SEPARATE OPINION BY JUDGE READ

I concur in the part of the Opinion which answers Questions (*b*) and (*c*)—dealing with the application of Chapter XII of the Charter, and competence to determine and modify the international status of South-West Africa—and am in general agreement with the reasons by which the answers are justified. I also concur in the part of the answer to Question (*a*) which relates to the continued substantive international obligations of the Union of South Africa arising under the Mandate. I am, however, unable to concur in the part of the answer which is concerned with accountability to, and supervision by, the United Nations or in the reasons by which it is justified. Accordingly, and with regret, I feel bound to state the reasons which have led me to dissent.

The Court is asked whether the Union continues "to have international obligations under the mandate for South-West Africa and, if so, what are those obligations?" To answer this question, it is necessary to examine the international obligations under the Mandate as they existed before the dissolution of the League, to consider the effect of the dissolution, and to ascertain whether any other factors have affected the continuance of those obligations.

For this purpose, it is unnecessary to retrace the ground covered by the Opinion of the Court. It is sufficient to note that the international status of South-West Africa was that of a mandated territory. The Union of South Africa exercised most of the powers which are inherent in sovereignty, but the residual elements were neither exercised nor possessed by the Union. It was subject to three kinds of international obligations.

The first, and the most important, 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. The most important, the corner-stone of the Mandates System, was "the principle that the well-being and development of such peoples forms a sacred trust of civilization", a principle which was established in paragraph 1 of Article 22 of the Covenant.

The second kind of obligations comprised those which were due to, and enured to, the benefit of the Members of the League : e.g., in respect of missionaries and nationals.

The third kind of obligations comprised the legal duties which were concerned with the supervision and enforcement of the first and the second. There was the compulsory jurisdiction of the Permanent Court, established by Article 7 of the Mandate Agreement ; and there was the system of report, accountability, supervision and modification, under paragraphs 7, 8 and 9 of Article 22, and Articles 6 and 7 of the Mandate Agreement. This third class of obligations was the new element in the Mandates System, and its importance should not be underrated. At the same time it should not be overestimated. The disappearance of the obligations included in the first and the second classes would bring the Mandates System to an end. The disappearance of the regime of report, accountability, supervision and modification, through the Council and the Permanent Mandates Commission, might weaken the Mandates System ; but it would not bring it to an end. As a matter of fact, the record shows that the paralysis of those agencies during six war years had no detrimental effect upon the maintenance of the well-being and development of the peoples.

These obligations have one point in common. 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). Further, each Member, at the time of dissolution, had substantive legal rights against the Union in respect of the Mandate. A substantial number of Members of the League were not signatories of the Charter, and have not since been admitted to membership in the United Nations. It is a principle of international law that the parties to a multilateral treaty, regardless of their number or importance, cannot prejudice the legal rights of other States. The United Nations, by signing and ratifying the Charter, could and did establish the competence of the Organization to perform functions in relation to the mandated territories. They could not, in law, transfer functions from the League to the Organization, without the consent and authority of the League, or of Members of the League whose legal rights would thus be impaired. Consequently, while the Charter had come into force and the organization of the United Nations had come into being before the dissolution of the League, the legal rights of many States, which were not members of the new Organization, as regards the mandated territories including South-West Africa, remained in full force and vigor.

Bearing in mind the nature of the international status of South-West Africa under the Mandates System, it is necessary to consider the effect of the dissolution of the League. In this matter, I concur

in the view of my colleagues that the international status of South-West Africa, as a mandated territory, survived the League. I also agree with their view that the international obligations of the Union under the Mandate continued. On the other hand, I differ from the majority on two points: (1) I regard as significant the survival of the rights and legal interests of the Members of the League; and (2) in the effect of the dissolution upon certain of the auxiliary obligations under the Mandate.

With regard to the first point, the same reasons which justify the conclusion that the Mandate and the obligations of the Union were not brought to an end by the dissolution of the League, lead inevitably to the conclusion that the legal rights and interests of the Members, under the Mandate, survived. If the obligations of the Union, one of the "Mandatories on behalf of the League", continued, the legal rights and interests of the Members of the League must, by parity of reasoning, have been maintained. It is therefore necessary to find, and to rely on, some disposition of the Mandate which, under the rules of international law, would be capable of impairing or extinguishing the legal rights and interests of the Members of the League, including those which are *not* members of the United Nations. No provisions of the Charter could be sufficient for the purpose. Only action by the League, or the consent of the Members of the League, could have that effect.

