the Assembly *the Principal Powers will have succeeded in settling by common agreement the terms of the Mandates* which they wish to submit to the Council.' (Italics added.)

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

The Principal Powers did reach agreement.

There is further evidence of the contemporary understanding of the respective roles of the member powers and of the League Council in establishing the Mandates.

The Prime Minister of Great Britain said in the House of Commons on 26 July 1920 (when asked "Do the Great Powers submit Mandates to the League of Nations? Is submission the real attitude?"): "The Great Powers are on the League of Nations, and they are only submitting to themselves." Again on 8 November 1920, when asked whether delegates at the League can "alter, amend and reject a mandate?", the Prime Minister replied:

> "The great Powers are represented, of course, on the Council of the League, and these Mandates have to be submitted to the Council of the League. It will require the unanimous consent of the Council of the League to reject them ... Nothing can be done except by a unanimous decision of the Council. That means that nothing can be done without the consent of the Powers concerned."

Further, on 14 December 1920, a question was put asking whether any draft mandates had been submitted to the Assembly of the League "and, if not, why not, seeing the duty of defining the degree of authority, control, or administration to be exercised by the mandatory falls in the first place on the Members of the League?" The Under-Secretary of State for Foreign Affairs made a printed reply in which he said:

> "... the Council of the League of Nations decided on 5 August 1920, that the duty of defining the degree of authority, control, or

> administration to be exercised by the mandatory does not under the Covenant in the first place fall upon the Assembly of the League of Nations. According to clause 8 of Article 22 of the Covenant, the degree of authority, control, or administration is to be explicitly defined in each case by the Council 'if not previously agreed upon by the Members of the League'. The Council considered that the words 'Members of the League' in this context were intended by the framers of the Covenant to designate the Members of the League concerned, i.e., the great Powers assembled at the Peace Conference among whom the mandates were to be distributed. The text of the Covenant is thus held to provide for the intervention of the League of Nations as regards the settling of the terms of the mandates, only through the organ of the Council of the League, and that only in case of disagreement among the Powers concerned. The Powers have, however, decided to give to the words of the Covenant a wider interpretation and to take them as implying that the Council shall act not merely in case of disagreement, but in all cases as a confirming authority. Negotiations for overcoming certain outstanding difficulties are in progress and if agreement can be reached it is hoped that the approval of the League will be given to the draft mandates before the close of the present session at Geneva."

This was also the point of view set forth in the Ishii Report to the Council of 20 February 1921 where the Rapporteur said that: "In general . . . the role of the Council may be limited merely to ratification of the proposals made by the mandatory powers."

Six years later the British Government's analysis of the situation had not been changed. On 21 February 1927, in response to the question: "Who conferred the Mandate for Tanganyika territory on His Britannic Majesty?", the Secretary of State for the Colonies replied:

> "Under Article 119 of the Treaty of Versailles the former German territories in Africa were surrendered to the Principal Allied and Associated Powers who, in accordance with Article 22 of the Treaty [*scilicit* the Covenant], agreed that the mandates to administer these territories should be conferred upon the Governments concerned; and proposed the terms in which the mandates should be formulated. Having arranged the allocation and delimitation of these territories as between themselves, the Governments concerned agreed to accept their respective Mandates and to exercise this on behalf of the League of Nations on the proposed terms, and the Mandates were then confirmed by the Council of the League."

In addition to this clear evidence of the British interpretation of the actual application of paragraph 8 of Article 22 of the Covenant, one may note that at the private session of the Council on 4 August 1920, M. Bourgeois (France) pointed out that: "the Principal Allied and Asso-

ciated Powers, at the moment when the Covenant was drafted, had, in using the phrase 'Members of the League', in effect intended to refer to themselves." In a discussion on the mandate drafts in the Council of the League on 10 December 1920, the Representative of Italy said that, strictly speaking, by the terms of Article 22 (8) of the Covenant, no drafts of 'A' mandates had been brought to the notice of the Council since they had not yet been communicated to Italy "and, consequently, there was, as yet, no agreement in regard to the matter between the Principal Allied Powers". He referred to the "necessity of an agreement *between the Principal Allied Powers, as provided for by Article 22*". (Italics added.)

In the light of this record there is no escape from a further point noted in my separate opinion of 1962 which apparently is not fully accepted in the Court's Judgment. The point is whether the fourth paragraph of the preamble of the Mandate for South West Africa is evidence contradicting the conclusion just set forth above and proves that the Powers had not agreed upon the terms of the Mandate and that they were actually "defined" by the Council.

When on 14 December 1920, Mr. Balfour handed in to the Council drafts of the 'C' mandates, the Council immediately referred these drafts to the Secretariat to be studied by the experts. As appears from subsequent reports by Viscount Ishii, the Secretariat was concerned to make sure that the proposed terms conformed to Article 22 of the Covenant and that the role of the Council of the League should be appropriately recognized. As stated by Viscount Ishii, what is now the fourth paragraph of the preamble was inserted—

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

Along the same lines, the words following the preamble in the Balfour draft (the Council "approves the terms of the Mandate as follows"), were replaced by the phrase which appears in the final text, namely: "Confirming the said Mandate, defines its terms as follows:"

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

> "*Whereas*, by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:"

It will be seen that this text slightly paraphrases the text of paragraph 8 of Article 22 of the Covenant. On the other hand, the French text follows the text of paragraph 8 of Article 22 more closely and, in doing

so, brings out more clearly the condition subject to which the Council was authorized to act. The French text reads as follows:

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

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

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

This whole fourth paragraph of the Preamble is omitted entirely from the four Mandates for Togo and the Cameroons which as already noted had a different development. At the meeting of the Council of Four on 7 May 1919, when the decision was taken to allocate the Mandates, it was agreed that the British and French Governments would make a joint recommendation to the League as to the future of the former colonies of Togo and the Cameroons; at this point there was no decision to place these territories under mandate. But the Joint Recommendation of the two Governments to the League on 17 December 1920 proposed a division of the two colonies between France and Great Britain and, in accordance with the spirit of Article 22, that they be placed under mandates. The two Governments accordingly sent to the Council four draft mandates which are similar to the other 'B' mandates. The Joint Recommendation says that the two Governments "venture to hope that when the Council has taken note of them it will consider that the drafts have been prepared in conformity with the principles laid down in the said Article 22, and will approve them accordingly".

When the Council of the League approved these four drafts on 1 August 1922, it did not insert the new fourth paragraph of the Preamble although it did insert the final one-line phrase. If it had been the understanding that under Article 22 of the Covenant the Council actually had to define *all* the terms of the Mandates in the absence of prior agreement by *all* the Members of the League, and if the fourth paragraph of the Preamble as it appears, *inter alia*, in the Mandate for South West Africa, is to be so understood, it would be impossible to explain why these four Mandates were subject to a different rule. The second paragraph of the Preamble of these four Mandates recites that the Principal Allied and Associated Powers had "agreed" that France and Great Britain should make a joint recommendation concerning these former colonies and this was evidently treated as an agreement of the Powers in advance to accept whatever recommendation the two governments might make. This conclusion is borne out by the treaties of 13 February 1923 between the United States and France concerning the rights of the former in French Cameroons and Togo; they refer to the agreement of the four Powers upon these Mandates, just as the treaty of 11 February 1922 between the United States and Japan concerning rights in the islands under Japanese mandate recites the prior agreement of the same four Powers on the allocation of the Mandate and on its terms.

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

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

It is necessary at this point to deal briefly with another detail of the interpretation of Article 22 of the Covenant. Paragraph 1 of Article 22 has been quoted above with particular emphasis upon the words "*and that securities for the performance of this trust should be embodied in this Covenant*". Since there is reference in the further paragraphs of Article 22 to the Council of the League and also to "a permanent commission" but no mention whatever of the Permanent Court of International Justice, it has been argued that resort to the Court as ultimately provided for in paragraph 2 of Article 7 of the Mandate is not one of the "securities for the performance of this trust" and therefore must have some lesser or different role. In rejecting this point of view, it must be noted that the quoted text of paragraph 1 of Article 22 does not say "*all* the securities" or even "*the* securities", which would have the same meaning. This is made the more clear by the French text which says ". . . il convient d'incorperer dans le présent Pacte *des* garanties pour l'accomplissement de cette mission". It surely was not *ultra vires* the Council to confirm the inclusion in the Mandate of Article 7 with its two safeguards—one requiring the Council's consent to any modification

and the other providing for recourse to the Permanent Court of International Justice.

It is now necessary to turn to the argument of Respondent noted above to the effect that Respondent as Mandatory had agreed to accept only a certain very specific kind of supervision namely that specified in Article 22 of the Covenant when it referred to the Council of the League and to the commission which actually became the Permanent Mandates Commission. These bodies, so the argument runs, were known in advance to the Respondent which accordingly knew precisely what kind of supervision it was agreeing to accept.

Counsel for Respondent relied heavily on the proposition that the whole mandates system was adopted as a compromise and that, accordingly, one must bear in mind in interpreting the mandates the point of view of the Mandatory Powers which, at times, was strongly opposed to the ideas advanced largely by President Wilson. It is of course true, that two points of view were aired at the Paris Peace Conference. On the one hand there were those who advocated the annexation of the colonial possessions of the enemy powers. The interests of some of the victorious Powers which advocated this point of view attached differing importance to the Middle Eastern area and to the African area. President Wilson was vigorously opposed to the idea of annexation, but it was the famous project of General Smuts of South Africa which he accepted and upon which the ultimate mandates system was based [1].

With particular reference to the British Dominions and especially to the Union of South Africa, certain particular factors must be borne in mind if the circumstances attending the "negotiations" of the Mandate for South West Africa are to be properly understood. There is no need here to dwell upon the familiar incidents at the Paris Peace Conference in the last few days of January 1919, but it may be recalled that at this stage President Wilson had succeeded in gaining the support of Mr. Lloyd George for the principle of non-annexation and the establishment of the mandates system. The other members of the "Big Five" were no longer in opposition. The final "compromise" based on the memorandum presented to the Council of Ten by Lloyd George on 30 January (the text of which with only some modifications became Article 22 of the Covenant) was a domestic matter concerning the internal arrangements of the British Empire. From the international point of view Great Britain had not conditioned her acceptance of the mandates system or the role of mandatory, on the adoption of the draft of what became Article 22 of the Covenant including the plan for the 'C' mandates which entrusted wide powers to South Africa and to Australia in their mandates respectively in South West Africa and in New Guinea and the Pacific Ocean south of the Equator. In effect, Lloyd George appealed to the other members of the Council of Ten to help him meet the internal

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[1] The Smuts plan, however, had not included the German colonies in Africa in his mandate scheme.

problem of the British Empire. (See Lloyd George, *The Truth About the Peace Treaties*, 1938, Vol. I, p. 541.) According to Hunter Miller ("The Origin of the Mandates System", *Foreign Affairs*, Vol. 6, 1927, pp. 277-280):

> "Of course London wanted to keep peace in what I may call the Commonwealth family. Aside from that desire it cared very little about annexation as distinguished from mandates either in Africa or in the Pacific; indeed, while committed to the Japanese claim for islands north of the Equator, the British probably preferred the mandate system to annexation in either locality."

According to a learned South African judge:

> "A certain amount of confusion was no doubt occasioned by the fissiparturience of the Empire . . . The signatories of the Covenant were as little concerned about the purely domestic question as to the relationship of His Majesty's various capacities to each other as they were with the purely domestic question as to which organs within the Union would exercise the executive and which the legislative function over the mandated Territory." (van der Heever, J., in *Rex* v. *Offen*, *op. cit.*, at pp. 84 and 85.)
>
> "If the mandate system did not serve as an inter-imperialist compromise, it functioned as a most useful principle for reconciling the clashing aspirations of various units of the British Empire. British statesmen sorely needed a formula which would meet the demands for outright annexation put forward by Australia, New Zealand and South Africa and the opposing demand that the Empire refrain from further expansion. The answer, of course, was found in that ingenious device called the 'C' mandate." (Haas, Ernest B., "The Reconciliation of Conflicting Colonial Policy Aims: Acceptance of the League of Nations Mandate System", VI *International Organization*, 1952, p. 521, at p. 532.)

It must be remembered that prior to World War I, the British Dominions and India had no recognized separate international personality; they were merely parts of the British Empire. Due to their magnificent military contributions during the war, the leaders of the Principal Allied and Associated Powers were prepared to give the Dominions and India a special status at the Peace Conference and, ultimately, to admit them as original members of the League of Nations (see generally H. Duncan Hall, *The British Commonwealth of Nations*, 1920, pp. 180 ff).

There were long arguments before agreement was reached about separate representation of the Dominions. Various compromise formulæ were adopted. In the Council of Twenty-five, the Dominions were entitled, as members of the British Empire Delegation, to places amongst

the five members allotted to the Empire. The Rules of the Conference, as issued to the Press on 15 January 1919, included in the first group the Big Five and any "belligerent Powers with special interests"—these Powers included Belgium, Brazil, the British Dominions, India and some others. When the future of the German colonies was discussed in the Council of Ten (consisting of the heads of governments and foreign ministers of the Big Five) "representatives of Australia, New Zealand and South Africa were allowed to be present and to express their views . . " (Counter-Memorial, Book II, p. 11).