The second point relates to the auxiliary obligations, the third kind of obligations mentioned above as arising under the Mandate. No problem exists, as regards the compulsory jurisdiction of the Permanent Court, which was transferred to this Court by Article 37 of the Statute.

The obligations in relation to report and accountability to, and supervision by, the League, under paragraphs 7 and 8 of Article 22 of the Covenant and Articles 6 and 7 of the Mandate Agreement, present more difficulty. The discharge of these obligations directly involved the participation of the Council and the Permanent Mandates Commission. The League, by its Resolution of April 18th, 1946, paragraph 3, recognized "that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end", and noted "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". It was no longer possible for the Union to send reports to a non-existent Council, or to be accountable to, or supervised by, a non-existent Permanent Mandates Commission. It is, therefore, necessary to give close consideration to the action taken at Geneva, in April 1946, in order to determine

the effect of the termination of the League's existence upon these auxiliary obligations.

The Assembly which met at Geneva in April, 1946, was not an ordinary Assembly engaged in routine business. It was not attempting to amend the Covenant, or the provisions of the Mandates. It was winding up the League. Its most important resolution read as follows:

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

There is no doubt that the Assembly succeeded in its purpose. The League has, in fact, come to an end. The only question, and one which has been raised by eminent jurists, is whether the Assembly was legally competent to do what it did.

I am of the opinion that the Assembly was competent to liquidate the League, on two grounds.

The first is that which is indicated by the preamble: "Considering that, under Article 3, paragraph 3, of the Covenant, the Assembly may deal with any matter within the sphere of action of the League." Mortality is an essential attribute of human organization. In the field of municipal law, it is possible to provide, by legislation, for supervised liquidation, but, in international law, there is no super-State or supreme legislative authority. In the case of an international organization, and in the absence of express provisions in its charter, a legal power of liquidation arises by necessary implication. Under the Covenant, the Assembly, representing all of the Members, was clearly justified in proceeding upon the assumption that this power to liquidate could be exercised by it, and by no other organ or agency of the League.

The second ground is based upon a general principle of law recognized by civilized nations. Any legal position, or system of legal relationships, can be brought to an end by the consent of all persons having legal rights and interests which might be affected by their termination. The Assembly, in liquidating the League, was not merely clothed with the authority conferred upon it by the Covenant. Its action, in winding up the League and the Mandates System, expressed the consent of all the Members of the League, present or absent, to the measures adopted; and waived, on their behalf, any rights or any objections that they might have raised to the course of action approved by its resolutions.

The Assembly, in providing for the liquidation of the Mandates System, was faced with practical problems, some of which are relevant to the present case. There was the need to enable Man-

datory Powers to conclude trusteeship agreements. The Mandatory Power, as such, was not the sovereign of the territory. It had no right of disposition, no *jus disponendi :* it was merely a Mandatory on behalf of the League. Only the League and its Members could authorize a Mandatory to conclude a trusteeship agreement ; or, indeed, to take any action which would impair rights or obligations under a Mandate or bring a Mandate to an end. Similarly, only the League could make legal provision for the proposal by the Union, which involved the termination of the Mandate for South-West Africa by incorporation of the Territory as an integral part of the Union with international recognition conferred by the General Assembly of the United Nations. Further, in view of the provisions of the Charter, there would, of necessity, be a period of indefinite duration, between the dissolution of the League and the conclusion of trusteeship agreements or other disposition of the Mandates. To cover this period, it might be essential, in the interest of the well-being and development of the peoples of the territories under Mandate, to make some provision for the discharge of the League functions, in respect of accountability, supervision and modification, by the United Nations.

The action of the Assembly was expressed in the Resolution of April 18th, 1946, which included the following provision :

> "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."

The resolution was not expressed in technical legal language, but rather as a political document. It did, however, set forth the intention of the League and its Members that the Mandates should survive the League. It expressed the consent of the League and its Members to the disposition of the Mandates by *other arrangements agreed between the United Nations and the respective Mandatory Powers.* The language used was broad enough to cover the practical problems referred to above : to give legal authority to a Mandatory to terminate a Mandate by concluding a trusteeship agreement ; to sanction the termination of a Mandate by emancipation, incorporation or merger ; or to enable a modification of a Mandate by establishing report and accountability to, or supervision by, the United Nations. These ends could only be accomplished by arrangements agreed between the United Nations and the Mandatory Power. There can be no doubt that the competence of the Assembly and Members to wind up the League extended

to the Mandates System and included executory measures of this sort, which were essential elements of effective liquidation.