From the point of view of the argument that the Union of South Africa knew in detail what kind of supervisory system was being provided for the Mandate over South West Africa which it was accepting, it is important to note that the British draft project submitted by Lloyd George on 30 January 1919 did not include any provision for the Permanent Mandates Commission which was inserted later and exists as paragraph 9 of Article 22 of the Covenant. The record shows that the Union of South Africa was intent upon controlling the territory of South West Africa which was adjacent to its borders and that when it became apparent that outright annexation was not politically possible, the Government of South Africa was ready to accept the 'C' Mandate for South West Africa with that measure of control which paragraph 6 of Article 22 of the Covenant envisaged. Lloyd George could not have presented his project on 30 January had it not already been clear that if President Wilson agreed to the draft this would be the basis on which South Africa's ambitions in regard to South West Africa would be realized.

According to Hunter Miller (*The Drafting of the Covenant*, Vol. I, p. 114) there was already "tacit consent" as to the distribution of the mandates as of 30 January 1919. Certainly South Africa had agreed to the Mandate by the time the formal allocation was made by the Council of Four on 7 May 1919.

Certain other data indicative of South African acceptance of the Mandate before all of the details were agreed upon should be noted at this point. In September 1919 the South African Parliament passed the South West Africa Mandate Act, Act No. 49, 1919 (*Official Yearbook of the Union of South Africa 1910-1920*, pp. 113 and 905-906). The Act, which was to be in effect for one year but subject to be extended by resolution by both Houses of Parliament, contained, *inter alia*, the following paragraphs:

> "Whereas at Versailles on the 28th of June, 1919, a Treaty of Peace, a copy of which has been laid before Parliament, was signed on behalf of His Majesty and it is expedient that the Governor-General should have power to do all such things as may be proper and expedient for giving effect insofar as concerns the Union to the Treaty, *or to any Mandate issued in pursuance of the Treaty with reference to the territory of South-West Africa*:
> Be it enacted . . .

1. The Governor-General may make such appointments, establish such offices, issue such proclamations and regulations and do such things as appear to him to be necessary for giving effect, so far as concerns the Union, to any of the provisions of the said Treaty *or to any Mandate issued in pursuance of the Treaty to the Union with reference to the territory of South-West Africa ...*" (Italics added.)

General Smuts as Prime Minister urged the passage of the Act indicating that the proposed Mandate for South West Africa might take its final form at the Peace Conference while Parliament was not in session and that accordingly interim powers should be provided to enable the Government generally to take such actions as might be necessary in the circumstances. Prime Minister Smuts informed the Parliament about the elaboration of the proposed mandates system with particular explanations about the 'C' mandates which would include South West Africa. He said that the members of Parliament would find the report of the Commission which had drafted the mandates in a blue book which had been issued and they would find that the Mandate for South West Africa was in terms almost identical with Article 22 of the Covenant.

It appears that this South West Africa Mandate Act was renewed in July 1920 and subsequently. (*Official Yearbook of the Union of South Africa 1924*, p. 111.)

Having in mind these dates indicating the acceptance of the Mandate for South West Africa by the Government of the Union of South Africa, at Paris probably by 30 January and at least by May 1919, and in the South African Parliament in September 1919, one may return to the relevant dates involved in the further drafting of the Covenant and of the mandates at the Peace Conference. Of course the Union of South Africa was not legally bound until the Covenant entered into force as part of the Peace Treaties on 10 January 1920, and the subsequent formal approval of the Mandate for South West Africa by the Council of the League on 17 December 1920. The significant fact is that there was acceptance in principle. "Respondent was at all material times willing to accept such Mandate ..." (Dissenting opinion of Judge van Wyk, 1962, p. 594.) This acceptance in principle was not qualified by reservations concerning this or that detail but evidenced the conclusion by South Africa that the acceptance of the 'C' mandate, as it might be worked out, was the only way in which the desired control of South West Africa could be obtained.

When the general outline of Article 22 of the Covenant was provisionally accepted in the Council of Ten on 30 January 1919 there was a bare reference to the rendering of an annual report; nothing was said about the nature of the report. The last two paragraphs of Article 22 were added at the Sixth Meeting of the Commission of the League of Nations on 8 February 1919 (Miller, *op. cit.*, pp. 110-111). These two paragraphs read as follows:

"(8) The degree of authority, control, or administration to be exercised by the Mandatory shall, if not provisionally agreed upon by the Members of the League, be explicitly defined in each case by the Council.

(9) A Permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the Mandates."

The text of Article 22 including these two paragraphs was adopted on 13 February 1919 (*ibid.*, Vol. II, pp. 438, 441, 484-486).

At this stage the nature of the Permanent Mandates Commission was still unknown; its constitution was not actually agreed upon until 29 November 1920.

The composition of the Permanent Mandates Commission was actually discussed in the Council of the League of Nations between 4 August and 29 November 1920. At first there was no agreement as to whether the Mandatory Powers were to be represented on the Mandates Commission at all, or in any event, whether the majority of the Commission should be composed of representatives of non-Mandatory Powers. While this whole question was still under debate, at the Fourth Meeting of the Tenth Session of the Council on 23 October 1920, Mr. Balfour (Great Britain) stated that he would like to consult the representatives of the Dominions who were about to arrive in England. At the First Meeting of the Eleventh Session of the Council on 14 November 1920, Mr. Fisher (Great Britain) reported that the representatives of the British Dominions were inclined to the view that the number of members of the Commission should not exceed five. Mr. Fisher continued:

"In view of the fact that the Commission on Mandates might be called upon to revise the conditions of administration of the mandates by the Mandatory Powers, it would perhaps be better if these Powers were not represented on the reduced Commission."

These are the only two indications in the record of an expression of British Dominions' interest in the composition of the Permanent Mandates Commission. The debates in the Council continued and at the meeting of 26 November it was agreed there should be nine members with a majority from non-Mandatory States. It was also agreed that the International Labour Organisation could select an expert who would be attached to the Commission.

The actual procedures later to be followed by the Permanent Mandates Commission were certainly not known when South Africa accepted the Mandates. The questionnaire which was regularly sent to each Mandatory was not elaborated until 1922. The Council of the League did not approve the procedures for examining petitions until 31 January 1923. Moreover, the composition of the Commission changed. In 1925 M. Rappard, who had been chief of the Mandates Section of the League Secretariat, was

made extraordinary member of the Commission raising the number to ten. In 1927 the number was increased to 11 by adding a German member. The majority remained nationals of non-Mandatory Powers.

Paragraph 9 of Article 22 of the Covenant hardly gave any indication of the way in which the Permanent Mandates Commission would function; it merely said that it would "receive and examine the annual reports of the Mandatories" and would "advise the Council". There was no hint here of the practice established under which representatives of the Mandatories appeared regularly before the Commission at Geneva and were often subjected to severe cross-examination although in general during the days of the League of Nations the amenities of diplomatic interchange were much more rigorously observed than they have come to be in the United Nations. Harsh and violent language was rare at Geneva, resolutions were couched with extreme diplomatic indirection and the general tendency was to avoid putting a Member "on the spot". It is the more striking to note the vigour of certain criticisms in the Permanent Mandates Commission and in the Assembly, for example in connection with the Bondelzwarts rebellion which was discussed in 1922, 1923 and 1924. At the Fourteenth Session of the Permanent Mandates Commission in 1928, South Africa was represented by Mr. Werth. He spoke of the criticisms of a Rehoboth petition and referred to "the gravity of the charges laid" by the Commission. He said he "detected . . . a note of impatience—I might almost say a note of displeasure and annoyance" (p. 60). Lord Lugard replied to Mr. Werth (p. 98). M. Merlin said that the "report under review was so fragmentary as to be quite unreadable" (p. 67). M. Rappard said:

> "he did not know of any more depressing reading than pages 29 and following of the annual report for 1927, not only because of the conditions depicted but because the authors of the report, the district commissioners and magistrates, seemed to be lacking in human sympathy for the Natives . . . The authors of the report always seemed to consider the interests of the Whites, even when dealing with the question of the Natives." (Pp. 101, 102.)

Such criticisms were not typical of all sessions of the Permanent Mandates Commission but these are not unique examples.

It was true that the Members of the Permanent Mandates Commission were selected as individual experts but this did not prevent some of the members from serving as their countries' delegates to the Assembly of the League where as national representatives they took an active part in political discussions concerning events in the mandated territories.

Aside from the evolution of the character and operation of the Per-

manent Mandates Commission, South Africa as a Mandatory Power could not have known how the organs of the League of Nations would develop. The Council was indeed to be the chief supervisory body, but it was a body of shifting composition. According to Article 4 of the Covenant, the Council would have been composed of the five Principal Allied and Associated Powers and four non-permanent members selected by the Assembly. Since the United States did not participate in the League, even at the outset the large Powers did not have a majority. Two more small Powers were added in 1922 and from then on the small Powers were always in the majority; after 1926 there were nine non-permanent members [1].

Neither Article 22 of the Covenant nor the text of the Mandate refers to any role for the Assembly of the League of Nations. The evolution of Assembly activity under Article 3 (3) of the Covenant was not them foreseen, but Article 3 of the Covenant is co-equal with Article 22 in the allocation of functions between organs of the League. The Assembly became "the central organ of the League" (Walters, *op. cit.*, Vol. I, p. 127), and from the First Session insisted annually on reviewing the operation of the mandate system.

In its First Session the Assembly decided that mandates, as dealt with in the annual report from the Council to the Assembly, should be referred to the Assembly's Sixth Committee (Burton, *The Assembly of the League of Nations*, 1941, pp. 79-80). Lord Robert Cecil vigorously argued for the right of the Assembly under Article 3 (*ibid.*, pp. 214-220). The request for consideration of the mandates was brought up at each Assembly by the Norwegian Delegation and the annual consideration by the Sixth Committee was by no means always perfunctory. In 1922 members of the Assembly were aroused by the so-called Bondelzwart's rebellion in South West Africa. M. Bellegarde of Haiti made a strong speech and the Assembly unanimously passed a resolution. The Permanent Mandates Commission (*Annexes to Minutes of Third Session*, pp. 290 and following) made a report which was in effect a rebuke to South Africa and severely criticized its failure to carry out its promise to the Assembly that an official investigation would be made. In the Fourth Assembly in 1923 the South African Delegate protested and defended his Government's action but the Assembly adopted a resolution expressing regret that the Permanent Mandates Commission had been unable to report that satisfactory conditions had been established in South West Africa; the resolution expressed the hope that future reports from the Mandatory would allay misgivings. The next annual report from South Africa stated that adjustments had been made (*Permanent Mandates Commission, Fourth Session*, pp. 42, 46, 59, 78, 112 and 119).

[1] The unanimity rule was not always controlling.

A further striking example of the interest which the Assembly took in the problems of mandate administration is afforded by the records of the Seventh Ordinary Session of the Assembly (League of Nations, *Official Journal, Special Supplement No. 50, Minutes of the Sixth Committee*, 1926, pp. 16-26). On this occasion there was a vigorous discussion of two proposals which the Permanent Mandates Commission had made to the Council and which had aroused some opposition among the members of the Council. The proposals had to do with a more elaborate questionnaire and with the question whether the Commission could conduct oral hearings for petitioners. M. van Rees, Vice-Chairman of the Permanent Mandates Commission, explained the Commission's actions to the Assembly and was followed by two members of the Commission who were present as delegates of their countries to the Assembly—Madame Bugge-Wicksell (Sweden) and General Freire d'Andrade (Portugal).

Although the representative of South Africa took part in this debate in the Assembly, there were many occasions when important action was taken concerning the administration of the mandates system when South Africa as a Mandatory Power apparently did not feel sufficiently concerned to send a representative. The situation was described to the Court in the dossier transmitted by the Secretary-General of the United Nations in connection with the Court's Advisory Opinion of 7 June 1955 on *Voting Procedure on Questions Relating to Reports and Petitions concerning the Territory of South-West Africa*:

> "As for the participation in the Council of Mandatories which were not members of that body, there was a gradual development of practice. In the early days of the League, all of the Mandatories were members of the Council except for the three Dominions Australia, New Zealand and South Africa. A representative of the 'British Empire' sat as a permanent member of the Council, but during the first three years of the League no special representative of a Dominion ever came to the Council. During those three years such important decisions were taken as the adoption of a constitution of the Permanent Mandates Commission, the approval of the terms of the Mandates under which the Dominions were to administer the Mandated territories, the invitation to Mandatories to furnish reports, the adoption of the rules of procedure of the Permanent Mandates Commission and the consideration of the first two reports of the Commission. This absence of the Dominions may, however, not be the result of the practice of the Council, but rather of the arrangements within the British Commonwealth regarding diplomatic representation of its members.
>
> The first occasion on which special representatives of the Dominions sat in the Council during its discussion of Mandates questions was on 20 April 1923, when the national status of in-

habitants of B and C Mandates was under consideration. On that occasion the representative of the Union of South Africa was appointed to a drafting committee to prepare a resolution for adoption by the Council.