As a result of the foregoing considerations, it is possible to summarize the position, as regards the international status of South-West Africa and the international obligations of the Union arising therefrom, after the termination of the existence of the League :

First : the Mandate survived, together with all of the essential and substantive obligations of the Union.

Second : the legal rights and interests of the Members of the League, in respect of the Mandate, survived with one important exception—in the case of Members that did not become parties to the Statute of this Court, their right to implead the Union before the Permanent Court lapsed.

Third : the obligations in respect of report and accountability to, and supervision by, the League and its organs, and in respect of modification, were affected by impossibility of performance, due to the disappearance of the Council and Permanent Mandates Commission.

Fourth : the position, as regards report, accountability and supervision was subject to modification by arrangement agreed between the United Nations and the Union.

With regard to the other factors which may have affected the continuance of the international obligations of the Union, there is one which cannot be overlooked. A territory, held under Mandate by a Member of the United Nations, is not left to the uncontrolled administration of the Mandatory Power. In the present instance, the Union, in the case of disputes relating to the interpretation or the application of the provisions of the Mandate, is subject to the compulsory jurisdiction of this Court—under the provisions of Article 7 of the Mandate Agreement and Article 37 of the Statute, reinforced by Article 94 of the Charter. The importance of these provisions cannot be measured by the frequency of their exercise. The very existence of a judicial tribunal, clothed with compulsory jurisdiction, is enough to ensure respect for legal obligations. In addition, the General Assembly has wide powers under Article 10 and other articles of the Charter. There is, therefore, no lack of adequate provision in the Charter for dealing with the position of a territory under Mandate during the period intervening between the dissolution of the League and the termination of the Mandate, whether by conclusion of a trusteeship agreement or in some other way.

There remains the question—the fourth point in the above summary—whether the position, as regards report, accountability

and supervision, has since been modified by arrangement agreed between the United Nations and the Union of South Africa ; or, in other words, was there an "arrangement agreed between" the United Nations and the Union whereby the United Nations was to be substituted for the Council and the Permanent Mandates Commission of the League, in the matters of report, accountability and supervision ?

It is unnecessary to discuss the juridical nature of an international agreement. It is sufficient, for present purposes, to state that an "arrangement agreed between" the United Nations and the Union necessarily included two elements : a meeting of the minds ; and an intention to constitute a legal obligation.

It has been suggested, in the written statements of the governments and in the argument, that there was agreement between the Union and the United Nations, and that the latter was substituted for the League organs, as regards report, accountability and supervision. In reviewing the evidence upon which this suggestion is founded, it will be convenient to concentrate upon the single question whether there was a meeting of the minds ; i.e., whether an agreement was reached between the Union and the United Nations, in the course of the proceedings before the General Assembly and its Committees.

At a meeting of the Fourth Committee, November 13th, 1946, the representative of the Union made the original proposal, in the following words :

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

This proposal was renewed from time to time and its nature and scope were confirmed, explained and clarified by different representatives of the Union. It is unnecessary to cite all the instances. Fortunately, there is on record a statement, which received the unanimous approval of the Fourth Committee, and which gives a detailed explanation of the proposal as understood both by the representative of the Union and by the members of the Fourth Committee. The Rapporteur's Report, October 27th, 1947, stated :

> "At the thirty-third meeting of the Committee on 27 September 1947, in response to a request by the representative of Denmark for amplification of the proposal to maintain the *status quo* in South West Africa and to continue to administer the Territory in the spirit of the mandate, particularly with regard to the United Nations and its organs, the representative of the Union of South Africa explained that the annual report which his Government would submit on South West Africa would contain the same type of information on the Territory as is required for Non-Self-Governing Territories under Article 73 (*e*) of the Charter. It was the

assumption of his Government, he said, that the report would not be considered by the Trusteeship Council and would not be dealt with as if a trusteeship agreement had in fact been concluded. He further explained that, since the League of Nations had ceased to exist, the right to submit petitions could no longer be exercised, since that right presupposes a jurisdiction which would only exist where there is a right of control or supervision, and in the view of the Union of South Africa no such jurisdiction is vested in the United Nations with regard to South West Africa."

The terms of a letter from the deputy permanent representative of the Union, May 31st, 1948, show that the proposal could no longer be regarded as standing. Even if the original proposal could have been regarded as having been made with a view to a legal obligation, it could no longer be so regarded after the Union had indicated that the transmission of information was on a voluntary basis. It is, therefore, necessary to ascertain whether an arrangement was agreed between the Union and the United Nations before that date.

It is clear, from the record, that the Government of the Union was not prepared to put forward any proposal which went beyond the following elements:

(*a*) an undertaking to transmit annual reports, in accordance with, and in the terms of, Article 73 (*e*) of the Charter, for the information of the United Nations;

(*b*) by virtue of the provisions of the Charter, this information would be available to the General Assembly, in the exercise of its functions under Article 10 and other articles of the Charter, in any matter in which the functions might concern South-West Africa.

It is equally clear, from the record, that the General Assembly was not prepared to agree to an arrangement on such a limited basis.

On the other hand, it is doubtful whether the General Assembly was willing, at any stage, to agree to any arrangement that did not involve a trusteeship agreement for South-West Africa. It is certain that the General Assembly was not prepared to agree to any arrangement that did not involve the following: reports of the same nature and scope as those which had been due to the Council under the provisions of Article 22 of the Covenant and the Mandate Agreement; substitution of the United Nations for the Council and Permanent Mandates Commission, as regards report, accountability and supervision; review of reports by the Trusteeship Council. It is equally certain that the Union was not ready to agree to an arrangement involving these elements.

In these circumstances, it is necessary to conclude that there was no arrangement agreed between the Union and the United Nations, in the matter of report, accountability and supervision.

In the absence of such an arrangement, the only other possible bases for the obligations in question would be succession by the United Nations to the functions, powers and responsibilities of the League in respect of Mandates. Such a succession could not be based upon the provisions of the Charter, because, as I have stated above, no provisions of the Charter could legally affect an institution founded upon the Covenant, or impair or extinguish legal rights and interests of those Members of the League which are not members of the United Nations. It could not be based on implications or inferences drawn from the nature of the League and the United Nations or from any similarity in the functions of the organizations. Such a succession could not be implied, either in fact or in law, in the absence of consent, express or implied by the League, the United Nations and the Mandatory Power. There was no such consent.

Reference to the terms of the Resolution of the General Assembly, February 12th, 1946, XIV-I (I), Clause 3 C, shows that the General Assembly's action was inconsistent with the doctrine of succession. Paragraph 3 read :

> "3. *The General Assembly* declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations, and adopts the following decisions, set forth in A, B, and C below."

The decision C read :

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

The Mandate involves functions and powers of a political character. It is founded upon a treaty and an agreement. The parties are the League and the Union of South Africa. In substance, decision C provides that the General Assembly will examine a request from the Union of South Africa and other interested parties that the United Nations should assume League functions, as regards report, accountability and supervision over the South-West African Mandate. No such request has been forthcoming, and the General Assembly has not had occasion to act under decision C. The very existence of this express provision, however, makes it impossible to justify succession based upon implication.

In the case of the League, there was no consent to succession in the case of Mandates; and it is impossible to imply consent, in view of the express provision of paragraph 4 of the Resolution of April 18th, 1946, cited and discussed above, with regard to arrangements between the United Nations and the Mandatory Powers. It will be observed that the provisions of paragraph 4 are complementary to, and in complete accord with, those of decision C. This may be explained by the fact that the members of the First Committee of the League, who drafted the resolution, were fully aware of the provisions of decision C.

Accordingly, in the absence of an "arrangement agreed between" the United Nations and the Union, and in the absence of succession by the United Nations to the political functions of the League, in respect of the Mandates, I am obliged to conclude that the Union of South Africa is not under an obligation, arising under the Mandate, to render annual reports, under paragraph 7 of Article 22 of the Covenant and Article 6 of the Mandate Agreement, to the United Nations. For the same reasons, the Union is not under any obligation, arising under the Mandate, as regards accountability to, and supervision by, the United Nations.

With regard to the so-called right of petition, the foregoing considerations would be applicable. There are, however, additional reasons, which prevent me from concurring in the answer given by the Court and the reasons by which it is justified. The regulation of petitions was based upon rules of procedure adopted by the Council of the League on January 31st, 1923. Obligations which the Union may have incurred as a result of the adoption of these rules cannot possibly be regarded as "international obligations under the mandate for South-West Africa", within the meaning of Question (*a*). Further, even if the United Nations succeeded to the functions of the League, in respect of mandated territories, it would not follow that the General Assembly would be bound by the rules of procedure adopted by the Council of the League, as regards petitions or any other aspects of the problem. The General Assembly could make its own rules, acting under the provisions of Article 21 of the Charter.

(*Signed*) J. E. READ.