. . . . . .

The right of Mandatories to sit in the Council certainly extended to all times when the reports of the Permanent Mandates Commission concerning their respective Mandates were under discussion, and also to the discussions of questions raised by the Mandates Commission or otherwise, which concerned conditions in all Mandates generally. On the other hand, no Mandatory not a member of the Council ever was present at the election of members of the Permanent Mandates Commission. As to discussions of the general organization of the Mandates system, Mandatories not members of the Council did not participate in the broad initial decisions of 1920 to 1922 concerning that system, perhaps for reasons which have no relevance here. However, three such Mandatories were present in the Council in 1927 when it was decided to create another post on the Permanent Mandates Commission in order to permit the appointment of a German national." (*I.C.J. Pleadings, etc.*, 1955, pp. 45 ff.) (The footnotes are omitted.)

Nor would it be correct to assume that the Mandate for South West Africa was not discussed in the Permanent Mandates Commission except when a representative of the Mandatory was present. Judge Lauterpacht lists seven occasions when South Africa was not represented at meetings of the Council when South West African affairs were discussed (separate opinion 1955, p. 103). Even when representatives of South Africa attended a session of the Permanent Mandates Commission, it was the regular practice of the Commission to discuss the problems of the Mandate privately, either before the representative of the Mandatory was called in or after he had left or both.

The role of the Secretariat of the League in the administration of the system for supervising the mandates was also an important one. The information in the reports from the Mandatories—

"was supplemented not only by the annual hearings of the accredited representatives, but also by much other available documentary material—special studies published for and by the Mandatory Governments, the results of anthropological and other technical inquiries, clippings from newspapers and other periodicals, accounts of debates in the local consultative bodies or in the parliaments of the administering States, petitions from or about the territories, etc. All of this literature was carefully sifted by the Mandates Section of the Secretariat of the League, and each of its elements was thoughtfully considered by at least some of the members of the Commission. As a consequence, it can be admitted that no event of any importance taking place in any of the mandated territories

escaped the attention of the supervisory organ . . ." (Japan an exception.) (Rappard, "The Mandates and the International Trusteeship Systems", 61, *Political Science Quarterly*, 1946, reprinted in his *Varia Politica*, 1953, at p. 183.)

The various developments and changes in the operation of the League system for supervision of the mandates as described above, were accepted or acquiesced in by the Union of South Africa. The record does not sustain the contention that South Africa's acceptance of obligations under the Mandate was limited to acquiescing in certain precise kinds of supervision known to it in advance of its acceptance. If South Africa agreed to submit to the jurisdiction of the Permanent Court of International Justice without devoting much thought to the nature of that jurisdiction, that fact would not supply any basis for denying the right or juridical interest which Applicants properly asserted in this case.

SECTION VII. THE ABSENCE OF JUDICIAL PRECEDENTS FOR APPLICATIONS LIKE THOSE IN THE PRESENT CASE

The question can be asked why no State during the period of the League of Nations invoked the jurisdiction of the Court in the general interest of the good administration of the mandate if it was true that paragraph 2 of Article 7 gave them that right. Many explanations could be given. One might first ask in response why, during the whole League period, were the Greek claims on behalf of Mavrommatis the only mandate cases brought to the Court in exercise of the conceded right of States to bring to the Court the claims of their nationals?

In 1929 the Vice-Chairman of the Mandates Commission, M. van Rees, submitted to the Commission in writing some thoughts which had been inspired by press reports of complaints about practices in certain mandates. He said that people overlook that—

". . . the mandates themselves, without exception, offer the Governments of the States of which they are nationals a much more effective means of remedying this state of affairs than any appeal for intervention, whether by the Mandates Commission or public opinion.

This means is furnished by the stipulation, which is included in all the Mandates, whereby the mandatory Power agrees that any dispute whatever which may arise between it and another Member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, and which cannot be settled by negotiation can be submitted to the Permanent Court of International Justice."

He wanted to bring this situation to public notice by incorporating it in the Minutes. (P.M.C., *Minutes, XVI Session*, 1929, p. 152.)

M. Rappard said there was little chance for merchants to get that help from their governments—

> "Very strong arguments would be necessary to induce a Government to submit to the Permanent Court of International Justice a matter which would put it in conflict with a foreign Government." (*Ibid.*, p. 153.)

But the Commission agreed to include the statement by M. van Rees in the Minutes.

In their report to the Council in the same year, in commenting on the status of non-native inhabitants of South West Africa in the light of a nationality act, the Commission advised the Council "this question appeared to be one which might merit reference to the Permanent Court of International Justice" (*ibid.*, p. 203). No action followed these *démarches*.

In 1930 in a report by M. Palacios, as Rapporteur, on a petition from a mining company in South West Africa about the application of a law, the Rapporteur said:

> ". . . the Commission might . . . advise the petitioners, if they were not nationals of the Union, to come to an arrangement with their Government. Perhaps, in this way, Article 7 of the Mandate might even be brought into play and, in order to settle the matter, it might be referred to the Permanent Court of International Justice at The Hague in order to ascertain whether, in the interpretation of the mandate, some fundamental right had really been infringed in the present case."

This suggestion was not pressed. (P.M.C., *Minutes, XVIII Session*, 1930, p. 155.)

In 1934, Lord Lugard, in a discussion on the question of the incorporation of South West Africa in the Union as a Fifth Province, said:

> ". . . if the proposal should be thought to be of doubtful legality under the mandate system, the Council could, if it so desired, refer the question to the Permanent Court of International Justice, provided for by Article 14 of the Covenant, and referred to in Article 7 of the mandate. The article in the mandate only referred to a dispute between two Members of the League, but Article 14 of the Covenant stipulated that the Council might ask the advisory opinion of the Court on *any* question." (P.M.C., *Minutes, XXVI Session*, 1934, pp. 163-164.)

No such action was taken.

M. Rappard's comment in 1929 is supported by an opinion based on long experience:

> "Experience has shown that the disadvantages of the existence of divergent views regarding the interpretation of a general international convention of a technical character are rarely regarded by those responsible for the foreign policy of a State as a sufficient reason for accepting the political responsibility involved in instituting contentious proceedings against another State." (C. Wilfred Jenks in 45 *Annuaire de l'Institut de droit international*, 1954, Part 1, p. 378.)

This attitude of governments may be the explanation of the scarcity of mandate cases in the Court but that scarcity cannot be prayed in aid of an interpretation of paragraph 2 of Article 7 of the Mandate for South West Africa in order to bar such a case when it is submitted to this Court as has now been done. It is also noteworthy that while the Council of the League of Nations never asked the Permanent Court of International Justice for an advisory opinion concerning a mandate—as it had an unquestioned right to do under Article 14 of the Covenant—the General Assembly of the United Nations has asked the International Court of Justice for three advisory opinions on the Mandate for South West Africa.

SECTION VIII. THE DRAFTING OF THE U.N. TRUSTEESHIPS

The Judgment of the Court supports its interpretation of paragraph 2 of Article 7 of the Mandate for South West Africa by a reference to the trusteeship agreements concluded under the United Nations. The argument was elaborated in the separate opinion of Judge Sir Percy Spender in the *Northern Cameroons* case. (*I.C.J. Reports 1963*, pp. 15, 65, 84 ff.) The fact is that adjudication clauses, closely resembling that in paragraph 2 of Article 7 of the South West Africa Mandate, were inserted in all the trusteeship agreements except the strategic trusteeship of the Pacific Islands under the United States and the two trusteeships in which Australia assumed responsibility, namely New Guinea and Nauru.

The negotiation of trusteeship agreements was entirely different in the United Nations in 1946 and subsequently from the negotiation of the mandate agreements in 1919 and the ensuing years. As has been seen, in 1919 agreement was first reached on which territories were to be placed under mandate. Thereafter the terms of the mandates were drafted in the Milner Commission in 1919 and then approved by the Council of Heads of Delegations at the Peace Conference. Although there was a later clamour from the League Assembly to learn the texts of the drafts, the texts of the mandates were agreed by the Principal Allied and Associated Powers and then confirmed by the Council of the League; the Powers did not submit themselves to cross-examination in the Assembly. But the Union of South Africa had no right to continued administration of the territory of South West Africa until it accepted a mandate agreement. (Details of these steps are given in my separate

opinion of 1962 at pp. 387-401; some parts of them are described in the present opinion.)

In contrast, as this Court held in its Advisory Opinion of 1950, "the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System". (*I.C.J. Reports 1950*, pp. 128, 144.) Since all States holding mandates were thus free to place their mandated territories under trusteeship or not to do so, they had the whip hand in deciding what provisions should be inserted in the trusteeship agreements, even though it was true that there were extensive discussions of the drafts in Sub-Committee I of the Fourth Committee of the General Assembly, which, under Article 85 of the Charter, was to approve the agreements.

Under Articles 82 and 83 of the Charter, the United States submitted a draft for a strategic trust of the Pacific islands formerly held under Japanese mandate and this draft was considered in the Security Council, not in the General Assembly. The United States did not choose to include an adjudication clause in its strategic trusteeship where rights of inspection may also be limited. But it sent its draft agreement to the other members of the Security Council and to New Zealand and the Philippines some months before the draft was submitted to the Security Council. (See Armstrong and Cargo, "The Inauguration of the Trusteeship System of the United Nations", XVI *Department of State Bulletin*, March 23, 1947, pp. 511, 521.) A similar practice was followed by other governments regarding other trusteeship agreements and the United States made numerous comments and suggestions on drafts transmitted to it before the formal discussions in the General Assembly. In the later debates in the Fourth Committee of the General Assembly, Mr. Thomas, speaking for the United Kingdom, said that the United States was the only Government to submit amendments to the British drafts. The United States amendments—

> ". . . had been discussed fully, with the result that some were adopted as they stood, others adopted in modified form, others were withdrawn by mutual agreement and one left over to be raised before the General Assembly". (*G.A., O.R., 2nd Part, 1st Session, Fourth Committee*, p. 160.)

Although it is true that the debates in the committees of the General Assembly were detailed, in no case could a State be compelled to accept any provision to which it objected.

The Australian trusteeship for New Guinea was approved by the General Assembly on 13 December 1946 along with seven other trusteeship agreements. The draft trusteeship for Nauru was submitted jointly

by Australia, New Zealand and the United Kingdom on 27 September 1947.

The separate opinion of Judge Sir Percy Spender in the *Northern Cameroons* case (at p. 85) is correct in noting that the Sub-Committee of the Fourth Committee of the General Assembly first examined the draft trusteeship agreement submitted by New Zealand for Western Samoa, and this draft was taken as the basis for ensuing discussions of other trusteeships. But other drafts were discussed separately. In regard to the Australian draft for a trusteeship for New Guinea, the United States proposed numerous modifications. (They are printed in Annex 5*b*, p. 242, *G.A., O.R., 2nd Part, 1st Session, Fourth Committee*, Part II.)

The separate opinion here under reference suggests that the question was whether the draft of the New Guinea trusteeship was acceptable to the Sub-Committee of the Fourth Committee. The fact was that the issue was whether any suggestions from the Sub-Committee or its members were acceptable to Australia. The representative of Australia throughout these discussions was Professor (as he then was) Kenneth Bailey, who had played a distinguished part in the drafting of the Charter at the San Francisco Conference. He made very clear the position of the Australian Government, as appears from the following quotations of his statements from the Summary Records of the Sub-Committee already cited:

> "He had been astonished . . . to hear it suggested that the decision with respect to Western Samoa was an indication of what the decision should be in the case of the other draft agreements." (P. 121.)
>
> ". . . the task of the Sub-Committee was really one of negotiation with the Governments submitting texts" (p. 141).
>
> "Mr. Bailey (Australia) said that the process of examination of the agreement by the Sub-Committee was not intended to elaborate a new text. The task of the Sub-Committee was to negotiate, in the name of the General Assembly, with the administering Powers and to suggest to them modifications it deemed necessary. It was for the administering Powers to express their willingness or unwillingness to accept suggested modifications." (P. 192.)
>
> "Annex 5*f*. Delegation of Australia: comments on proposals for modification of the trusteeship agreement submitted for the mandated Territory of New Guinea. [Pp. 246-248.]
>
> 1. The delegation of Australia has given careful consideration, in the light of the discussions in the Sub-Committee both on the Western Samoan Agreement and on the first reading on the New Guinea draft agreement, to the modification proposed by other delegations. In indicating its attitude to the proposals, the delegation of Australia will aim at brevity even at the risk of a certain curtness, which it hopes will not be misunderstood.

. . . . . .

Preamble . . . The additional clauses proposed seem unnecessary . . .

Article 2 . . . The delegation of Australia understands that this proposal has been withdrawn . . .

Article 3 . . . The delegation of Australia understands that these proposed modifications have been withdrawn . . .

Article 4. *Proposed modification 1.*

Proposal *(a)* is unacceptable . . .

Proposal *(b)* seems unnecessary . . .

Proposed modification 2. This proposal does not seem to be necessary.

Proposed modification 3 . . . this proposal does not seem to be necessary.

Proposed modification 4. This proposal is unacceptable.

Article 5. *Proposed modification 1.* The proposed omission seems unnecessary.

Proposed modification 2. The proposal to delete the article is not acceptable . . .

Proposed modification 3 . . . is not acceptable . . .

Article 7 . . . Three modifications are proposed in this article. They cannot be accepted by the delegation of Australia . . ."

In a supplementary report by the Australian Delegation (Annex 5*h*, p. 248) there is a summary of certain points on which the Delegation thought there was a "general consensus of opinion in the Sub-Committee", in the light of which the Australian Delegation was submitting a new draft of Article 8 "for approval of the Sub-Committee, *subject always to final acceptance by the Australian Government*". (P. 250. Italics added.)

Professor Bailey's interventions in the Fourth Committee itself do not reveal any different posture. See, e.g., *General Assembly, Official Records, 2nd Part, 1st Session, Fourth Committee, Part I, Summary Record of Meetings*, 1 November-12 December 1946, pp. 150 and 163.

A draft trusteeship agreement for Nauru was established later by Australia, New Zealand and the United Kingdom. Its terms closely parallel those in the agreement for New Guinea. According to the report of the Sub-Committee which considered and approved the draft agreement, no suggestion was made about adding an adjudication clause. (U.N. Doc. A/C.4/127, 21 Oct. 1947.) In the Fourth Committee itself, the representative for Australia, Mr. Forsyth, answered suggestions made for amendments or additions to the draft. He accepted none of

them and the draft agreement was approved by the Committee (U.N. *General Assembly, Official Records, Second Session, Fourth Comm., Trusteeship, Summary Records of Meetings*, 16 September-6 November 1947, pp. 98-104).

It is in this framework that one must read Professor Bailey's statement of 29 November 1946 in the Sub-Committee about the non-inclusion in the New Guinea draft trusteeship agreement of an adjudication clause comparable to that in Article XVI in the draft for Western Samoa:

> "Mr. Bailey (Australia) stated that no article comparable to article XVI had been included in the draft agreement for New Guinea, because the obligation to submit a dispute to the International Court of Justice was considered to be covered by Australia's undertaking, under Article 36 of the Statute of the International Court of Justice, to be bound by the compulsory jurisdiction of the Court. The clause had been included in the mandate, because at the time of its promulgation the Permanent Court of International Justice had not been established and the optional clause had not been accepted." (*Op. cit.*, p. 86.)

It is futile to try to dismiss this contemporary official Australian explanation for the omission of an adjudication clause by attempting to show that since the Australian obligation under Article 36 of the Statute was limited in content and in time, the Sub-Committee would not have accepted this reason for not including a special adjudication clause in the trusteeship agreement. The creation by "hindsight", and with a view to supporting a particular thesis unconnected with the New Guinea Trusteeship, of a theory that the adjudication clause was omitted from the Australian trusteeship agreements because of the absence of clauses conferring certain rights for nationals of other States, rests, at most, on nothing more than a certain coincidental parallelism. The separate opinion of Judge Sir Percy Spender, in *Northern Cameroons*, lays emphasis also on the fact that the United States delegate—

> ". . . withdrew his proposal to insert certain Articles in the New Guinea draft, specifically he withdrew the proposal to insert an Article concerning '*the procedure to be followed with respect to disputes over the interpretation and application of the provisions of the draft agreement*' " (p. 94 of the separate opinion citing pp. 163-164 of the records of the Sub-Committee).

But the United States just as "specifically" withdrew proposals to insert "articles concerning regional organizations, the submission of annual reports and the functions of the Trusteeship Council"—in other words, all proposals which it was apparent Australia was not prepared to accept. I do not find a shred of evidence in the record to support the theory that the United States withdrew its proposal for an adjudication clause because it had dawned on that delegation that the New Guinea Trustee-

ship did not include individual rights for nationals as the Western Samoa Trusteeship did. Nor do I find the slightest evidence to support the conclusion in the separate opinion (at p. 95) that the adjudication clause was left out of the New Guinea Trusteeship because "the General Assembly did not regard it as serving any purpose".

SECTION IX. THE INTEREST OF THE GENERAL ASSEMBLY AND THE ALLEGED CIRCUMVENTION OF ARTICLE 34 OF THE STATUTE

Another challenge to the standing of the Applicants in these cases was based on the assertion that they were acting as agents of the General Assembly of the United Nations and not in their own individual interests. It is true that the Application of Ethiopia—at page 18—(and of Liberia, *mutatis mutandis*) stated that the proceedings were instituted "in order to protect the legal interest of Ethiopia in the proper exercise of the Mandate, as well as that of other States similarly situated . . .". The interests of other States and of the General Assembly of the United Nations were stressed by counsel for Applicants thereafter. It was argued that this is an abuse of the process of the Court since it constitutes an attempt to circumvent paragraph 1 of Article 34 of the Statute which, by its provision that "only States may be parties in cases before the Court", prevents the United Nations or one of its organs from instituting contentious proceedings which can lead to a judgment having binding effect.

Respondent asserts in the Counter-Memorial, Book IV, p. 448, that "the Applicants in the present case are in substance only nominal parties to the proceedings, the real parties being the independent African States . . .". But the Applicants are themselves two of the independent African States and the fact that an interest is shared by other States is no disqualification.

In the matter of *Appeals from Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*, the Czechoslovak Government, the Applicant, in requesting an extension of the time fixed by the Permanent Court of International Justice for the presentation of its observations, advanced as one reason for the request its need to consult the Governments of Romania and Yugoslavia, parties to the treaty involved in the case (*P.C.I.J., Series C, No. 68*, p. 266). The Court instructed the Registrar to inform the Czechoslovak Government "qu'en tout état de cause, les observations dont il s'agit ne sauraient être envisagées par la Cour autrement que comme des observations présentées au nom du seul Gouvernement tchécoslovaque . . .". If other Governments wished to present their own views in their own names, the Court said they should seek to intervene as provided in Article 63 of the Statute (*loc. cit.*, p. 272). But the Court did not suggest that Czechoslovakia's shared interest disqualified it from filing an application in the Court. Would they have so held, if Czechoslovakia had wished to consult a larger number of States? Two States, Members of the United Nations, filed applications

in the instant case; four States, Members of the League of Nations, instituted the proceedings in the *Wimbledon* and *Memel* cases. In the *Oder Commission* case, there were six Applicants. (*P.C.I.J., Series A, No. 23* (1929).) When there are several parties in one interest they can be reckoned as one party only. (Cf. Article 31 (5) of the Statute.) The two Applications in this case were joined; this could be done if there were 20 Applicants, or more.

It will be recalled that in the *Memel* case, the Rapporteur of the Council of the League, regretting that a unanimous vote could not be secured for requesting an advisory opinion, urged the four Principal Powers to bring an action against Lithuania in the Permanent Court on the basis of Article 17 of the Convention of 8 May 1924. The representative of Lithuania said the entire Council was a party to the dispute. (League of Nations, *Official Journal*, 13 February, 1932, p. 540.) The four Powers did bring the action and the Permanent Court dealt with the case without any suggestion that there was any impropriety in the application or that it circumvented Article 34 of its Statute which is substantially similar in this respect to Article 34 of the Statute of the International Court of Justice. The situation could be the same with respect to any of the numerous international organizations which now have the right to request the Court for an advisory opinion (see the list in the Court's *Yearbook 1964-1965*, pp. 34-35), where the constitution of the organization also permits members to apply to the Court for an interpretation of its provisions [1].

Where members are thus given a right to apply to the Court for an interpretation of a constitutional or other basic treaty provision, the clause giving them the right to institute the action is the only title they need to obtain judgment; they do not need to point to some other legal provision specifically giving them a "legal interest".

Respondent also asserted that the present proceedings against Respondent are to be seen as part of a political campaign (Counter-Memorial, Book IV, p. 446 and elsewhere). That there has been and continues to be vigorous opposition to the practice of the policy of apartheid in the mandated territory of South West Africa, is clearly true. The opposition extends to the practice of apartheid in the Republic of South Africa

[1] See F.A.O. constitution of 1945, as amended 1957, Art. 17; Peaslee, *International Governmental Organizations, Constitutional Documents*, Vol. I, pp. 664, 672; Statute of the International Atomic Energy Agency of 1956, Art. 17, *ibid.*, Vol. II, pp. 926, 938; U.N.E.S.C.O. constitution of 1945, Art. 14 (providing also an alternate form for judicial settlement if the General Conference so determines), *ibid.*, pp. 1802, 1809; W.H.O. constitution of 1948, as amended 1959, Art. 75, *ibid.*, pp. 1881, 1891.

itself but the Court is not concerned with matters outside of the mandated territory. The task before the Court—as I see it—is to decide a dispute about the interpretation or application of provisions of the Mandate, namely whether the policy and practice of apartheid in South West Africa violates the duty imposed on the Mandatory by Article 2 to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory". The Court has no jurisdiction to consider the legality under international law of practices of the Republic of South Africa in its own territory.

However, since Respondent has sought to eliminate the legitimate legal interest of Applicants in the present proceedings, on the ground that the proceedings are part of a campaign by African States against the Respondent (cf. argument of Counsel, 26 October 1965, C.R. 65/87, pp. 45 ff.), a word must be said on this subject. At times counsel for Respondent seemed to suggest that the "campaign" was one waged just by other African States but he admitted that criticism began much earlier and that non-African States also had supported resolutions condemning the practice of apartheid. (C.R. 65/87, p. 47. Examples of statements by non-African governments are in the Reply, pp. 76-83.) To put the matter in proper perspective, it is necessary to recall that the question of South African racial discrimination was first brought before the General Assembly in 1946 by India. The Indian representative referred to the efforts of Ghandi in South Africa in 1907 and 1913. He submitted a resolution by which the General Assembly would have resolved that "the Union Government's discriminatory treatment of Asiatics in general and Indians in particular on the ground of their race constitutes a denial of human rights and fundamental freedom and is contrary to the Charter". (*Yearbook of the United Nations*, 1946-1947, p. 145.) Long arguments took place year after year concerning the competence of the General Assembly under Article 2 (7) of the Charter but the issue recurred in one Assembly after another. In 1950, the resolution adopted by the General Assembly recited "that a policy of 'racial segregation' *(Apartheid)* is necessarily based on doctrines of racial discrimination". It was the Asian States which brought the broader apartheid issue to the General Assembly. (*Ibid.*, 1950, p. 407.) In 1956, for example, there were separate resolutions on Indians in South Africa and on the general problem of racial discrimination in that country. This latter resolution, actually adopted in January 1957, came at a time when there were only four African States in addition to South Africa, who were Members of the United Nations. (*Ibid.*, 1956, p. 144, cf. G.A. Res. 820 (IX), 14 December 1954.) Counsel for Respondent stressed actions in "these later years" (C.R. 65/87, p. 48); he may have meant after November 1960—the "critical date" when the Applications in these cases were filed.

It is not inappropriate to recall that in the period after the end of World War I the Permanent Court of International Justice, as well as the Council of the League, were called upon repeatedly to deal with legal problems connected with Polish-German antagonisms which from time to time flared into very sharp differences of opinion (see Walters, *A History of the League of Nations*, 1952, Vol. I, pp. 406-408). In the General Assembly of the United Nations and in the Security Council immoderate and intemperate language has, unfortunately, often been used on a variety of issues. It would be invidious to quote specific instances, but since 1946 public attention has often focused on the violence with which Members of the United Nations have condemned policies and practices of other Members in areas outside as well as inside the continent of Africa.

Both this Court and the Permanent Court of International Justice have had to resist efforts to divert it from its judicial duty by allegations of the political motivations of those who have sought to set its processes in motion either by requests for advisory opinions or by applications in contentious proceedings. The Permanent Court was attacked for its opinion in the *Austro-German Customs Régime* matter. (See Hudson in 26 *American Journal of International Law*, 1932, pp. 1, 9.) Judges Adatci, Kellogg, Rolin-Jaequemyns, Sir Cecil Hurst, Schücking, van Eysinga and Wang, in a joint dissent in that case made a notable statement:

> "The undersigned regard it as necessary first of all to indicate what they believe to be the task assigned to the Court in this case. The Court is not concerned with political considerations nor with political consequences. These lie outside its competence.
>
> The Council has asked for the opinion of the Court on a legal question. [The question is stated.] That question is purely legal in the sense that it is concerned with the interpretation of treaties." (*P.C.I.J., Series A/B, No. 41* (1931), p. 75.)

That is the situation in the instant contentious proceedings [1].

The point is well put by the judicial commission appointed under Article 26 of the Constitution of the International Labour Organisation to examine the complaint filed by the Government of Portugal concerning the observance by the Government of Liberia of the Forced Labour Convention, 1930 (No. 29):

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[1] It may be noted that in the law of the United States in cases where the plaintiff brings suit in a general interest as noted above, the motive of the plaintiff is of no concern to the Court even where it is shown that he brings the suit merely to be revenged on the defendant or out of spite or malice. See *Corpus Juris Secundum*, Vol. I, pp. 1064-1065.

"In these circumstances, the Commission cannot regard the complaint as calling for summary dismissal on the ground of its alleged political character. The Commission is not concerned with any political aspects which the matter may have; the task entrusted to it is that of examining judicially whether or not there has been or is a failure by Liberia to secure the effective observance of the provisions of the Forced Labour Convention, 1930 (No. 29), ratified by Liberia on 1 May 1931. In taking this view the Commission has been guided by a series of decisions of the International Court of Justice in cases in which it was contended before the Court that it should decline to give an advisory opinion by reason of the political nature of the questions on which its opinion was requested, and notably by the decisions of the Court in the *Conditions of Admission of a State to Membership of the United Nations (Article 4 of the Charter)* case [1] and the *Certain Expenses of the United Nations* case [2]. As was said by the Court in the *Conditions of Admission* case [1], the Commission 'is not concerned with the motives which may have inspired this request'; it is no part of its function either to endorse or to impugn them; while the question referred to the Commission may be, to use the language of the Court in the *Expenses* case [3], 'intertwined with political questions', the task of the Commission is to examine judicially without regard to such considerations, whether or not the obligations of the Constitution and the Convention are being carried out." (International Labour Organisation, *Official Bulletin*, Vol. XLVI, No. 2, Supplement II, April 1963, at p. 155. The Commission was composed of Judge Armand-Ugon, a Member of the International Court of Justice from 1952 to 1961, Judge Goonetilleke of Ceylon and Professor Castrén of Finland who had wide experience as a judge in international arbitrations, etc.)

As this Court said in the *Northern Cameroons* case (*I.C.J. Reports 1963*, p. 15, at p. 27):

"The Court is not concerned with the question whether or not any dispute in relation to the same subject-matter existed between the Republic of Cameroon and the United Nations or the General Assembly. In the view of the Court it is sufficient to say that, having regard to the facts already stated in this Judgment, the opposing views of the Parties as to the interpretation and application of relevant Articles of the Trusteeship Agreement, reveal the existence of a dispute in the sense recognized by the jurisprudence of the

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[1] *I.C.J. Reports 1947-1948*, p. 61.
[2] *Ibid., 1962*, pp. 155-156.
[3] *Ibid.*, p. 155.

> Court and of its predecessor, between the Republic of Cameroon and the United Kingdom at the date of the Application."

It is equally true in the instant case, that the Court is not concerned with the question whether or not any dispute in relation to the same subject-matter existed or exists between the Republic of South Africa and the United Nations or the General Assembly.

SECTION X. THE QUESTION OF THE LAPSE OF THE MANDATE

Another argument has been advanced which, if well-founded, would negative the existence of Applicants' right to institute proceedings under Article 7 (2) of the Mandate. The first of Respondent's final submissions as presented to the Court by Respondent's Agent on 5 November 1965 reads as follows:

> "That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder."

It has already been pointed out that there is nothing in the so-called "new facts" presented by Respondent which would lead the Court to reconsider the view which it has consistently taken since 1950 that the Mandate did not lapse on the dissolution of the League. On this point the Court was unanimous in 1950 and there were no opposing views expressed in 1955 or 1956. Moreover it is still true, as the Court stated in its Advisory Opinion of 1950, quoted by the Court in its 1962 Judgment, that—

> "If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." (*I.C.J. Reports 1962*, p. 333.)

In the present phase of the case, Respondent sought to surmount this difficulty by alleging that it had a title to South West Africa based on conquest. On 27 May 1965, counsel for Respondent stated (C.R. 65/39, p. 37): "The Respondent says, Mr. President, that the legal nature of its rights is such as is recognized in international law as flowing from military conquest." It is doubtful whether Respondent relied heavily on this argument which is in any case devoid of legal foundation.

It is a commonplace that international law does not recognize military conquest as a source of title. It will suffice to quote from Lauterpacht's *Oppenheim* (8th ed., Vol. I, p. 567):

> "Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory. Such annexation makes the enemy State cease to exist, and thereby brings the war to an end. And as such ending of war is named subjugation, it is conquest followed by subjugation, and not con-

> quest alone, which gives a title and is a mode of acquiring territory. It is, however, quite usual to speak of 'title by conquest', and everybody knows that subjugation after conquest is thereby meant. But it must be specially mentioned that, if a belligerent conquers a part of the enemy territory and afterwards makes the vanquished State cede the conquered territory in the treaty of peace, the mode of acquisition is not subjugation but cession."

It is of course known that Germany did not cede South West Africa to South Africa and that South Africa did not conquer the whole of the territory of Germany.

I do not find it necessary to add much to what the Court and the separate opinions of Judges McNair and Read in 1950 and the Court in 1962 have said about the fact that the Mandate survived the dissolution of the League of Nations, beyond what has already been noted above in connection with the Palestine question. But it is interesting to take note of a memorandum prepared by the Secretariat of the United Nations in 1950 at the request of the Economic and Social Council on the question of the then legal status of the régime established by and under the League of Nations for the protection of minorities. Much of the memorandum is pertinent to the mandates [1].

The memorandum explores general principles concerning the termination of international legal obligations and the various factors or circumstances of change which need to be considered. Early on, the memorandum asserts:

> "An international obligation remains valid so long as there is no cause for its extinction. It follows that the extinction of the obligation cannot be presumed; it is essential to establish the fact which caused its extinction, such as the expiry of its period of validity or the disappearance of the object of the obligation." (P. 3.)

The memorandum concludes that the Second World War "in itself has not caused the extinction of the obligations relating to minorities" (p. 9.)

At page 11 of the memorandum there is a heading—"the theory that the Declarations should be deemed to have lapsed"—and under the heading there is the indication that "the following arguments are adduced in support of this theory". It is in the assemblage of these arguments that the memorandum states: "The dissolution of the League of Nations involved the extinction of the obligation." A further argument is stated, namely that "juridically speaking, the United Nations is not the 'suc-

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[1] The document is E/CN.4/367 of 7 April 1950; it is supplemented in E/CN. 4/367/Add. 1, of 27 March 1951, in which the Secretariat deals with certain criticisms of its first memorandum and with certain new facts.

cessor' of the League of Nations". The Secretariat's comment on these arguments is as follows:

> "It is true, as has been stated above (p. 11), that the United Nations is not legally the successor of the League of Nations . . . Nevertheless, the United Nations, like the League of Nations, is the representative organ of the international community, and in this capacity is naturally called upon to assume the functions exercised by the League of Nations *vis-à-vis* States which had entered into obligations towards organs of the League of Nations." (P. 14.)

Then after quoting from United Nations resolutions, especially G.A. 24 (I) of 12 February 1946:

> "It is true that the General Assembly has not yet decided that the United Nations should assume the functions exercised by the League of Nations with regard to the protection of minorities, but as section C of the resolution provides for the possibility of the transfer to the United Nations of the functions and powers entrusted to the League of Nations under treaties, international conventions, agreements and other instruments having a political character, it may be concluded that the General Assembly has assumed that the dissolution of the League of Nations has not resulted in the *ipso facto* termination of the obligations arising out of these various instruments . . .
>
> It is interesting to compare the case of the international mandates, which is to a great extent analogous to that of the protection of minorities. The 'mandatory' Powers were bound by an agreement with the League of Nations. The United Nations Charter (Article 77) expressly stated that the Trusteeship System would apply to 'territories now held under mandate'." (P. 15.)

The memorandum also considers the argument that the lapse of the League of Nations guarantee of the minority régime had destroyed the balance of the system. To these arguments the memorandum replies:

> "This consideration is certainly important, but it is not decisive. It should not be forgotten that the United Nations has taken the place of the League of Nations and has assumed the general functions formerly performed by the League." (P. 17.)

The memorandum continues:

> "The conclusion therefore seems warranted that so far as the ordinary causes of the lapse of international obligations are concerned, the suppression of the guarantee formerly accompanying the obligations in respect of minorities has not extinguished the obligations themselves."

In the ensuing portions of the memorandum, various specific minorities agreements are considered *seriatim*. Here there is detailed analysis

of such "profound and general" changes of circumstances as those which affected Poland and Czechoslovakia. However, in the case of Turkey, where no new treaty since the Treaty of Lausanne of 1923 had intervened, the memorandum concludes that the factors of change, including the dissolution of the League, were not sufficient to have altered Turkey's obligations.

> "Unless it is considered that all obligations concerning the treatment of minorities are now no longer valid, the obligations undertaken by Turkey have retained their validity." (P. 57.)

The memorandum says in conclusion:

> "Reviewing the situation as a whole, therefore, one is led to conclude that between 1939 and 1947 circumstances as a whole changed to such an extent that, generally speaking, the system should be considered as having ceased to exist." (P. 71.)

However, in response to certain criticisms and certain new facts the Secretariat issued an addendum on 27 March 1951. In this addendum the Secretariat calls attention to the Court's Advisory Opinion of 1950 on the *International Status of South West Africa.* After quoting from pages 133 and 136 of that Opinion the addendum reaches the following conclusions:

> "The relevance of the opinion of the Court on South West Africa for the present question of the validity of the minorities undertakings is simply that it establishes the principle that the extinction of the League of Nations does not *ipso facto* carry with it the extinction of a system established under its auspices. To draw any further analogy between the two systems of mandates and minorities would, however, be difficult; the differences between the two are too numerous and too well known to enumerate here.
>
> Finally the opinion of the Secretariat that the minorities system has ceased to exist was not based solely on the ground of the League's extinction, which was only one element in one of the several grounds advanced."

The Absence of Reversionary Rights of the Principal Allied and Associated Powers

During the oral proceedings (C.R. 65/31, p. 54) a question was put to Counsel for both Parties by one of the members of the Court, inquiring whether it was their view that any residual right inhered in the Principal Allied and Associated Powers to deal with problems of the mandates after the dissolution of the League. Counsel for Respondent refused to "express any view" on the question (C.R. 65/39, p. 40), a refusal of which the Court is required by Article 49 of the Statute to take "formal note". But the argument that the Principal Allied and Associated Powers had any such residual or reversionary rights is devoid of merit. It finds practically no support in the doctrine. (Cf. Duncan

Hall, "The Trusteeship System", XXIV, *British Year Book of International Law*, 1947, pp. 33, 50.)

It needs no elaborate demonstration to show that Article 119 of the Treaty of Versailles did not involve a cession of territory to the Allies; the idea of a cession which would have meant even a momentary or technical lodgment of sovereignty over the former German colonies was wholly at variance with the agreed settlement of this colonial problem. According to Innes, C.J., in *Rex* v. *Christian* (1923), *South African Law Reports*, 1924, Appellate Division, at pages 108-109:

> "The expression 'renounce in favour of' is sometimes used in the Treaty as equivalent to 'cede to' ... Not so with the overseas possessions; or at any rate with such of them as fell within the operation of Article 22. They were not by Article 199 ceded to all or any of the principal powers, any more than the City of Danzig was ceded to them under Article 100."

The Allies acquired the right to allot the mandates and thereafter became *functi officio*. The mandatories were mandatories on behalf of the League and not of the Powers. The South West Africa Mandate provides that changes should have the consent of the Council of the League, not just the consent of the Powers. In 1946, the Assembly undertook to exercise the powers of the Council; the Powers, as such, did not purport to exercise any rights of disposition or control save as they may have derived some new right of disposal under the Charter in connection with the trusteeship system.

To assume that the Principal Allied and Associated Powers had some residual or reversionary rights would entail a consideration of a number of other factors. As is well known, the position of the United States was a special one in which by separate treaty with Germany it claimed as against Germany all the rights of a party to the Treaty of Versailles and by separate bilateral treaties with other States assured its rights in certain mandated areas, but made no such treaty in regard to South West Africa although it did make a treaty with Japan concerning rights in the 'C' Mandate of Pacific Islands north of the Equator. Query whether in 1945 it could be said to have identical rights—if any such there were—with France and Great Britain. (But see Whiteman, *Digest of International Law*, Vol. I, p. 602.)

If Italy and Japan at any time had any such rights, they surrendered them in the Peace Treaties of 1947 and 1951 which contained the following stipulations:

Article 40 of Italian Peace Treaty, 1947:

> "Italy hereby renounces all rights, titles, and claims deriving from the mandate system or from any undertakings given in con-

nexion therewith, and all special rights of the Italian State in respect of any mandated territory."

Article 2 of the Japanese Peace Treaty, 1951:

"*(d)* Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947 extending the trusteeship system to the Pacific Islands formerly under mandate to Japan."

It would be curious to find that a right to resume control or to complain of breaches now appertains only to France and Great Britain. I am not aware that any of the "Powers" asserted such a right during the San Francisco Conference or at any other time. The history of the Palestine Mandate and of Great Britain's actions with respect to the termination of the Mandate lend no support to any theory of residual or reversionary powers.

Even if one asserts the existence of reversionary or residual rights, this could hardly affect the rights of Members of the League in general, under Article 7 of the Mandate, to complain of violations of clauses of the Mandate. If *(quid non)*, the Principal Allied and Associated Powers or some of them who were Members of the League had an additional title to make complaint, that would not change the situation.

SECTION XI. THE LEGAL RIGHT OR INTEREST OF APPLICANTS APPRAISED IN THE CONTEXT OF THE JURIDICAL NATURE OF THE REAL MERITS OF THE CASE

Although the Judgment of the Court recognizes that some of the Applicants' submissions request "pronouncements and declarations" and that the first and second submissions are included in that class, the Judgment says—

"... the question which has to be decided is whether ... any legal right or interest (which is a different thing from a political interest) was vested in the members of the League of Nations, including the present Applicants, individually, and each in its own separate right to call for the carrying out of the mandates as regards their conduct clauses".

But the question also is whether the same Applicants individually had a right to ask the Court to interpret the Mandate so that—for example—those States might then determine whether to proceed through political channels to induce the Mandatory to act in a certain way. Such an inter-relation of the function of the Permanent Court of International Justice and of the political organs of the League of Nations was frequently illustrated in connection with the peace settlements after World War I. Thus, under Article 11 of the Covenant, it was "de-

clared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international peace or the good understanding between nations upon which peace depends". Under Article 35 (1) of the Charter of the United Nations, Members have a comparable right if there is a "situation which might lead to international friction". Assume a Member of the League (or of the United Nations) considered that the practice of apartheid in the mandated territory of South West Africa was in violation of the Mandate and that it might disturb "good understanding between nations"—as indeed it has—or that it might "lead to international friction"—which indeed it has. Assume that such hypothetical member, before taking the matter to the Assembly (or General Assembly) wished to secure an authoritative pronouncement from the International Court as to whether its interpretation of the mandate was correct. Surely it would have a legal interest cognizable under paragraph 2 of Article 7 of the Mandate. Even a potential intention to act under Article 11 of the Covenant (or Article 35 of the Charter) would justify an application to the Court and there is no legal requirement that an applicant should declare the reason why it wished the information. It might, as the Permanent Court said in the *Memel* case, merely wish a "guide for the future".

The Judgment accepts or rejects certain conclusions by the test of their acceptability as being reasonable. By this test I find it impossible to find that because the "missionary" rights under Article 5 may constitute what the Judgment calls "special interests" rights, or may have what it calls in some contexts a "double aspect", the Applicants' legal right or interest to prosecute a claim to judgment in regard to missionaries, must be admitted but that they have no such right or interest in regard to the practice of apartheid. This seems to me an entirely artificial distinction, and, as I have shown, not supported by the history of the drafting. Because Applicants did not specifically invoke Article 5 in their Applications, the Judgment denies them the right to obtain a finding whether the Mandate —on which any such right would rest—still subsists. Applicants do base their ninth submission on Article 7 (1) which provides that the terms of the Mandate may not be changed without the consent of the Council of the League; the Judgment denies them the right to know whether even their admitted rights under Article 5 could be terminated by the unilateral act of the Mandatory although it is said that "there is no need to enquire" whether the consent of the Member would have been necessary. The Judgment does not say whether the consent of every Member would be necessary for the termination of a procedural clause. Looking at the history of the drafting of the Mandate with the intimate connection between the two paragraphs of Article 7, it again seems highly artificial to take a position as follows: the decision of the Court in 1962 that para-

graph 2 of Article 7 survives, in whatever form or way, is accepted, but this surviving right of resort to the Court does not entitle Applicants to learn from the Court whether paragraph 1 of Article 7 is still in force, although if it is not, the Mandatory might also terminate the second paragraph of Article 7 and deny to Applicants even what are—under the Judgment of the Court—the meagre rights to file their applications and learn that the Court has jurisdiction. Jurisdiction to do what? Jurisdiction, according to the Judgment, to say that the Court cannot give effect to the claims because Applicants lack a legal right or interest.

The intimation in the Judgment that the Applicants' interest in, for example, the practice of apartheid in the mandated territory of South West Africa, is only political and not legal, harks back to the joint dissent of 1962. At page 466 of that joint opinion, it was said that while a Court generally must "exclude from consideration all questions relating to the merits" when it is dealing with an issue of jurisdiction:

> "It is nevertheless legitimate for a Court, in considering the jurisdictional aspects of any case, to take into account a factor which is fundamental to the jurisdiction of any tribunal, namely whether the issues arising on the merits are such as to be capable of objective legal determination."

The opinion continued to say that the principal question on the merits would be whether the Mandatory is in breach of its obligations under Article 2 of the Mandate. They concluded—provisionally, it is true—that the problems presented are suitable for appreciation in a technical or political forum but that the task "hardly appears to be a judicial one". The thesis that the interpretation of Article 2 of the Mandate is more political than legal is in effect another way of saying as today's Judgment says, that the interest of Applicants in the interpretation or application of Article 2 is political rather than legal. The question, viewed in this light, is a question of justiciability and thus requires an examination of the criteria which the Court could use in discharging this task. At least the third submission of the Applicants should be rejected if it is not a justiciable issue to determine whether the practice of apartheid in the mandated territory of South West Africa promotes "the material and moral well-being and the social progress of the inhabitants of the Territory". I proceed to deal with this problem.

The problem involves *(a)* the identification of the persons who may be described as the beneficiaries of the mandate; and *(b)* the justiciability of the claims and the standard to be applied.

(a) *The Identification of the Persons who May Be Described as the Beneficiaries of the Mandate*

There is no uniformity of terminology on this point in the texts of Article 22 and in the Mandate itself. In paragraph (1) of Article 22, there is reference to territories "*inhabited by peoples* not yet able to stand by themselves under the strenuous conditions of the modern world". There is a further reference to "such peoples" in paragraph (1) and the same term is used in paragraph (2). Paragraph (3) mentions "the people". Paragraph (5) mentions "peoples" and "natives", while (6)—which is the paragraph dealing specifically with 'C' mandates—mentions "the indigenous population".

In the Mandate for South West Africa, the second paragraph of Article 2 refers to "the inhabitants", while the third paragraph of Article 3 mentions "natives", as does Article 4.

Importance attaches to the problem because the population of the territory, when it was placed under mandate in 1919, comprised some 194,000 non-White Africans, some 6,000 "Basters", who were persons of mixed blood, an additional 3,500 classified as "Coloureds", and about 20,000 White persons or "Europeans" of whom the majority were Germans but "a considerable portion" were South Africans [1]. If the "sacred trust" obligated the Mandatory to "promote to the utmost the material and moral well-being and the social progress" of *all* the inhabitants of the territory, that is, of the European Whites as well as of the non-Whites, then the Mandatory might justify certain policies which were especially directed to the welfare of the White segment of the population. But if it was the non-White segment of the population whose well-being and progress were to be promoted, then other criteria would be applicable. Since the varied terminology referred to above does not provide a ready answer, one must consider other aids to interpretation.

The sound conclusion would seem to be that in the 'C' mandates, the protective provisions were intended to apply to the indigenous peoples and not to the White settlers. It is inconceivable that the representatives of the Allies who in 1919 drafted the Peace Treaty with Germany (of which the Covenant was a part) and the Mandates, were concerned about the development of the welfare and progress of German settlers in South West Africa or even about the White farmers from South Africa. It is paragraph 6 of Article 22 which applies to the 'C' mandates and this paragraph explicitly mentions "the indigenous population".

In *Rex v. Christian*, cited above, Judge de Villiers spoke of the Mandatory's "duties to the inhabitants of the territory, more especially towards the indigenous populations".

[1] The figures in round numbers are from table XVI in the official report of the so-called Odendaal Commission of 1963, at page 37, and are given there as of 1921 when, it is said, the first reliable statistics were available. In the Counter-Memorial, Book III, p. 379, sec. 87, it is stated that the "European" population was 14,830 in 1913; the statement about the German and South African elements is also taken from this latter source.

Opinion in the Permanent Mandates Commission was not unanimous. At the Sixth Session in 1925 after Mr. Smit, Representative of South Africa, had told the Commission that the time would come when South West Africa would become independent, M. Rappard said:

> "... it was not for the white minority in a mandated territory to declare when this moment had arrived. The mandate system was designed to secure the welfare of the natives and this was the object which the authors of the system had kept in view." (P. 60 of the *Minutes*.)

At the Seventh Session in 1925 the subject was much discussed. M. van Rees, the Vice-Chairman submitted a note which is Annex 4 to the Minutes (p. 151). He said in this "Analysis of the Dispositions Relating to the Application of the Mandates System", that the provisions of the Covenant and the mandates—

> "are sometimes not as clear and definite as they might be. So vague are they, indeed, that occasionally they seem to lend themselves to very different interpretations, while a number of them, if taken literally, lead to illogical conclusions."

He added that—

> "... there is no official commentary to inform us as to their origin. Under these circumstances, it is for the Commission to study them and to interpret them for its own use whenever it meets with an obscure clause, so as to obtain a set of guiding principles which may enable it to appraise the administration of the mandatory Powers." (P. 152.)

M. van Rees continued in Annex 4*a* with a specific study of the liquor traffic; he was severely critical of the drafting of Article 22. He quotes from an article by Professor Henri Rolin who said of Article 22:

> "... the vagueness of certain phrases, the clumsy circumlocutions, the absence of that simplicity and directness which enables us to see in the expressions what is really meant, cause us obvious embarrassment as soon as we read it ... It is clear that these over-refined and badly turned paragraphs were not originally written in French."

In Annex 12, General Freire d'Andrade interpreted Article 22 as applying not just to the native peoples but to all the inhabitants. Sir F. Lugard expressed his disagreement with Freire d'Andrade's interpretation (see Annex 12*a*, p. 206):

> "... the reference to '*such* peoples' in the first paragraph of Article 22 of the Covenant refers explicitly to the 'peoples' just mentioned—e.g., those 'not able to stand alone'—and not to *all* inhabitants of the mandated territory; but I concur that the Mandatory is responsible for all the inhabitants."

Freire d'Andrade replied in turn (Annex 12*b*) explaining his point of view, not as favouring the Whites, but as follows (p. 208):

> "Thus I think that in Africa Natives and Europeans must go side by side on a footing of individual equality. And this will be impossible if blacks are to be settled on their lands under the supervision of their directors until such time as they can govern themselves and become little independent peoples. Moreover, will such a time ever come?"

At the Ninth Session, 1926, when Mr. Smit was present representing the Union of South Africa, M. Rappard said (at p. 35):

> "South West Africa ... was being administered by a small minority of white people and no one doubted that this minority would soon be capable of administering the country independently of the South African Union. This, however, did not at all mean that the inhabitants, that was to say, the native majority, would be able to stand by themselves."

At the Twenty-second Session (1932), Mr. Te Water, representing the Union of South Africa, in a discussion of a speech by the Prime Minister, said (at p. 24):

> "No doubt, when the Prime Minister spoke of the future of South West Africa as being in the hands of its own population, he had in mind the thinking part of the population—the white population."

At the Twenty-sixth Session (1934) M. Rappard, in an exchange of views with Mr. Louw, representing South Africa, said that—

> "... the mandate was temporary in the sense that it was for the administration of the natives until they were able to stand by themselves. The white population was eminently able to do so, but it was clearly not to that population that Article 22 of the Covenant referred." (P. 52.)

Mr. Louw did not challenge this statement. M. Palacios, another member of the Commission, agreed with M. Rappard:

> "It was not enough simply to refer to the 'provisions' of the mandate; the actual 'institution' of the mandate, according to the letter and spirit of Article 22 of the Covenant, was what was of chief importance. It was obvious that the tutelary provisions of the mandate were based on that article, but what it chiefly brought out was the special and essential status of the territory and its inhabitants." (P. 52.)

In the following year, at the Twenty-seventh Session, M. Rappard declared that—

> "The mandate had never been intended to provide for the specific interests of this or that section of the white population ... The policy of the mandate was, however, to improve the position of the

natives, even possibly at the expense of white settlers." (Pp. 158 and 161.)

Lord Lugard generally agreed with what M. Rappard had said, asking—

"... whether, after fifteen years of mandatory Government, there were still no natives sufficiently educated and developed to be able to express views on current questions, or to sit on native councils and native courts, or even on the Legislative Assembly or the Advisory Council?" (P. 162.)

Dr. Conradie of South Africa regretted to admit there were no Natives who could be thus helpful.

These various illustrative examples are by no means conclusive but show how the question of interpreting Article 22 and the mandates concerned the Permanent Mandates Commission. Here is another case where a purely textual interpretation according to a rule of "clear meaning" would, in fact, be meaningless. All of the circumstances surrounding the evolution of the mandates system and the preparation of the most unusual text of Article 22, indicate that it was the intention to provide for the peoples who were thought to be "not yet able to stand by themselves" because they had not absorbed Western customs, manners and ways of life and government. (Cf. the statement of Mr. Te Water, representative of South Africa, at the Twenty-second Session of the Permanent Mandates Commission, p. 25 of the *Minutes*.) The European (German) and South African settlers and farmers do not fit that category. I have not seen any evidence that the drafters at Paris or in the Mandates Commission in London were aware of the existence in South West Africa of the relatively small numbers of Coloureds or Basters. It may be that if the representatives of South Africa at the Peace Conference had been asked whether the Coloureds and Basters were more comparable to the "Natives" or indigenous Africans, than to the Europeans in the Territory, they would have advised that they were more comparable to the former. On such a basis I think these two small groups would have been considered to be covered by the protective provisions.

Of course the Mandatory should not ignore the welfare of the White inhabitants but this is due to the general responsibilities of a governing authority and not the precise duties laid upon a mandatory.

(b) *The Justiciability of the Claims and the Standard to Be Applied*

The Court's Judgment seems to proceed on the assumption that the claims of Applicants are perfectly clear and need no analysis. But the record shows continual disagreement on the nature of those claims and the final determination of their content and meaning were specifically reserved for subsequent decision by the Court. In view of

the nature of the Court's Judgment, that decision has not been made.

It would seem to be a truism that in an international court which is not bound by any technical rules of procedure or evidence, the meaning of submissions should be sought in the intention of the party submitting them[1]. The meaning must be ascertained from the entire record, including statements made before and after the formulation of the submissions. "The Judgment of the Court should attach to the submissions of the Parties a purpose, though not necessarily an effect, which the Parties attached to them." (Separate opinion of Judge Sir Hersch Lauterpacht in *Norwegian Loans, I.C.J. Reports 1957*, p. 35.)

The difficulty of finding the meaning of Applicants' submissions arose mainly out of their use of the expression "norm and/or standards" to indicate the criterion to be used to determine whether the practice of apartheid was compatible with the obligations of the Mandate. The problem is a focal one and can best be clarified by reference to the oral proceedings.

The first witness was called for Respondent on 21 June 1965 (C.R. 65/49). From this date on, almost to the end of the oral pleadings, Counsel for Applicants objected that Applicants' contentions were being erroneously stated and therefore formed an improper basis for the testimony of the witnesses. On 22 June (C.R. 65/50, pp. 18 ff.) Counsel for Applicants made a "basic objection", arguing that Counsel for the Respondent had made "an ambiguous and erroneous formulation" of the Applicants' case. According to Counsel, "such an improper foundation is not only confusing in its nature and inherently to the witnesses, to the Applicants, and, with respect, to the Court itself, by purporting thus to direct evidence at a position falsely attributed to the Applicants ...". Counsel said further that the "improper foundation" "is based upon an unintelligible misrepresentation of the Applicants' theory and position". The President of the Court assured Counsel that his rights would be fully protected and that it would be

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[1] Counsel pleading before the Court are not always aware that the technical procedural rules prevailing in many municipal law systems do not prevail in this Court which can never be reduced to the role of acting as umpire or referee in a forensic contest or debate. This is well settled in the jurisprudence of the Court and in doctrine. A former First Secretary of this Court has well said:

> *[Translation]* "The lawyers (counsel and advocates) of the Parties come before the Court steeped in the atmosphere of their national legal backgrounds. They often find it very difficult to put aside their own procedural rules and to bear in mind the special conditions and requirements of international justice." (Jean-Flavien Lalive, "Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de Justice", 1950, Vol. VII, *Annuaire suisse de droit international*, p. 77 at p. 92.)

On 22 June 1965 the Court put to the Parties a series of questions concerning the extent of the Court's freedom to make its own interpretation of paragraph 2 of Article 2 of the Mandate, no matter what the actual arguments of the Parties. (C.R. 65/50, pp. 68-69.) The Parties were thus made aware that the subject was in the mind of the Court.

for the Court to decide on all aspects of the evidence proffered and upon any objections he made.

Later on the same day (at pp. 28 ff.), Respondent's Counsel commented on the observations of Counsel for Applicants. In response, Counsel for Applicants (at p. 33) made the following comprehensive re-statement of Applicants' position:

> "The Applicants' case is, in the Applicants' submission, not accurately or fairly reflected in the Respondent's summary thereof or description thereof, as to which the evidence is proffered by Respondent. The phrase which is used and attributed to the Applicants, and described by Respondent in repeated references in the oral proceedings (to which citations will gladly be offered by the Applicants if permitted or requested), does not correspond to the fundamental theory of the Applicants' case.
>
> There are two major branches of the Applicants' case. One relates to standards of interpretation which have been applied by competent international organizations as part of the scheme of the Mandate. This involves the standard of interpretation, of a content described by the Applicants, in relation to the supervisory organ responsible for the supervision of the Mandate, and also involves the relationship between that administrative agency and the Court. This branch of the case, therefore, reflects and is based upon a legal theory, which involves the mandate jurisprudence, which involves the clear, explicit and virtually unanimous pronouncements and judgments of the competent international organ which the Applicants submit, for reasons which have been set forth in detail, should be accepted by the Court as authoritative interpretations of the Mandate. It is *apartheid* we are talking about. If this witness or any witness addresses himself as an expert or otherwise to the questions of discrimination and separation which are implicit in and reflected in the undisputed facts of record in this case, there would be no question of admissibility of such evidence so directed by competent witnesses with respect to that branch of the Applicants' case.
>
> And, secondly, Mr. President, with respect to the norm, the rule of international law for which the Applicants contend in terms of Article 38 of the Statute—that, as the Court will well be aware, has been presented to the Court as an alternative and a cumulative, or supplemental, argument on the basis that the practice of States and the views of the competent international organs are so clear, so explicit, and so unanimous in respect of the policies against discrimination, that such standards have achieved the status of an international rule of law, as a legal conclusion based upon the application of Article 38.
>
> These are the branches of the case. When the evidence is proffered

> indiscriminately with respect to the formula, 'norm and/or standards as contended for by the Applicants', reflecting and echoing a description thereof in the oral proceedings which bears no resemblance to that contended for by the Applicants, either as a standard of interpretation or as a rule of international law, the Applicants have respectfully submitted that such a proffer based upon such a premise or foundation is (with respect, the word used, Mr. President, was 'unintelligible' and it may not be 'unintelligent') but it is incomprehensible as to what this witness, or any witness, asked to testify with respect to such a formulation, is really addressing himself to."

Applicants kept stressing the point that their argument had two alternative aspects; one aspect was based on the argument of the existence of a norm as a rule of law and the other aspect was reliance on a standard of interpretation to which the governing effect of a legal rule was not attributed.

The misunderstanding between Counsel persisted and Counsel for Applicants raised objections time and again[1]. The issue was at times stated to be—as Respondent contended—what was "the case" made out by Applicants upon which they rested? As the President stated, "it will be a matter for the Court to determine what was the case which you made out ...". (20 October 1965, C.R. 65/85, p. 57.) If the Court, instead of rejecting the Applicants' claim, had considered the instant case on the full merits, it would have had to make a finding as to the nature of the Applicants' submissions or "case". It would scarcely seem credible that the Court, in a full review of the matter, could have failed to accept the alternative character of Applicants' arguments based, on the one hand, on an international legal norm, and on the other hand, on an international standard as an aid to interpretation. The Court would have had to extricate the basic contention from the semantic swamp in which the argument frequently bogged down.

The importance of the issue lies in the fact that at times the argument of Applicants seemed to suggest that the so-called norm of non-discrimination had become a rule of international law through reiterated statements in resolutions of the General Assembly, of the International Labour Organisation, and of other international bodies. Such a contention would be open to a double attack: first, that since these international bodies lack a true legislative character, their resolutions alone cannot create law[2]; and second, that if Applicants' case rested upon the thesis that apartheid should be declared illegal because it conflicted with a general rule of international law, it might be questioned whether such a claim would fairly fall within the ambit of paragraph 2 of Article 7 which refers to disputes about the interpretation or application of

[1] In a statement on 9 November, C.R. 65/96, Counsel recalled in detail and with specific citations the occasion on which he had objected.

[2] The literature on this point is abundant.

the provisions of the Mandate. If the Court were to hold that the practice of apartheid is a violation of a general rule (norm) of international law, it might seem to be passing on the legality of acts performed within the Republic of South Africa itself, a matter, which, as already noted, would be outside the Court's jurisdiction. On the other hand, if the Court had considered the question of the existence of an international standard or criterion as an aid to interpretation of the Mandate, it would have been pursuing a course to which no objection could be raised. In my opinion, such a standard exists and could have been and should have been utilized by the Court in performing what would then be seen as the purely judicial function of measuring by an objective standard whether the practice of apartheid in the mandated territory of South West Africa was a violation of the Mandatory's obligation to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory".

The freedom granted to the Mandatory by Article 2 (1) to exercise the option to treat the mandated territory for certain administrative purposes "as an integral portion of the Union of South Africa", is circumscribed by the obligation to strive "to the utmost" to achieve the ultimate objective which is clearly indicated by the Covenant of the League of Nations. Nor does the specification in paragraph 2 of Article 2 of the Mandate that "the Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants" in itself indicate the ultimate goal; this prescription, too, is a means to the end and this is a required means since paragraph 6 of Article 22 of the Covenant expressly subjects the exercise of the optional freedom to the safeguards of the mandates system.

* * *

It was necessarily left to the Mandatory, *in the first instance*, to choose means appropriate to achieving the desired end. But its choice was subject to review, in the first instance by the Permanent Mandates Commission, next by the Council of the League and then by the Assembly of the League in reviewing the report of the Council. There could also be, as there is now, a resort to this Court. All this is true because a mandatory was accountable [1].

If the intention had been to leave all decisions, all choice of objectives

[1] "... all political power which is set over men, and ... all privilege claimed or exercised in exclusion of them, being wholly artificial, and for so much a derogation from the natural equality of mankind at large, ought to be some way or other exercised ultimately for their benefit ... Such rights, or privileges, or whatever else you choose to call them, are all in the strictest sense a *trust*; and it is of the very essence of every trust to be rendered *accountable* ..." (Edmund Burke's speech on Fox's East India Bill, 1 December 1783.)

and methods to the unreviewed and unreviewable [1] discretion of the Mandatory, why the elaborate provisions imposing accountability and establishing an expert body to examine, to cross-examine, to report and to make recommendations? Why was Article 7 (2) included in the Mandate?

There is no need and there is no intention here to impugn South Africa's motives; they have not been put in issue. It may be assumed for purposes of this particular part of the analysis that the motives are immaterial. The difficulties of reaching the objectives of the sacred trust were and are enormous; they must not be underestimated; the routes which might be followed toward the goal are multiple. Various mandatories utilized various methods. But the choices of policies followed by a mandatory are subject to review and it does not follow that each member of the Court has to decide subjectively whether he believes the mandatory has chosen wisely or correctly. The law abounds in examples of standards or criteria which are applied by courts as tests of human conduct. As in most aspects of the judicial process, the application cannot be purely mechanical as machines may measure infinitesimal variations in the thickness of a sheet of metal [2]. Judge Kaeckenbeek, as President of the Arbitral Tribunal of Upper Silesia under the Geneva Convention from 1922 to 1937, wrestled successfully with many problems such as the way to test unlawful discrimination through the use of discretionary powers. He recalled, for example, that:

> "... the pressure of public opinion, largely manufactured by the State, may be quite as tyrannous as systematic discrimination by the authorities. It may be very hard to draw the line between the two, although international protection [under the Geneva

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[1] "Unreviewable" except for the possibility of investigating a charge of *mala fides*. I think no such charge against any mandatory was ever examined but specific acts and policies in South West Africa were frequently criticized in the Permanent Mandates Commission.

[2] "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter." (Cardozo, *The Nature of the Judicial Process*, 1921, p. 13; and at p. 90 quoting Brütt, *Die Künst der Rechtsanwendung*, p. 57: "The interpreter must above all things put aside his estimate of political and legislative values, and must endeavour to ascertain in a purely objective spirit what ordering of the social life of the community comports best with the aim of the law in question in the circumstances before him."

> Convention] covers the latter and not the former." (*The International Experiment on Upper Silesia*, 1942, p. 261.)

The Permanent Court had occasion to say in regard to a right of minorities: "There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law." (*Series B, No. 6* (1923), p. 24.) (Cf. *Series A/B, No. 44* (1932), p. 28.) I cite these instances to show types of legal problems an international tribunal may solve [1].

Municipal courts have had even wider experience. Objective standards in the doctrine of provocation as a defence to a charge of murder were developed by the English courts from 1837 on, but the "reasonable man" test developed in English communities had to be adjusted when, for example, cases had to be decided in the Indo-Pakistan sub-continent with its "intricate class structure" and "extraordinary diversification of racial, religious, cultural and economic interests . . ." (Brown, "The 'Ordinary Man' in Provocation: Anglo-Saxon Attitudes and 'Unreasonable Non-Englishmen' ", 13 *International and Comparative Law Quarterly*, 1964, p. 203). One can trace in many legal fields the judicial applications of tests for the interpretation of constitutions or laws—tests such as *due* process of law, *unreasonable* restraint of trade, *unfair* competition, *equal* protection of the laws, *unreasonable* searches and seizures, *good moral* character, etc.

One of the great jurists of the United States in this century, Judge Learned Hand, explained how his court found and applied a standard to determine a legal provision:

> "Very recently we [the federal court] had to pass upon the phrase 'good moral character' in the Nationality Act; and we said that it set as a test, not those standards which we might ourselves approve, but whether 'the moral feelings, now prevalent generally in this country' would 'be outraged' by the conduct in question: that is, whether it conformed to 'the generally accepted moral conventions current at the time'." (*Repouille* v. *United States*, 165 F. 2d. 152, 153 (1947).)

In another context, the Supreme Court of the United States in 1957 used as a test in passing on the constitutionality of an obscenity law—

> ". . . whether to the average person, applying contemporary com-

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[1] International tribunals have long been accustomed, in judging claims cases, to apply an international standard as the test of a State's liability for injuries to aliens. Counsel for both Parties treated this point in a most unsatisfactory way but it is not necessary to elaborate here.

munity standards, the dominant theme of the material taken as a whole appeals to prurient interest". (*Roth* v. *United States* (1957) 354 U.S. 476, 489 [1].)

In the law of the United States on trusts, the dominant tests of the conduct of a trustee are the tests of "the reasonable man" or "the prudent man". It is not necessary to show an improper motive although that also may be taken into account. "In the determination of the question whether the trustee in the exercise of a power is acting from an improper motive the fact that the trustee has an interest conflicting with that of the beneficiary is to be considered." (American Law Institute, *Restatement of the Law*, Trusts 2d., 1959, p. 404.) The *Restatement* gives an illustration of a conflicting interest which, *mutatis mutandis*, could by analogy have an application to the Mandatory of South West Africa:

> "A devises Blackacre to B in trust and directs B to sell Blackacre if in his judgment such sale would be for the best interest of the beneficiaries. It clearly appears that a sale would be highly advantageous to the beneficiaries, but B refuses to sell the land solely on the ground that the purchaser would probably use the land in a manner to cause a depreciation in value of B's own land situated nearby. The court may order a sale of land." *(Loc. cit.)*

The *Restatement* also points out that a trustee which has or should have special facilities, like a bank or trust company. may be held to a somewhat higher standard than that applied to an individual trustee (*op. cit.*, p. 530). A mandatory, be it noted, is an "advanced" nation "who by reason of [its] resources, [its] experience or [its] geographical position" is selected to assume the sacred trust. Finally it may be noted that ". . . if the trustee is permitted to invest in a particular security or type of security in his discretion and the circumstances are such that it would be beyond the bounds of a reasonable judgment to make the investment, the trustee is subject to liability if he makes it". (*Ibid.*, p. 539.) Of course the Court must decide what is "reasonable".

Judicial experience with the protection of human rights, rights of the person, are also relevant to the problem of adjudicating upon a mandatory's compliance with the obligations of the "sacred trust". The Supreme Court of the United States has said that while—

> ". . . normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which

[1] Cf. Lloyd, *Public Policy—A Comparative Study in English and French Law*, 1953, pp. 124 ff. and 143 ff.

> might suffice to characterize the classification as reasonable rather than arbitrary and invidious [State action resulting in racial segregation], even though enacted pursuant to a valid State interest, bears a heavy burden of justification ... and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy". (*McLoughlin* v. *Florida* (1964), 379 U.S. 184, at pp. 191 and 196.)

But the Court has also recently stated in a case holding the Connecticut birth-control law unconstitutional, that "we do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions". (*Griswold* v. *State of Connecticut* (1965), 58 Supreme Court, p. 1678 at p. 1680.) In the same case, in the joint concurring opinion of Mr. Justice Goldberg, the Chief Justice and Mr. Justice Brennan, it is said that while one agrees with Mr. Justice Brandeis that a State "may serve as a laboratory; and try novel social and economic experiments" this power does not include "the power to experiment with the fundamental liberties of citizens". Connecticut, the justices held, had not shown that the law in question serves any "subordinating State interest which is compelling" or that it is "necessary ... to the accomplishment of a permissible State policy".

Two quotations may be added from another field, that of the administrative discretion of the government in determining measures deemed necessary to maintain public order, a field which has aspects of comparability to the choice of measures by the Mandatory:

> "... the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid ... has arisen. His decision to that effect is conclusive ... The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force...
>
> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial

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[1] Cf. views expressed on racial discrimination and the Charter of the U.N. in *Fujii* v. *State of California* 217 Pac. 2d. 488 (1950) and in concurring opinions of Justices Black, Douglas and Murphy in *Oyama* v. *California*, 332 U.S. 633.

> questions." (Chief Justice Hughes for the Court in *Sterling* v. *Constantin* (1932), 287 U.S. 378.)

In the *Lawless* case, the European Court of Human Rights (1961) held that:

> ". . . the existence at the time of a 'public emergency threatening the life of the nation' was *reasonably* deduced by the Irish Government from a combination of several factors . . .". (This under Article 15 of the treaty—the right of derogation.)

The Court obviously had to appraise and pass judgment on the reasonableness of the Government's action.

Examples such as the foregoing and others which could be adduced, are relevant to a reconsideration of the doubt expressed in the 1962 joint dissenting opinion whether the issues arising under Article 2 (2) are "capable of objective legal determination". The problem presented to the International Court in this case is one of very great consequence indeed but the judicial task facing the Court, while differing in magnitude, does not differ in kind from tasks in other courts such as those to which attention has been called. If the Council of the League had asked the Permanent Court of International Justice for an advisory opinion on a question which involved an interpretation of Article 2 (2) of the Mandate, it does not seem to me credible that the Court would have replied that the task was beyond its capabilities. The like task which, in my view, confronted this Court, is not beyond its capabilities. It might be an easy way out to say that the Mandatory had an unreviewable discretion but since I believe that that would not be a legally justifiable conclusion I could not concur in such a judgment.

I would pose a hypothetical situation. Assume that the League of Nations had not been wound up but continued to exist. Assume that the Permanent Mandates Commission continued to function with the same type of expert personnel. Assume that either by receipt of a request from the Council for an advisory opinion or by an application filed by a member of the League, the International Court was faced by the question whether the practice of apartheid in South West Africa in 1960 promoted the progress and welfare, etc., of all the inhabitants. Suppose the Court acting under Article 50 of the Statute asked the Permanent Mandates Commission to enquire and give an expert opinion on that question. I suggest that the Commission would have replied that although in 1925 they might not have considered the apartheid policy incompatible with the obligations of the Mandatory under the conditions and circumstances of that era, they now believed it was incompatible under the conditions of 1960. I believe the Court would have decided that this opinion was well-founded.

The law can never be oblivious to the changes in life, circumstance and community standards in which it functions. Treaties—especially multipartite treaties of a constitutional or legislative character—cannot have an absolutely immutable character. As was said in the separate opinion of Judge Sir Percy Spender in *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (*I.C.J. Reports 1962*, p. 151 at 186):

> "A general rule is that words used in a treaty should be read as having the meaning they bore therein when it came into existence. But this meaning must be consistent with the purposes sought to be achieved . . . in the case of the Charter . . . the general rule above stated does not mean that the words in the Charter can only comprehend such situations and contingencies and manifestations of subject-matter as were within the minds of the framers of the Charter . . . No comparable human instrument in 1945 or today could provide against all the contingencies that the future should hold."

Respondent recognized the obligation to adjust to change, although its argument turned on an unacceptable attempt to distinguish between the interpretation and the application of a treaty. As stated in the Rejoinder (Vol. I, p. 150):

> "But the nature of the obligation thus interpreted is such that Respondent must necessarily have regard to changed or changing circumstances in carrying out the said obligation. In other words, in the application of the terms of the Mandate to the circumstances of 1960, a different practical effect may be reached than would have resulted from a similar application in 1920 . . . the Mandate, whenever interpreted, involves a duty on the Mandatory's part to give consideration to all relevant circumstances when determining policy, as a necessary component of its obligation to pursue the prescribed objectives in good faith. Amongst the circumstances to be thus considered, are the general philosophical views prevalent in the world, and their impact on the inhabitants of the Territory."

The "general philosophical views prevalent in the world" certainly include the content of Articles 1, 55 and 73, of the Charter of the United Nations and the world-wide condemnation of apartheid.

In oral argument also, Counsel for Respondent fully recognized the necessity for taking account in the administration of the Mandate of changes in the world—although I cannot accept the framework of discussion of discretionary powers and of good and bad faith in which the following comments were made:

> "We did not say that in the application of the norm to facts the Court must put on blinkers and look at the facts only as they existed in 1920, it would obviously have been ridiculous to say so. Similarly, we did not suggest that, in fulfilling its discretionary

> function under the Mandate of promoting to the utmost, and in formulating its policies with that purpose in view, the mandatory was to have regard only to facts, conceptions and attitudes as they existed in 1920. That would have been equally ludicrous . . . the mandatory could not, in the new circumstances which arose after the Second World War . . . retain the same attitude as in 1920 when applying the law to the facts, or in formulating policies with a view to complying with its obligations; it had to take proper cognizance of this change in attitudes and conceptions, in order to fulfil its discretionary function properly." (C.R. 65/21, pp. 21-22.)

The "sacred trust of civilization" referred to in Article 22 of the Covenant has as its purpose the development of certain specified peoples to "stand by themselves under the strenuous conditions of the modern world". The "modern world" under whose "strenuous conditions" the peoples of the Mandate were "not *yet* [in 1920] able to stand by themselves", is a multi-racial world. It is a world in which States of varied ethnic composition and of different stages of economic and political development are now associated in the United Nations on the basis of "sovereign equality". (Article 2 (1) of the Charter.) Obviously "the modern world" is not a static concept and could not have been so considered by the framers of the Covenant of the League. Even if their vision of a warless world did not materialize, that is no reason why covenanted goals which are still attainable should be ignored. As the Nuremberg Tribunal in its judgment of 1 October 1946 said of another part of international law in interpreting another great multipartite convention: "This law is not static but by continual adaptation follows the needs of a changing world." (Text in 41 *American Journal of International Law*, 1947, p. 172.) Since 1945 at least, it has been the duty of a mandatory to prepare the peoples of the mandates to stand by themselves in this actual world of contemporary reality. As the diversity of States has increased, so has broadened the duty to train people to stand by themselves in such diversity. The objective is not fanciful nor illusory; States formerly under mandate are now members of the United Nations and are the sovereign equals of the States which formerly administered them as mandates.

The virtually universally accepted description of other legal characteristics of this actual modern world is written in the Charter of the United Nations. It is a world in which "friendly relations among nations" are to be "based on respect for the principle of equal rights and self-

determination of peoples", and in which there is to be international co-operation both in solving international problems "of an economic, social, cultural, or humanitarian character", and "in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". (Cf. Articles 1, 55, 56, 73 and 76.)

Since, as I have explained, I believe the judicial task of the Court in interpreting Article 2 of the Mandate, is to be performed by applying appropriate objective standards—as, in other contexts, courts both international and national have done—it is not necessary for me to enter here into the meaning of a legal "norm" either as the term appears to have been used in the pleadings in this case, or with one or more of the connotations to be found in jurisprudential literature [1]. This section of the opinion has shown that the standard to be applied by the Court must be one which takes account of the views and attitudes of the contemporary international community. This is not the same problem as proving the establishment of a rule of customary international law, and I have already explained that I do not accept Applicants' alternative plea which would test the apartheid policy against an assumed rule of international law ("norm"). It is therefore not necessary to discuss here whether unanimity is essential to the existence of *communis opinio juris*. It has also been plainly stated herein that my conclusion does not rest upon the thesis that resolutions of the General Assembly have a general legislative character and by themselves create new rules of law. But the accumulation of expressions of condemnation of apartheid as reproduced in the pleadings of Applicants in this case, especially as recorded in the resolutions of the General Assembly of the United Nations, are proof of the pertinent contemporary international community standard. Counsel for Respondent, in another connection, agreed that "the effect of obtaining the agreement of an organization like the United Nations would, for all practical purposes, be the same as obtaining the consent of all the members individually, and that would probably be of decisive practical value", for the United Nations "represents most of the civilized States of the world". (C.R. 65/15, p. 28.) It is equally true that obtaining the disagreement, the condemnation of the United Nations, is of decisive practical—and juridical—value in determining the applicable standard. This Court is bound to take account of such a consensus as providing the standard to be used in the interpretation of Article 2 of the Mandate. Today's Judgment does not ignore humanitarian considerations, or the "moral ideal" of the sacred trust, but seeks to find where and how they have been "given juridical expression" and "clothed in legal form". With due respect, I explore these same areas, but find the "juridical expression" and "legal form" lead to legal conclusions different from those reached by the Court.

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[1] See in general, Dillard, "Some Aspects of Law and Diplomacy", 91 *Recueil des cours*, 1957, p. 449.

Accordingly, it must be concluded that the task of passing upon the Applicants' third submission which asserts that the practice of apartheid is in violation of the Mandatory's obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations, is a justiciable issue, not just a political question. Therefore, the legal interest of Applicants in the proper administration of the Mandate, as set forth in other parts of this opinion, was properly invoked by the Applications filed on 4 November 1960, and the Court should, in my opinion, have given judgment on the real merits of the case.

(Signed) Philip C. JESSUP.
